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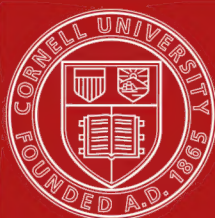
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A treatise on the law of real property.



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THE LAW OF REAL PROPERTY.

A TREATISE
ON THE
LAW OF REAL PROPERTY

IN THREE VOLUMES

BY *ANFORD*
JAMES M. KERR
et

VOLUME I.

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PREFACE.

IT has been the aim of the author to set forth in this work the law of real property, as it exists in the United States, and to give an account of the origin and history of the principles upon which this law is based. Incorporated in the work are citations from American, English, and Canadian adjudicated cases which enforce and illustrate the principles and doctrines of this branch of the law. While our law relating to real property is founded upon the principles of the Common Law, yet some of the doctrines are derived from the Civil Law,—particularly those relating to equity and equitable estates (including Powers, Trusts, and Uses). The author has sought to give an account of the origin and history of principles, so as to meet the wants of the student just entering upon the subject. It is thought that the short account of Feudal Law, of Old English Tenures and Modern English Tenures, and the origin of Chancery Powers, will be of assistance to the student in arriving at a clear conception of the present doctrines of this branch of the law.

The author has sought to make this treatise a manual for the busy lawyer, wherein he can find discussed the various questions liable to come up in every-day practice. All the various estates, the methods of their creation, and their incidents are given especial attention. The chapter on Estate by the Curtesy is thought to furnish the only systematic and exhaustive treatise on the subject. The chapter on Dower is also very full. The same is true of Estates for Years (including Farm Leases), Homestead Exemptions, and Equitable Estates (includ-

ing Powers, Trusts, and Uses). Joint Estates (including the Partition thereof), Mortgages, Deeds, Title, Rights of Common, Ways, Easements, and Rents are fully discussed.

In order to make this work of service to the profession, the author has referred to all reports and reporters where the cases cited may be found, so that the practitioner may examine the authorities relied upon from the books on his shelves ; for this double citation will enable him to find at once the original report, no matter what series of official or unofficial reports he may own or have access to. This, it is thought, will be a great saving of time and trouble to the persons using this treatise. These duplicate citations have been made to the National Reporter System, which embraces the whole body of American adjudications for the last decade ; to the American Decisions, the American Reports, the American State Reports, the Lawyers' Reports Annotated, the Lawyers' Co-operative Publishing Company's edition of the United States Reports, Moak's English Reports, the English Common Law Reports, the English Law and Equity Reports, the Revised Reports, Smith's Leading Cases, and Ballard's Annual of the Law of Real Property.

To render this treatise further serviceable, the cases are arranged in an orderly manner ; alphabetically according to States, followed by United States, Canadian, and English reports, in the order named, the case last reported being put first ; that is to say, each series is arranged in the inverse order of decision. This method presents the cases relied upon in an orderly manner, bringing all the authorities in one state, or court, together in one place, and enables the practitioner to readily run through each note, to secure the citation he wants. This, it is thought, will materially facilitate the work of "running down" a subject, or preparing a brief.

JAMES M. KERR.

September 24, 1895.

TO
JUDGE SEYMOUR D. THOMPSON.

CONTENTS.

BOOK I.

INTRODUCTORY.

CHAPTER I.

PRELIMINARY.

	PAGE
§ 1. Property—Generally.....	1
§ 2. Same—Classes of property.....	3
§ 3. Same—Blackstone's definition—Exclusive ownership.....	3
§ 4. Same—Austin's definition—Restricted property.....	5
§ 5. Early history of property.....	6
§ 6. Same—Evolution of private property.....	7
§ 7. Right of property and hereditary patrimony.....	9
§ 8. Same—Recognition of the right of private property.....	10
§ 9. Same—Alienation and devise.....	11
§ 10. Same—The retrait.....	12
§ 11. Theories of the origin of private property in land.....	12
§ 12. Same—1. The discovery theory.....	13
§ 13. Same—2. The occupation theory.....	14
§ 14. Same—3. The labor theory.....	15
§ 15. Same—4. The theory of contract.....	15
§ 16. Same—5. The <i>lex</i> theory.....	16
§ 17. Same—6. The natural-economic theory.....	16
§ 18. Same—7. The natural rights theory.....	17
§ 19. Same—8. The government-grant theory.....	18
§ 20. Real and personal property—Distinction and devolution....	19
§ 21. Definition of real property.....	20
§ 22. Same—"Land" and "real estate".....	21
§ 23. Same—Maryland doctrine.....	22
§ 24. Same—Tenement.....	22
§ 25. Same—Hereditaments.....	23
§ 26. Same—Same—Division of hereditaments.....	24

CHAPTER II.

WHAT IS REAL PROPERTY.

	PAGE
§ 27. Generally.....	27
§ 28. Things real become personalty by agreement.....	27
§ 29. Church-pews—Definition.....	28
§ 30. Same—Assignment of pews.....	29
§ 31. Same—Rights of pew-holders in pews—English doctrine....	30
§ 32. Same—Same—American doctrine.....	30
§ 33. Same—Same—Limitation and qualification of property in pew.....	32
§ 34. Same—Same—As to right of occupancy.....	32
§ 35. Same—Law regulating.....	33
§ 36. Same—Same—Episcopal church.....	34
§ 37. Same—Same—Same—Vestry's control.....	34
§ 38. Same—Same—Free church—Power of trustees.....	35
§ 39. Same—Grant in perpetuity.....	35
§ 40. Same—Interest of pew-holders in church edifice and lands..	36
§ 41. Same—Restrictions on use and treatment of pew.....	37
§ 42. Same—Abandonment or sale of church edifice.....	38
§ 43. Same—Changes and repairs.....	39
§ 44. Burial lots.....	40
§ 45. Corporate stocks and lands.....	42
§ 46. Same—Realty held by corporation in trust when.....	43
§ 47. Same—Land is real estate when.....	44
§ 48. Same—Nature and object of investment.....	44
§ 49. Electric poles and wires realty.....	45
§ 50. Emblements—Growing crops.....	45
§ 51. Same—When crop severed.....	47
§ 52. Fee-farm lease.....	48
§ 53. <i>Fructus industriales</i>	48
§ 54. Same—Products of a mixed nature—Hops.....	52
§ 55. <i>Fructus naturales</i>	53
§ 56. Same—Growing trees.....	54
§ 57. Same—Same—Overhanging trees.....	56
§ 58. Same—Same—"Line trees.".....	57
§ 59. Same—Cut trees.....	58
§ 60. Ground-rent—Definition.....	58
§ 61. Same—Nature and methods of creation.....	59
§ 62. Same—Disposition of in case of intestacy.....	59
§ 63. Heirlooms—Definition.....	60
§ 64. Same—Not recognized in America.....	60
§ 65. Houses and buildings.....	61
§ 66. Same—Built by tenant.....	62
§ 67. Same—Consent to erection.....	63
§ 68. Same—Chamber or floor in building.....	63
§ 69. Same—Same—Effect of destruction of building.....	66

CHAPTER III.

WHAT IS REAL PROPERTY—*continued.*

	PAGE
§ 70. Ice a part of the realty.....	68
§ 71. Same—On navigable streams.....	68
§ 72. Same—Same—Where title extends to the thread of the stream.....	70
§ 73. Same—On non-navigable streams.....	70
§ 74. Same—On ponds—1. "Great ponds".....	70
§ 75. Same—Same—2. Mill-ponds.....	71
§ 76. Same—On canals.....	73
§ 77. Same—Appropriation of ice.....	73
§ 78. Incorporeal hereditaments—Definition and nature.....	74
§ 79. Land usually real estate.....	74
§ 80. Same—Exceptions to the general rule.....	77
§ 81. Leasehold estate.....	77
§ 82. Light and air.....	78
§ 83. Manure—Real estate when.....	78
§ 84. Same—Where made in other than agricultural pursuits....	79
§ 85. Same—Made on non-agricultural lands.....	80
§ 86. Same—Agreement of parties respecting.....	81
§ 87. Same—New Jersey and North Carolina doctrine	81
§ 88. Same—English rule.....	82
§ 89. Market stalls.....	82
§ 90. Mines and minerals.....	83
§ 91. Same—Common-law doctrine.....	85
§ 92. Same—Royal charters.....	85
§ 93. Same—New York doctrine.....	86
§ 94. Same—Pennsylvania doctrine.....	87
§ 95. Same—Georgia doctrine.....	87
§ 96. Same—California doctrine.....	87
§ 97. Same—Severance and conveyance.....	88
§ 98. Same—Reservation of mineral ores.....	89
§ 99. Same—Surface support.....	91
§ 100. Same—Same—Rights of grantee.....	92
§ 101. Same—Same—When owner retains surface.....	93
§ 102. Same—Same—Where owner grants surface and retains minerals.....	93
§ 103. Money real estate when.....	94
§ 104. Movables realty when.....	96
§ 105. Railroads—Road-beds, rails, etc.....	96
§ 106. Same—Foundations, columns, etc., of railroad.....	97
§ 107. Same—Rolling stock.....	97
§ 108. Sea-weed—Marine increment.....	98
§ 109. Same—When cast between high and low water-mark.....	99
§ 110. Saw-mill, saw-dust, etc., real estate when.....	99
§ 111. Water real estate when.....	100

CHAPTER IV.

FIXTURES.

	PAGE
§ 112. Definition of fixture.....	103
§ 113. What fixtures pass with the realty.....	103
§ 114. <i>Criteria</i> for determining.....	111
§ 115. Same—1. Actual annexation.....	112
§ 116. Same—Same—Manner of annexation and character of article.....	113
§ 117. Same—2. Appropriation to the use.....	114
§ 118. Same—3. Adaptation to the use.....	114
§ 119. Same—4. Policy of the law.....	115
§ 120. Same—5. Intention of the parties.....	115
§ 121. Same—Same—Permanency of attachment controlled by intent.....	117
§ 122. Kinds or classes of fixtures.....	118
§ 123. Same—1. Agricultural fixtures.....	118
§ 124. Same—2. Domestic fixtures—a. Useful fixtures.....	119
§ 125. Same—Same—b. Ornamental domestic fixtures.....	120
§ 126. Same—3. Ecclesiastical fixtures.....	121
§ 127. Same—4. Trade fixtures.....	121
§ 128. Same—5. Mixed fixtures.....	123
§ 129. Between whom the question of fixtures may arise.....	124
§ 130. Same—1. Assignee in bankruptcy or for benefit of creditors and others.....	125
§ 131. Same—2. Debtor and execution creditor.....	125
§ 132. Same—3. Executor and heir at law.....	126
§ 133. Same—4. Executor of tenant for life and remainderman...	127
§ 134. Same—5. Heir at law and devisee.....	128
§ 135. Same—6. Landlord and tenant.....	128
§ 136. Same—Same—Removal of fixtures by tenant.....	130
§ 137. Same—Same—Renewal of lease without removal of fixtures.....	131
§ 138. Same—7. Mortgagor and mortgagee.....	131
§ 139. Same—8. Personal representative and devisee.....	134
§ 140. Same—9. Tenants in common.....	134
§ 141. Same—10. Vendor and vendee.....	134
§ 142. Same—Same—Gas-fixtures, chandeliers, etc.....	138
§ 143. Same—Same—Fixtures annexed by one in possession under contract of purchase.....	139
§ 144. Agreement in relation to fixtures.....	141
§ 145. Same—Limitation of doctrine.....	143
§ 146. Removal of fixtures.....	144
§ 147. Same—Exceptions to the rule.....	146

BOOK II.

TENURES.

CHAPTER I.

INTRODUCTION.

	PAGE
§ 148. English origin of our institutions.....	148
§ 149. Same—English common and statute law.....	149
§ 150. Teutonic origin and English institutions.....	149
§ 151. Same—The feudal system.....	150

CHAPTER II.

THE FEUDAL LAW.

§ 152. Sources of the English law.....	152
§ 153. Origin of feudal government.....	152
§ 154. France and Clovis.....	153
§ 155. Same—Riparian Franks.....	154
§ 156. Same—Theodosian Code.....	154
§ 157. Same—Introduction of feuds.....	154
§ 158. Same—Laws of Normandy.....	155
§ 159. Establishment of feudal tenures.....	156
§ 160. Same—Origin and growth of feudal customs.....	157
§ 161. Same—Military services.....	158
§ 162. Same—The German <i>comites</i>	160
§ 163. Same—Allodial tenures.....	162
§ 164. Same— <i>Consuetudines feudorum</i>	162
§ 165. Definition of feuds.....	163
§ 166. Kinds of feuds—Proper and improper.....	163
§ 167. Same— <i>Ligium</i> and <i>non-ligium</i>	164
§ 168. Same— <i>Feudum antiquum</i> and <i>feudum novum</i>	164
§ 169. Same— <i>Feudum nobile</i> and <i>feudum dignitatis</i>	164
§ 170. Investiture of feuds.....	165
§ 171. Same—Improper or symbolical vestiture.....	165
§ 172. Same— <i>Breve testatum</i>	166
§ 173. Fealty—Oath of.....	166
§ 174. Homage—Ceremony of.....	167
§ 175. Duties of lord and vassal.....	167
§ 176. Feudal aids.....	168
§ 177. Estate of vassal.....	168
§ 178. Alienation of feuds.....	169
§ 179. Same—Sub-infeudation.....	169
§ 180. Estate of the lord.....	169
§ 181. The lord's obligation on vassal's eviction.....	170

	PAGE
§ 182. Descent of feuds.....	170
§ 183. Same— <i>Feudum talliatum</i>	171
§ 184. Same—Distinguished from succession under Roman law...	171
§ 185. Investiture upon descent.....	172
§ 186. Same—Relevium.....	172
§ 187. Escheat of feuds.....	172
§ 188. Forfeiture of feuds	172
§ 189. Forfeiture of seigniorv.....	173
§ 190. Feudal jurisdiction... ..	173

CHAPTER III.

ANCIENT ENGLISH TENURES.

§ 191. Introduction of feuds.....	175
§ 192. Doctrine that lands held of king.....	177
§ 193. Consequences of establishment of feudal tenures.....	177
§ 194. Same—Effect on Bocland and Folcland.....	178
§ 195. Nature of the tenures.....	178
§ 196. Same—Escheat and forfeiture.....	179
§ 197. Kinds of tenures.....	179
§ 198. Same—Regarding free tenures.....	180
§ 199. Villeinage and copyholds.....	182
§ 200. Tenure <i>in capite</i>	184
§ 201. Tenure <i>de honore</i>	184
§ 202. Tenure by knight-service.....	185
§ 203. Same—Duties imposed.....	185
§ 204. Same— <i>Scutagium</i>	185
§ 205. Same—Fruits of tenure by knight-service.....	186
§ 206. Tenure by escuage.....	186
§ 207. Tenures by grand serjeanty.....	186
§ 208. Consequence of tenure.....	187
§ 209. Statute <i>Quia Emptores</i>	187
§ 210. Homage—Ceremony and importance of.....	188
§ 211. Fealty—An incident of feudal tenure.....	188
§ 212. Aids of the ancient English tenure.....	189
§ 213. Reliefs—Sums paid on investiture.....	189
§ 214. Primer seisin—Definition.....	190
§ 215. Wardship—Distinction between male and female wards... ..	190
§ 216. Marriage—Male and female wards.....	192
§ 217. Abolition of military tenures.....	193

CHAPTER IV.

TENURE IN THE UNITED STATES.

§ 218. Allodial tenures.....	194
§ 219. Doctrine of tenure in the United States—Socage tenures...	195

	PAGE
§ 220. Same—Discovery foundation of title.....	196
§ 221. Same—Indian titles.....	196
§ 222. Right of eminent domain.....	197
§ 223. Restriction as to use.....	198
§ 224. Same—Foundation of doctrine.....	199
§ 225. Same—Application of maxim.....	200

BOOK III.

CORPOREAL HEREDITAMENTS.

CHAPTER I.

ESTATES IN GENERAL.

§ 226. Definition of estate.....	201
§ 227. The origin of estates.....	204
§ 228. Estate in land—Definition.....	205
§ 229. Same—Division of.....	205
§ 230. Freehold estate in lands—Definition.....	205
§ 231. Same—Qualities of freehold estate.....	206
§ 232. Same—Seisin.....	206
§ 233. Same—Entry.....	207
§ 234. Same—Livery of seisin.....	208
§ 235. Same—Disseisin.....	209
§ 236. Same—Same—Kinds of disseisin.....	209
§ 237. Same—Same—What constitutes a disseisin.....	211
§ 238. Abatement—Effect of.....	212
§ 239. Abeyance of freehold.....	213
§ 240. Who may be freeholders.....	214
§ 241. Same—Aliens.....	216
§ 242. Same—Same—Federal and state statutes.....	218
§ 243. Same—Corporations.....	224
§ 244. Division of estates.....	225

CHAPTER II.

ESTATES IN FEE-SIMPLE.

§ 245. Definition of fee.....	226
§ 246. Definition of fee-simple.....	227
§ 247. <i>Quantum</i> of estate in fee-simple.....	228

	PAGE
§ 248. Same—Taken by corporation.....	228
§ 249. Tenant in fee-simple—Definition.....	229
§ 250. Words of limitation.....	229
§ 251. Same—Bastard.....	230
§ 252. Same—Informal and implied limitation.....	230
§ 253. Same—Statutory words of limitation.....	231
§ 254. Same—Executory limitation.....	231
§ 255. Same—To corporations—"Successors".....	231
§ 256. Same—Restrictions on ecclesiastical corporations.....	232
§ 257. Kinds of fees.....	232
§ 258. Inferior estates derived out of fee-simple.....	233
§ 259. Abeyance of fee.....	233
§ 260. Same—Land granted to pious uses.....	234
§ 261. Same—Franchise of corporation.....	235
§ 262. Same—Present doctrine as to abeyance of fees.....	235

CHAPTER III.

INCIDENTS OF AN ESTATE IN FEE-SIMPLE.

§ 263. Introduction.....	238
§ 264. Power of alienation.....	239
§ 265. Same—Definition of alienation.....	239
§ 266. Same—Kinds of alienations.....	240
§ 267. Same—Same—Voluntary alienations.....	240
§ 268. Same—Same—Early history of voluntary alienation.....	240
§ 269. Same—Same—Under the feudal system.....	241
§ 270. Same—Same—Burgage tenures.....	241
§ 271. Same—Same—Alienation of purchased land.....	241
§ 272. Same—Same—Gifts in maritagium.....	243
§ 273. Same—Sub-infeudations—Magna Charta.....	243
§ 274. Same—Tenants <i>in capite</i>	244
§ 275. Same—Alienation in mortmain.....	245
§ 276. Same—Statute of <i>Quia Emptores</i>	245
§ 277. Same—Involuntary alienation—Definition.....	246
§ 278. Same—Same—Restrictions against, upheld when.....	247
§ 279. Same—Same—Gifts to charitable uses.....	247
§ 280. Same—Modes of alienation.....	248
§ 281. Same—Same—1. Alienation by deed.....	248
§ 282. Same—Same—2. Alienation by matters of record.....	248
§ 283. Same—Same—3. Alienation by devise.....	248
§ 284. Same—General restraint of alienation.....	248
§ 285. Same—Same—Exceptions to the general rule.....	250
§ 286. Same—Same—Fee-farm estates.....	250
§ 287. Same—Same—Ground-rent estate.....	251
§ 288. Same—Same—Estates in fee-tail.....	252
§ 289. Same—Same—Estate for life—English doctrine.....	253
§ 290. Same—Same—Same—American doctrine.....	253
§ 291. Same—Same—Reason for the American rule.....	254

CHAPTER IV.

INCIDENTS OF AN ESTATE IN FEE-SIMPLE.

	PAGE
§ 292. Power of alienation—Estate for years.....	256
§ 293. Same—Estates settled on <i>feme covert</i>	257
§ 294. Same—Estates dedicated to charitable uses.....	257
§ 295. Same—Conditions in conveyance.....	258
§ 296. Same—Special restraints—Definition.	258
§ 297. Same—Same—Large's Case.....	260
§ 298. Same—Same—Prohibiting alienation to particular persons..	261
§ 299. Same—Same—Restricting alienations to particular persons..	261
§ 300. Same—Same—Restricting alienation to family.....	262
§ 301. Same—Same—Restraining alienation for a particular time..	263
§ 302. Same—Same—Condition to do certain acts.....	265
§ 303. Same—Same—Condition not to do certain acts.....	266
§ 304. Same—Same—Restraints on estates of persons not <i>sui juris</i> ,	269
§ 305. Same—Same—Restraints on marriage.....	270
§ 306. Same—Same—Restraints on second marriage.....	271
§ 307. Same—Forfeiture—Fee-simple estate.....	271
§ 308. Same—Same—Life estate.....	272
§ 309. Same—Same—Estate for years.....	274
§ 310. Same—Curtesy.....	274
§ 311. Same—Descent.....	274
§ 312. Same—Power of devise—Saxon and Danish rule.....	275
§ 313. Same—Same—Under the Normans and their successors....	275
§ 314. Same—Same—Reason for the common-law rule.....	276
§ 315. Same—Same—American rule.....	277
§ 316. Same—Dower.....	277
§ 317. Same—Forfeiture—English doctrine.....	277
§ 318. Same—Same—American doctrine.....	277
§ 319. Same—Liability for debts—Common-law doctrine.....	278
§ 320. Same—Same—American doctrine.....	278

CHAPTER V.

CREATION OF FEE-SIMPLE ESTATE BY DEED.

§ 321. Methods of creating fee-simple estates.....	280
§ 322. Same—Common-law rule—Apt words.....	281
§ 323. Same—Whole estate need not be conveyed.....	281
§ 324. Same—Reservations.....	282
§ 325. "Heirs" cannot be supplied by any other word.....	283
§ 326. Same—Must appear in operative part of deed.....	285
§ 327. Same—Supplied by reference to other instruments.....	287
§ 328. Same—Exceptions to the rule.....	288
§ 329. Same—Same—Deeds in trust and equitable estates.....	289
§ 330. Same—Same—Deed to corporations.....	290
§ 331. Same—Same—Deed to sovereign.....	290

	PAGE
§ 332. Same—Abrogation of rule by statute.....	290
§ 333. “Heirs”—Definition.....	291
§ 334. Same—Word of limitation, not of purchase.....	292
§ 335. Same—Construed “children” when.....	292
§ 336. Same—When to be ascertained.....	293
§ 337. Same—“Present heirs”.....	293
§ 338. Same—“Bodily heirs” or “heirs of the body”.....	294

CHAPTER VI.

CREATION OF FEE-SIMPLE BY DEVISE.

§ 339. Introductory.....	295
§ 340. Statute of uses—Effect of its passage.....	296
§ 341. Same—Adopted in this country.....	297
§ 342. Same—Rules of construction—Evading the statute.....	298
§ 343. Same—Same—American rules of construction.....	298
§ 344. Statute of wills—Effect on power to devise lands.....	300
§ 345. Devise of land carried fee when—Common-law doctrine..	301
§ 346. Same—Doctrine in American courts.....	302
§ 347. Same—Precatory devise.....	303
§ 348. Same—Rules for interpretation of deeds not applicable....	303
§ 349. Same—Words of limitation.....	304
§ 350. Same—“Heirs” not necessary to pass fee.....	305
§ 351. Same—What words carry a fee.....	306
§ 352. Same—“Estate” is <i>genus generalissimum</i>	311
§ 353. Same—What passes fee in reversion.....	313
§ 354. Same—When the fee vests.....	314
§ 355. Same—Words of survivorship in will—Doctrine of early English cases.....	315
§ 356. Same—Same—Doctrine of later English cases.....	316
§ 357. Same—Same—Doctrine of the American cases.....	316
§ 358. Same—Limited remainder—Vesting of.....	316
§ 359. Same—Devise with power—Carries fee when.....	317
§ 360. Same—Same—When fee does not pass.....	319
§ 361. Same—Same—Same—Reason for the rule.....	319
§ 362. Same—Devise with limitation over—Contingent fee.....	320
§ 363. Same—Same—Limitation over void for uncertainty.....	321
§ 364. Same—Same—Same—Fee in first taker.....	323
§ 365. Same—Devise to a person and his children.....	324
§ 366. Same—Same—What children included.....	325
§ 367. Same—Residuary clause carries fee when.....	326

CHAPTER VII.

CREATION OF FEE-SIMPLE BY DEVISE—*continued*.

§ 368. Enlargement of devise.....	327
§ 369. Same—When estate not enlarged.....	323

	PAGE
§ 370. Same—Intention of testator—Construction by comparison,	329
§ 371. Same—Same—Reference to other devises in will.....	330
§ 372. Same—Introductory clause.....	330
§ 373. Same—Same—Words in introductory clause enlarging estate to fee.....	332
§ 374. Same—Conclusion of will—Intention of testator declared by,	334
§ 375. Same—Where fee necessary to carry out intention of tes- tator.....	334
§ 376. Same—Estates in trust.....	335
§ 377. Same—Use devisee is to make of lands.....	336
§ 378. Same—By implication—Control over land.....	337
§ 379. Same—Same—Exceptions to the rule.....	339
§ 380. Same—Where charge on devisee.....	339
§ 381. Same—Same—Nature of charge on devisee.....	341
§ 382. Same—Same—Reason for the doctrine.....	341
§ 383. Same—Same—Failure or refusal to perform.....	342
§ 384. Same—Where charge on the estate.....	343
§ 385. Cutting down fee.....	344
§ 386. Same—Fee not cut down when.....	345
§ 387. Same—Doctrine of the American courts— <i>Jackson v. Bull</i> ,	349
§ 388. Same—Same—Doctrine of <i>Smith v. Bell</i>	351
§ 389. Statutory regulations.....	352
§ 390. Construction of devises since the statutes.....	352

CHAPTER VIII.

DESCENT OF FEE-SIMPLE ESTATES.

§ 391. Introductory.....	354
§ 392. Local or special customs—Control over descent.....	355
§ 393. Same—Gavelkind.....	355
§ 394. Same—Same—Where prevails.....	356
§ 395. Same—Borough-English.....	356
§ 396. Same—Effect on right to take as heir.....	357
§ 397. Same—Copyholds.....	357
§ 398. Descent as affected by domicil.....	358
§ 399. Descent at common law.. . . .	359
§ 400. Same—Seisin in law.....	359
§ 401. Same—Same—Prevents abeyance of freehold,.....	359
§ 402. Same—Seisin in deed.....	360
§ 403. Same—Same—How acquired.....	360
§ 404. Same—Distinction between seisin in law and in fact.....	361
§ 405. Same—When entry not necessary to convert seisin in law into actual seisin.....	362
§ 406. Common-law rules of descent.....	363
§ 407. Same—First rule.....	363
§ 408. Same—Same—Doctrine of <i>possessio fratris</i> ,.....	363
§ 409. Same—Same—Same—Effect on dower and curtesy.....	364
§ 410. Same—Second rule.....	365

	PAGE
§ 411. Same—Third rule.....	365
§ 412. Same—Fourth rule.....	365
§ 413. Same—Fifth rule.....	365
§ 414. Same—Sixth rule.....	366
§ 415. Same—Seventh rule.....	366
§ 416. Same—Eighth rule.....	366
§ 417. Same—Same—Feudal origin of primogeniture.....	367
§ 418. Rules of descent in the United States.....	367

CHAPTER IX.

DETERMINABLE FEES.

§ 419. Definition of determinable fees.....	370
§ 420. Distinguished from fee-simple.....	371
§ 421. Mode of limitation.....	371
§ 422. Limitations creating a determinable fee.....	372
§ 423. Kinds of determinable fees.....	373
§ 424. Same—Direct limitation.....	373
§ 425. Same—Collateral limitation.....	374
§ 426. Converted into a fee-simple how.....	374
§ 427. Determinable limitations and limitations upon condition— Distinction between.....	375
§ 428. Alienation and devise of.....	376
§ 429. Waste an incident of such estates.....	376

CHAPTER X.

CONDITIONAL FEES.

§ 430. Introductory.....	377
§ 431. Definition of conditional fee.....	377
§ 432. Early history of conditional fees.....	378
§ 433. Mode of limitation of conditional fees.....	378
§ 434. Nature of heirs special.....	379
§ 435. Statute <i>De Donis</i>	380
§ 436. In what sense limitation conditional.....	380
§ 437. Descent of conditional fees.....	381
§ 438. Executory devise after fee conditional.....	382

CHAPTER XI.

BASE FEES.

§ 439. Definition of base fee.....	384
§ 440. Creation of base fees.....	385
§ 441. Determinable conterminous with base fee.....	387
§ 442. Merger of base fees.....	388
§ 443. Descent of base fees.....	388

CHAPTER XII.

QUALIFIED FEE-SIMPLE.

	PAGE
§ 444. Definition of qualified fee-simple.....	390
§ 445. Power of tenant of qualified fee-simple over the estate.....	390
§ 446. Qualified fee-simple distinguished from other fees.....	391
§ 447. Objections to qualified fees-simple.....	391
§ 448. The doctrine of <i>Blake v. Hynes</i>	392
§ 449. Nature and mode of limitation.....	393
§ 450. Course of descent of a qualified fee-simple estate.....	394
§ 451. Alienation of qualified fee-simple.....	394

CHAPTER XIII.

ESTATES IN TAIL.

§ 452. Definition of an estate-tail.....	395
§ 453. What construed an estate-tail.....	396
§ 454. Distinguished from estates determinable.....	396
§ 455. Origin of estate-tail.....	397
§ 456. Same—Statute <i>De Donis</i>	397
§ 457. Same—Effect of construction.....	399
§ 458. Attempt to defeat the statute <i>De Donis</i>	400
§ 459. Recognition in the United States'.....	401
§ 460. Kinds of tails.....	402
§ 461. Same—General and special estates-tail.....	403
§ 462. Same—Same—Limitation in tail special valid where.....	404
§ 463. Same—Estates-tail male and female.....	404
§ 464. Same—Estate in frank-marriage.....	405
§ 465. Same—Fees-tail with conditional limitations.....	406
§ 466. Same—Estates-tail after possibility.....	406
§ 467. How estates-tail are created.....	407
§ 468. Same—Words of procreation necessary.....	407
§ 469. Same—Methods of creation—a. By deed.....	408
§ 470. Same—Same—"Heir" <i>nomen collectivum</i>	409
§ 471. Same—Same—b. By devise.....	410
§ 472. Same—Same—Same—Words creating estate-tail.....	411
§ 473. Same—Same—Same—Devise to several and survivors.....	413
§ 474. Same—Same—Same—Remainder over on failure of issue..	414
§ 475. Same—Same—Same—Effect of reversion on indefinite failure.....	417
§ 476. Same—Same—Same—Rule of construction.....	418
§ 477. Same—Same—Same—Intention of testator.....	419
§ 478. Same—Same—Same—Expressions which carry estate-tail..	420
§ 479. Same—Same—Same—Fee reduced by context.....	424
§ 480. Same—Same—Same—Doctrine of <i>Price v. Taylor</i>	425

	PAGE
§ 481. Same—Same—Same—Devise in tail not enlarged by implication.....	426
§ 482. Same—Same—Same—Doctrine of Wright v. Thayer.....	427
§ 483. Same—Words in frank-marriage sufficient.....	428

CHAPTER XIV.

ESTATES IN TAIL—*continued.*

§ 484. Rules relating to limitations creating estates-tail.....	430
§ 485. Of whom an estate in tail is held.....	432
§ 486. What property may be entailed.....	433
§ 487. Same—What essential to an entailment.....	433
§ 488. Same—Personalty not entailable.....	434
§ 489. Same—Annuities not entailable.....	434
§ 490. Same—Copyholds—Entailment by special custom.....	435
§ 491. Same—Conditional fee-simple entailable.....	436
§ 492. Same—Freehold or chattel interest not entailable.....	436
§ 493. Who may hold as tenant in tail.....	437
§ 494. Remainder upon fee-tail.....	437
§ 495. Heirs of donee in tail take by descent.....	437
§ 496. Rule in Shelley's Case.....	438
§ 497. Same—When rule prevails.....	438
§ 498. Same—Where "heirs" <i>descriptio personarum</i>	439
§ 499. Same—What within the rule.....	440
§ 500. Same—Rule of construction and not of law.....	441
§ 501. Same—Applied to estates in husband and wife.....	441
§ 502. Incidents of an estate in tail.....	442
§ 503. Same—Power to commit waste.....	442
§ 504. Same—Right to bar estate.....	443
§ 505. Same—Right to title-deeds—English rule.....	443
§ 506. Same—Same—American rule.....	444
§ 507. Same—Curtesy and dower.....	444
§ 508. Same—Forfeiture for treason.....	444
§ 509. Same—Incidents of fees which do not attach—Alienation..	444
§ 510. Same—Same—Duty to pay off incumbrances.....	445
§ 511. Same—Same—Merger.....	446
§ 512. Abolition and curtailment by statute.....	446
§ 513. Same—Effect of abolishing estates-tail.....	447
§ 514. Descent of estates-tail.....	448
§ 515. Same—Successive descents.....	449
§ 516. Same—Legislative change of descent.....	450

CHAPTER XV.

ALIENATION AND BARRING ESTATE-TAIL.

§ 517. Conditional fees.....	452
§ 518. Same—Doctrine of the common law.....	452

	PAGE
§ 519. Statute of Westminster II.—Origin and effect.....	452
§ 520. Same—Evils of the statute.....	453
§ 521. Same—Evading the statute—Origin of fines and recoveries,	453
§ 522. Alienating estates-tail.....	454
§ 523. Same—By issue in tail.....	455
§ 524. Same—Meaning of statute.....	455
§ 525. Same—Discontinuance.....	455
§ 526. Same—Modes of discontinuance.....	455
§ 527. Same—Effects of discontinuance.....	456
§ 528. Same—When discontinuance not had.....	456
§ 529. Same—Creates base fee when.....	457
§ 530. Fines—Nature and kinds.....	457
§ 531. Same—Common-law and statutory fines.....	458
§ 532. Same—Fines in the United States.....	458
§ 533. Common recovery—Definition.....	459
§ 534. Same—Nature of.....	459
§ 535. Same—Statutory tenant of the <i>præcipe</i>	459
§ 536. Same—Form of proceedings.....	460
§ 537. Same—Effect of.....	460
§ 538. Same—In United States.....	461
§ 539. Same—Against estate of creator of entail.....	461
§ 540. Same—By writ <i>ad quod damnum</i>	462
§ 541. Alienation by bargain and sale—English doctrine.....	462
§ 542. Same—Doctrine in United States.....	463
§ 543. Same—Statutory bar by deed.....	464
§ 544. Same—Formality of deed.....	465
§ 545. Same—Conveyance of limited interests.....	466
§ 546. Same—Record of deed.....	466
§ 547. Same—By mortgage.....	466
§ 548. Same—By partition.....	466
§ 549. Same—By sale on execution.....	467
§ 550. Same—By leases and releases.....	467
§ 551. Statutory abolition and curtailment.....	468
§ 552. Equitable estates-tail.....	473

CHAPTER XVI.

ESTATES FOR LIFE.

SECTION I.	Nature and incidents of life estates.
SECTION II.	Duties incident to life estates, tenures, etc.
SECTION III.	Estate <i>pur autre vie</i> .
SECTION IV.	How estates for life created.
SECTION V.	Emblements.
SECTION VI.	Estovers.
SECTION VII.	Waste.

SECTION I.—NATURE AND INCIDENTS OF LIFE ESTATE.

§ 553.	Introductory.....	475
§ 554.	Estate for life under feudal law.....	476

	PAGE
§ 555. Same—Term of grant—Formal words of instrument.....	476
§ 556. Definition of a life estate.....	477
§ 557. Estate for life a freehold.....	477
§ 558. What constitutes estate for life.....	478
§ 559. Kinds of estates for life.....	479
§ 560. Estates for life of the tenant... ..	479
§ 561. <i>Quasi</i> -tenants for life—Ecclesiastical persons.....	480
§ 562. Determinable estates for life.....	480
§ 563. Same—Special occupant.....	481
§ 564. Life estate by implication.....	481
§ 565. Same—What creates life estates by implication.....	482
§ 566. Same—Adding words of limitation.....	482
§ 567. Same—Absurd and superfluous expressions.....	483
§ 568. Same—Same—Reason for the rule.....	483
§ 569. Tenancy by the curtesy, etc.....	484
§ 570. The conditions attached to life estates.....	484
§ 571. Same—Liability for debts of tenant.....	485
§ 572. Enlargement of life estate to a fee.....	486
§ 573. Same—Power of disposition by will.....	486
§ 574. Nature of estate for life.....	488
§ 575. Same—Possession of tenant possession of reversioner....	488
§ 576. Adverse title—Purchase by life tenant.....	490
§ 577. Same—Not entailable.....	490
§ 578. Rights and incidents of an estate for life—1. Right to pos- session and products.....	490
§ 579. Same—Same—Right to possession of title-deeds.....	491
§ 580. Same—2. Right to recover damages	492
§ 581. Same—Same—Rules for valuation of life estate.....	493
§ 582. Same—3. Right to estovers, etc.....	494
§ 583. Same—4. Right to work mines, quarries, etc.....	494
§ 584. Same—Same—Right to open new mines, pits, and shafts... ..	494
§ 585. Same—Same— <i>Gaines v. Green Pond Iron Mining Co.</i>	495
§ 586. Same—5. Right to lease.....	496
§ 587. Same—6. Right to rents and profits.....	497
§ 588. Same—Same—Apportionment of rent... ..	497
§ 589. Same—7. Right to protection against sudden determina- tion of estate.....	498
§ 590. Same—8. Right of alienation.....	499
§ 591. Same—Same—Restraint on alienation.....	499
§ 592. Same—Same—Same—Active trust—Pennsylvania doctrine, ..	500
§ 593. Same—Same—Same—Withdrawing estate from creditors..	501
§ 594. Same—Same—Must be made by deed.....	501
§ 595. Same—Same—How great an estate may be conveyed by life tenant.....	501
§ 596. Same—Same—Passes by assignment for benefit of creditors.	502

SECTION II.—DUTIES INCIDENT TO LIFE ESTATES, TENURES, ETC.

§ 597. Duties of tenants of life estates—1. To defend title—Pray- ing in aid.....	503
--	-----

	PAGE
§ 598. Same—2. To pay taxes—a. Ordinary taxes.....	504
§ 599. Same—Same—b. Betterments.....	505
§ 600. Same—3. To make repairs.....	506
§ 601. Same—Same—Exception to the rule.....	506
§ 602. Same—4. To keep down interest.....	508
§ 603. Same—Same—Former rule.....	510
§ 604. Same—Same—Rule as to widows.....	510
§ 605. Same—5. To pay incumbrances.....	511
§ 606. Same—Same—Apportionment of incumbrances.....	511
§ 607. Same—Same—Same—Rule where widow the life tenant..	512
§ 608. Same—6. To insure.....	513
§ 609. Tenure of estate for life.....	513
§ 610. Permanent improvements—Rights of parties.....	514
§ 611. Same—Exceptions to the rule.....	514
§ 612. Partition by tenant for life.....	515
§ 613. Forfeiture of life estates.....	515
§ 614. Same—1. By conveying in fee.....	516
§ 615. Same—2. By adverse possession.....	517
§ 616. Same—3. By waste.....	518
§ 617. Valuation of life estate.....	518
§ 618. Same—English rule.....	518
§ 619. Same—American rule.....	519
§ 620. Merger of life estates.....	520
§ 621. Same—Estates <i>pur autre vie</i>	521
§ 622. Termination of life estate.....	521
§ 623. Same—Exception to the rule.....	521
§ 624. Same—Presumption of death.....	522

SECTION III.—ESTATES PUR AUTRE VIE.

§ 625. Definition of the estate.....	523
§ 626. <i>Quantum</i> of the estate.....	524
§ 627. Nature of interest in the estate.....	524
§ 628. Methods by which estate created.....	525
§ 629. Rights of tenants—Alienation, devise, and entail.....	525
§ 630. Same—Right to estovers.....	526
§ 631. Occupancy—1. Corporeal hereditaments—a. General occupancy.....	526
§ 632. Same—Same—Same—Abolition by statute.....	526
§ 633. Same—Same—b. Special occupancy.....	527
§ 634. Same—Same—Same—Who may be special occupants.....	528
§ 635. Same—2. Incorporeal hereditaments.....	528
§ 636. Termination of estate.....	529

SECTION IV.—HOW ESTATES FOR LIFE CREATED.

§ 637. Conventional and legal estates.....	529
§ 638. Estates for life by implication.....	530
§ 639. Creation by deed.....	530
§ 640. Same—Words of limitation.....	531

	PAGE
§ 641. Same—What creates life estate.....	532
§ 642. Created by devise.....	532
§ 643. Same—Words which carry life estate.....	533
§ 644. Same—Same—Raised by implication.....	534
§ 645. Same—Enlarging estate to a fee.....	535
§ 646. Same—Same—Devise with power of disposition.....	535
§ 647. Same—Same—Words in preamble.....	536

SECTION V.—EMBLEMENTS.

§ 648. Definition of emblements.....	537
§ 649. Life tenant entitled to.....	537
§ 650. Crop must be planted by tenant.....	538
§ 651. Where estate determined by tenant.....	538
§ 652. Ingress, egress, and regress.....	539

SECTION VI.—ESTOVERS.

§ 653. Definition of estovers.....	540
§ 654. Kinds of estovers.....	540
§ 655. Life tenant entitled to.....	541
§ 656. Same—Where tenant a widow.....	541
§ 657. What may be taken—Effect of exceeding right.....	542
§ 658. Same—English and American doctrines.....	543
§ 659. When to be taken.....	544
§ 660. For what purposes taken.....	544
§ 661. Where to be taken from.....	546
§ 662. Where to be used.....	546
§ 663. Common of estovers.....	547

SECTION VII.—WASTE.

§ 664. Definition.....	549
§ 665. What constitutes waste.....	549
§ 666. Same—Exceptions to the rule.....	550
§ 667. Kinds of waste.....	550
§ 668. Same—Voluntary waste.....	550
§ 669. Same—Permissive waste.....	550
§ 670. Liability of life tenant for waste—Common-law doctrine...	551
§ 671. Same—American doctrine.....	552
§ 672. Same—Acts of strangers.....	553
§ 673. Same—Tenants in dower and curtesy.....	554
§ 674. Same—Same—Permissive waste.....	554
§ 675. Kinds of lands subject to waste.....	554
§ 676. Acts constituting waste—General rule.....	555
§ 677. Same—1. Felling timber—General rule.....	557
§ 678. Same—Same—Amount to be taken.....	557
§ 679. Same—Same—Particular kinds of trees.....	559
§ 680. Same—Same—Local custom as to timber trees.....	559
§ 681. Same—Same—Timber improperly cut—Property in.....	560
§ 682. Same—2. Opening mines.....	561

	PAGE
§ 683. Same—3. In respect to building—Pulling down houses....	562
§ 684. Same—Same—Dilapidations.....	562
§ 685. Same—Same—Alterations.....	564
§ 686. Same—Same—Erection of new buildings.....	565
§ 687. Same—4. Changing course of husbandry.....	565
§ 688. Same—Same—Permitting land to become foul.....	566
§ 689. Same—5. Destruction of heirlooms.....	567
§ 690. Partial powers to commit waste.....	567
§ 691. Waste by ecclesiastics.....	567
§ 692. Destruction by fire.....	567
§ 693. Without impeachment of waste.....	568
§ 694. Remedies for waste—1. Writ of estrepement and writ of waste.....	569
§ 695. Same—2. Injunction.....	570
§ 696. Same—Same—Character of the remedy.....	571
§ 697. Same—Same—When granted.....	572
§ 698. Same—Same—Same—Threat to commit waste.....	573
§ 699. Same—Same—Same—Permissive waste.....	573
§ 700. Same—Same—Privity of title.....	573
§ 701. Same—Same—In favor of whom granted.....	575
§ 702. Same—Same—Against whom granted.....	575
§ 703. Same—Same—Bill for accounting.....	577
§ 704. Same—3. Forfeiture of estate.....	577

CHAPTER XVII.

ESTATE BY CURTESY.

SECTION I.	Origin and requisites.
SECTION II.	Nature, incidents, and duties.
SECTION III.	Barring curtesy.
SECTION IV.	Curtesy under statute.
SECTION V.	Who may be tenants by curtesy.
SECTION VI.	What property subject to curtesy.
SECTION VII.	What property not subject to curtesy.

SECTION I.—ORIGIN AND REQUISITES.

§ 705. Estate by curtesy—Introduction.....	580
§ 706. Definition of estate by curtesy.....	580
§ 707. Origin of estate by the curtesy—Lord Littleton's view....	581
§ 708. Same—Early origin of the estate.....	582
§ 709. Same—Adopted from northern nations.....	583
§ 710. Curtesy in England.....	584
§ 711. Same—Curtesy in gavelkind lands.....	584
§ 712. Curtesy in the United States.....	584
§ 713. Same—Under married women's acts.....	587
§ 714. Kinds of curtesy.....	588
§ 715. Same—1. Curtesy initiate.....	589
§ 716. Same—2. Curtesy consummate.....	591

	PAGE
§ 717. Same—3. Equitable curtesy.....	592
§ 718. Common-law requisites of curtesy.....	592
§ 719. Same—1. Lawful marriage.....	593
§ 720. Same—Same— <i>Lex loci</i> governs.....	594
§ 721. Same—Same—Celebration of marriage.....	595
§ 722. Same—Same—Void and voidable marriage.....	597
§ 723. Same—2. Seisin of wife.....	597
§ 724. Same—Same—What seisin is sufficient.....	599
§ 725. Same—Same—Seisin in fact or in deed.....	600
§ 726. Same—Same—Same—Exceptions to the rule.....	601
§ 727. Same—Same—Seisin in law.....	603
§ 728. Same—Same—Same—Reason for relaxing rule.....	604
§ 729. Same—Same—Same—Extent to which rule relaxed.....	604
§ 730. Same—Same—Seizure by descent cast.....	605
§ 731. Same—Same—Seized at time of death.....	606
§ 732. Same—Same—Possession by coparcener.....	606
§ 733. Same—Same—Possession by co-tenant.....	606
§ 734. Same—Same—Possession by wife's tenant.....	607
§ 735. Same—Same—Same—Lease for life before marriage.....	609
§ 736. Same—Same—Same—Receiving rents and profits.....	609
§ 737. Same—Same—Possession by husband—Kentucky doctrine,	609
§ 738. Same—Same—Possession by husband's grantee.....	610
§ 739. Same—Same—Seisin of guardian.....	610
§ 740. Same—Same—Equitable title and seisin.....	610
§ 741. Same—Same—Same—Exception to the rule.....	611
§ 742. Same—Same—Actual entry.....	612
§ 743. Same—Same—Same—Wild, waste, and uncultivated lands,	612
§ 744. Same—Same—Time of seisin.....	614
§ 745. Same—Same—Adverse possession.....	614
§ 746. Same—Same—Remainder and reversion.....	614
§ 747. Same—3. Issue of marriage.....	616
§ 748. Same—Same—Change of rule by statute.....	616
§ 749. Same—Same—a. Born alive.....	617
§ 750. Same—Same—Same—Degree of development and vitality,	618
§ 751. Same—Same—Same—Death of issue.....	619
§ 752. Same—Same—b. In lifetime of wife.....	620
§ 753. Same—Same—c. Be capable of inheriting.....	620
§ 754. Same—Same—Same—Seisin by wife.....	621
§ 755. Same—Same—Same—Estate devised to wife and heirs.....	621
§ 756. Same—Same—Same—Gives second husband curtesy.....	621
§ 757. Same—Same—Same—Wife's attainder.....	622
§ 758. Same—Same—d. Essentials need not coincide in point of time.....	623
§ 759. Same—4. Death of wife.....	624
§ 760. Same—Same—Civil death and bigamy of wife.....	624

SECTION II.—NATURE, INCIDENTS, AND DUTIES.

§ 761. Nature of estate by the curtesy.....	626
§ 762. Same—Tenure.....	626

	PAGE
§ 763. Same—Same—At common law.....	627
§ 764. Same—Same—Continuation of wife's estate.....	627
§ 765. Same—Has character of title by descent.....	627
§ 766. Same—When estate attaches.....	628
§ 767. Same—Same—Disclaimer.....	628
§ 768. Same—Same—Action by husband to recover.....	629
§ 769. Same—Same—Suspends descent.....	629
§ 770. Same—Suspends statute of limitation.....	629
§ 771. Same—Proceeds of judicial sale—Curtesy in.....	630
§ 772. Same—Insurable interest.....	631
§ 773. Incidents of curtesy—Generally.....	632
§ 774. Same—1. Right to sell or lease.....	633
§ 775. Same—2. Subject to the debts of the wife.....	634
§ 776. Same—3. Subject to debts of tenant.....	634
§ 777. Same—Same—Wife's right as creditor against curtesy.....	636
§ 778. Same—Same—Curtesy initiate.....	636
§ 779. Same—Same—Same—Under statute subjecting "any estate held by debtor".....	637
§ 780. Same—Same—Under recent American statutes.....	638
§ 781. Same—4. Emblements—Tenant by curtesy entitled to.....	639
§ 782. Same—5. Improvements—No allowance to tenant for.....	639
§ 783. Same—6. Waste by tenant by curtesy.....	639
§ 784. Same—Same—Liability of assignee.....	640
§ 785. Same—7. Partition.....	640
§ 786. Same—8. Power to sell, assign, or lease.....	641
§ 787. Same—Same—Effect of subsequent divorce.....	642
§ 788. Same—9. Suits with reference to.....	643
§ 789. Same—Same—Damages to reversion.....	643
§ 790. Duties of tenant by curtesy.....	643

SECTION III.—BARRING CURTESY.

§ 791. Barring curtesy—By agreement of parties.....	645
§ 792. Same—By attainder of wife.....	648
§ 793. Same—By divesture of wife on breach of covenant.....	648
§ 794. Same—By judicial proceedings under statute.....	649
§ 795. Same—By consent of husband to wife's will.....	650
§ 796. Same—By statute of limitations.....	651
§ 797. Same—By statutory enactment.....	651
§ 798. Same—By husband's conveyance.....	651
§ 799. Same—Same—In lands purchased with proceeds.....	652
§ 800. Same—By fine and recovery.....	652
§ 801. Same—By conveyance by wife during coverture.....	653
§ 802. Same—By settlement in trust.....	653
§ 803. Same—By instrument creating equitable estate.....	654
§ 804. Same—Same—Provisions excluding curtesy.....	654
§ 805. Same—By separate use for wife.....	656
§ 806. Same—Not by will or deed of grantor.....	656
§ 807. Same—Not by will of wife.....	657
§ 808. Same—Not by decree enjoining husband.....	657

	PAGE
§ 809. Same—Not by attainder of wife after issue.....	658
§ 810. Same—Not by ante-nuptial deed.....	658
§ 811. Same—Not by ante-nuptial gift.....	658
§ 812. Same—Not by abandonment of possession to co-tenant in common.....	659
§ 813. Forfeiture—By alienage.....	659
§ 814. Same—By decree of divorce.....	660
§ 815. Same—Same—1. Decree of nullity.....	660
§ 816. Same—Same—2. Decree <i>nisi</i>	661
§ 817. Same—Same—3. <i>A vinculo</i>	661
§ 818. Same—Same—Same—At suit of wife.....	662
§ 819. Same—Same—Same—At suit of husband.....	663
§ 820. Same—Same—Same—Rights of third persons.....	663
§ 821. Same—Same—4. <i>A mensa</i>	663
§ 822. Same—By adultery.....	664
§ 823. Same—By abandonment of wife.....	664
§ 824. Same—By failure to provide.....	665
§ 825. Same—By bigamy.....	665
§ 826. Same—By wrongful alienation.....	665
§ 827. Same—By attainder of husband of treason or felony.....	666

SECTION IV.—CURTESY UNDER STATUTE.

§ 828. Statutes—Generally.....	666
§ 829. Same—Construction of statutes.....	668
§ 830. Same—Married women's acts.....	669
§ 831. Same—Effect of statute—On curtesy initiate.....	670
§ 832. Same—Same—On curtesy consummate.....	672

SECTION V.—WHO MAY BE TENANTS BY THE CURTESY.

§ 833. Tenants by the curtesy—Generally.....	672
§ 834. Same—Alienage.....	672
§ 835. Same—Same—Naturalization.....	673
§ 836. Same—Attainder of treason or felony.....	674

SECTION VI.—WHAT PROPERTY SUBJECT TO CURTESY.

§ 837. Ancient rule.....	675
§ 838. At common law.....	675
§ 839. In estates-tail.....	676
§ 840. Same—On failure of issue.....	676
§ 841. Same—In this country.....	677
§ 842. In separate estate—At common law.....	677
§ 843. Same—Under statute.....	678
§ 844. In equitable estates of inheritance.....	679
§ 845. Same—Intention of grantor.....	680

	PAGE
§ 846. In estate of former husband.....	681
§ 847. In lands recovered.....	681
§ 848. In lands deed to which is taken in wife's name.....	681
§ 849. In lands of which wife seized by direct gift.....	682
§ 850. In lands conveyed to wife by husband.....	682
§ 851. In lands conveyed to trustee—By husband.....	682
§ 852. Same—By the wife.....	683
§ 853. Same—By third party.....	683
§ 854. Same—Same—Express exclusion of husband.....	684
§ 855. In lands held by guardian.....	685
§ 856. In wild lands.....	685
§ 857. In lands cast by descent.....	686
§ 858. In lands devised in trust.....	686
§ 859. In lands of beneficiary under will.....	687
§ 860. In mortgaged estate.....	688
§ 861. In trust estate.....	689
§ 862. In fees with conditional limitation.....	689
§ 863. In fees determinable.....	690
§ 864. In estate in remainder.....	692
§ 865. In estate in reversion.....	693
§ 866. In lands held in joint tenancy.....	693
§ 867. In estates in coparcenary.....	694
§ 868. In merged estates.....	694
§ 869. In money when.....	694
§ 870. In incorporeal hereditaments.....	695

SECTION VII.—WHAT PROPERTY NOT SUBJECT TO CURTESY.

§ 871. Introduction.....	696
§ 872. Estates not of inheritance.....	696
§ 873. Life estates.....	697
§ 874. Separate estate when.....	697
§ 875. Same—Will of grantor.....	698
§ 876. Same—With reservation in.....	698
§ 877. Same—Settlement by husband.....	699
§ 878. Estates held as trustee.....	699
§ 879. Pre-emption claim.....	700
§ 880. Land assigned for dower.....	700
§ 881. Estates held in joint tenancy.....	700
§ 882. Determinable fees.....	700
§ 883. In proceeds of land.....	701
§ 884. Lands of former husband.....	701
§ 885. Lands sold before marriage.....	701
§ 886. Adverse possession and bar of statute.....	702
§ 887. In lands mortgaged to wife.....	702
§ 888. In remainder and reversion.....	702

CHAPTER XVIII.

DOWER ESTATE.

SECTION	I.	Origin, history, and kinds of dower.
SECTION	II.	Nature and incidents of dower.
SECTION	III.	Requisites of dower.
SECTION	IV.	Who may be endowed.
SECTION	V.	What property and estates subject to dower.
SECTION	VI.	What property and estates not subject to dower.
SECTION	VII.	Assignment of dower.
SECTION	VIII.	Detention and recovery of dower—Actions affecting.
SECTION	IX.	Barring dower.
SECTION	X.	Provisions in lieu of dower—Election.

SECTION I.—ORIGIN, HISTORY, AND KINDS OF DOWER.

	PAGE
§ 889. Introductory.....	704
§ 890. Origin of dower.....	705
§ 891. Same—German origin.....	707
§ 892. Definition of dower.....	707
§ 893. Favored in law.....	708
§ 894. Kinds of dower.....	709
§ 895. Same—1. Dower by custom.....	709
§ 896. Same—2. Dower <i>ad ostium ecclesiæ</i>	710
§ 897. Same—3. Dower <i>ex assensus patris</i>	710
§ 898. Same—4. Dower <i>de la plus belle</i>	710
§ 899. Same—5. Dower at common law.....	710
§ 900. Dower in the United States.....	711
§ 901. Dower under statute.....	711
§ 902. Stages of dower.....	713

SECTION II.—NATURE AND INCIDENTS OF DOWER.

§ 903. Nature of dower.....	714
§ 904. Object of dower.....	715
§ 905. When dower vests.....	715
§ 906. Interest of wife in dower.....	715
§ 907. Same—Rights before assignment.....	716
§ 908. Same—Rights after assignment.....	718
§ 909. Law governing dower.....	719
§ 910. Same—As to place.....	719
§ 911. Same—As to time.....	721
§ 912. Same—Where law changed during coverture.....	722
§ 913. Incidents of dower.....	723
§ 914. Same—1. Inchoate dower.....	725
§ 915. Same—2. Consummate dower.....	731

	PAGE
§ 916. Same—Same—Right of quarantine.....	736
§ 917. Same—3. Assigned dower.....	737
§ 918. Same—Same—Right of alienation.....	739
§ 919. Same—Same—Duties imposed on.....	739
§ 920. Same—Same—Liability for debts of widow.....	741
§ 921. Same—Same—Subject to waste.....	742
§ 922. Same—Same—Subject to forfeiture.....	743
§ 923. Priority of dower.....	744
§ 924. Revival of dower rights.....	745
§ 925. Valuation of dower interest.....	745

SECTION III.—REQUISITES OF DOWER.

§ 926. Legal dower—Generally.....	748
§ 927. Same—1. Marriage—Must be legal.....	750
§ 928. Same—Same—Void and voidable marriage.....	755
§ 929. Same—Same—Proof of marriage.....	757
§ 930. Same—2. Seisin of husband.....	759
§ 931. Same—Same—What a sufficient seisin.....	763
§ 932. Same—Same—Character of seisin.....	763
§ 933. Same—Same—Duration of seisin.....	765
§ 934. Same—Same—Evidences of seisin.....	766
§ 935. Same—3. Death of husband.....	767
§ 936. Same—Same—Proof of death.....	767
§ 937. Equitable dower.....	767

SECTION IV.—WHO MAY BE ENDOWED.

§ 938. Introduction.....	768
§ 939. Second marriage—Spouse living.....	769
§ 940. Divorced wife.....	770
§ 941. Abandonment and adultery.....	773
§ 942. Alienage.....	774
§ 943. Same—Naturalization.....	775

SECTION V.—WHAT PROPERTY AND ESTATES SUBJECT TO DOWER.

§ 944. Generally.....	776
§ 945. Base and qualified fees.....	779
§ 946. Determinable fees.....	780
§ 947. Equitable estates.....	781
§ 948. Equity of redemption.....	782
§ 949. Estates for life— <i>Pur autre vie</i>	784
§ 950. Estates for years.....	784
§ 951. Estates in common.....	785
§ 952. Estates in copartnership.....	785
§ 953. Estates in expectancy.....	787
§ 954. Estates in joint tenancy.....	787
§ 955. Estates in tail.....	787
§ 956. Estates in trust.....	788

	PAGE
§ 957. Estates subject to conditions.....	788
§ 958. Growing crops.....	789
§ 959. Improvements—By husband and heir.....	789
§ 960. Incorporeal hereditaments... ..	790
§ 961. Lands aliened during coverture.....	790
§ 962. Lands conveyed in fraud of creditors.....	792
§ 963. Lands conveyed in fraud of dower.....	794
§ 964. Lands dedicated to public use.....	796
§ 965. Lands exchanged.....	797
§ 966. Lands held as dower.....	797
§ 967. Lands held by incomplete title.....	798
§ 968. Lands mortgaged—Mortgagor's wife.....	799
§ 969. Same—Same—Redeemed by husband or representatives..	801
§ 970. Same—Mortgagee's wife.....	803
§ 971. Lands not fully paid for.....	803
§ 972. Lands redeemed.....	805
§ 973. Lands sold by an assignee.....	806
§ 974. Lands wild and uncultivated.....	806
§ 975. Merged estates.....	807
§ 976. Mines, mineral lands, and quarries.....	811
§ 977. Money.....	813
§ 978. Rents and profits.....	814
§ 979. Reversions and remainders.....	815
§ 980. Shares of corporation.....	816
§ 981. Surplus proceeds of land.....	817

SECTION VI.—WHAT PROPERTY AND ESTATES NOT SUBJECT TO DOWER.

§ 982. Introductory.....	819
§ 983. Improvements.....	822
§ 984. Estates for years.....	823
§ 985. Estates in joint tenancy.....	823
§ 986. Estates in copartnership.....	824
§ 987. Estates in reversion and remainder.....	825
§ 988. Estates mortgaged.....	826
§ 989. Estates in tail.....	827
§ 990. Equitable estates.....	827
§ 991. Lands condemned for public use.....	828
§ 992. Lands given to public use.....	828
§ 993. Momentary and transitory seisin.....	829
§ 994. Pre-emption claims.....	830
§ 995. Trust estates.....	831
§ 996. Vendor's lien.....	832
§ 997. Wild and uncultivated lands.....	833
§ 998. Wrongful estates.....	833

SECTION VII.—ASSIGNMENT OF DOWER.

§ 999. Necessity for assignment.....	834
§ 1000. When right to assignment accrues.....	835

	PAGE
§ 1001. Demand of assignment.....	835
§ 1002. Widow's quarantine.....	835
§ 1003. Right of dower—Character.....	838
§ 1004. Same—Right of alienation.....	838
§ 1005. When dower assigned.....	839
§ 1006. Same—Contribution to redemption.....	840
§ 1007. Estimating value of dower.....	840
§ 1008. In improvements.....	843
§ 1009. Rents and profits.....	844
§ 1010. In property not devisable.....	845
§ 1011. In aliened lands.....	845
§ 1012. In partitioned lands.....	846
§ 1013. In crops growing on land.....	846
§ 1014. How dower assigned—Generally.....	847
§ 1015. Same—Manner of assignment.....	848
§ 1016. Same—Same—According to the common right.....	849
§ 1017. Same—Rules governing.....	849
§ 1018. Same—Law governing.....	850
§ 1019. Same—Estate granted.....	851
§ 1020. Same—Assignment by parol.....	851
§ 1021. Same—According to common right.....	852
§ 1022. Same—Same—Assignment in special manner.....	853
§ 1023. Same—Against common right.....	854
§ 1024. By metes and bounds.....	854
§ 1025. Same—Assignments in several parcels.....	856
§ 1026. Same—Same—Where held in severalty.....	856
§ 1027. Same—In common.....	857
§ 1028. Same—In money.....	857
§ 1029. Same—Improper assignment.....	858
§ 1030. Same—Failure of assignment.....	859
§ 1031. Same—Re-assignment.....	860
§ 1032. Who may make assignment of dower.....	861
§ 1033. Effect of assignment of dower.....	862

SECTION VIII.—DETENTION AND RECOVERY OF DOWER—ACTIONS AFFECTING.

§ 1034. Action to recover dower.....	864
§ 1035. Same—Writ of dower under <i>nihil habet</i>	865
§ 1036. Same—Suit in equity.....	866
§ 1037. Same—Pleading and practice.....	867
§ 1038. Same—Same—Demand.....	867
§ 1039. Same—Same—Where action to be brought.....	869
§ 1040. Same—Same—Against whom action brought.....	869
§ 1041. Same—Same—Abatement of action.....	870
§ 1042. Same—Same—Estoppel.....	870
§ 1043. Same—Same—Statute of limitations.....	870
§ 1044. Same—Same—Allowance of rents and profits.....	873
§ 1045. Same—Same—Assignment of mortgaged lands.....	873

	PAGE
§ 1046. Same—Same—Valuation of dower interest.....	874
§ 1047. Same—Same—Damages for detention.....	874
§ 1048. Same—Same—Judgment.....	876
§ 1049. Same—Same—Same—Form of.....	877
§ 1050. Same—Same—Assignment.....	877
§ 1051. Same—Same—Same—Writ of assignment—Return.....	878
§ 1052. Same—Same—Costs.....	878
§ 1053. Suits affecting dower.....	878

SECTION IX.—BARRING DOWER.

§ 1054. Methods of barring dower.....	880
§ 1055. Abandonment of husband not a bar to dower.....	891
§ 1056. Act of husband bars dower when.....	892
§ 1057. Act of Legislature may bar dower.....	893
§ 1058. Adultery of wife bars dower.....	894
§ 1059. Agreement for voluntary separation bars dower.....	895
§ 1060. Ante-nuptial contract bars dower.....	897
§ 1061. Conveyance and release bar dower.....	899
§ 1062. Same—Execution by wife.....	901
§ 1063. Same—Acknowledgment by wife.....	903
§ 1064. Same—Same—Defective acknowledgment—Curative statutes.....	904
§ 1065. Same—Where wife an infant.....	905
§ 1066. Same—Defeating conveyance by paramount title, etc.—Effect.....	905
§ 1067. Same—Power of release.....	907
§ 1068. Same—Mode of release.....	907
§ 1069. Same—Consideration to support release.....	910
§ 1070. Same—To whom release may be made.....	910
§ 1071. Same—Effect of release.....	910
§ 1072. Same—Evidence of release.....	911
§ 1073. Same—Construction of release.....	912
§ 1074. Conveyance by husband—Bars dower when.....	912
§ 1075. Conveyance in fraud of creditors—Effect of dower.....	914
§ 1076. Devise in lieu of dower—Effect of.....	915
§ 1077. Divorce bars dower.....	919
§ 1078. Abandonment and adultery as bar to dower.....	921
§ 1079. Eminent domain—Exercising power of, bars dower.....	921
§ 1080. Enforcement of mechanic's lien does not bar dower.....	922
§ 1081. Estoppel <i>in pais</i> bars dower.....	923
§ 1082. Foreclosure as a bar to dower.....	924
§ 1083. Jointure bars dower.....	926
§ 1084. Judicial sale for debts as a bar to dower.....	926
§ 1085. Mortgage as a bar to dower.....	928
§ 1086. Provision in lieu of, bars dower.....	929
§ 1087. Settlement during coverture as a bar to dower.....	929
§ 1088. Statute of limitations as a bar of dower.....	930
§ 1089. Statutory provisions in lieu of, bars dower.....	931
§ 1090. Waste bars dower.....	931

SECTION X.—PROVISIONS IN LIEU OF DOWER—ELECTION.

	PAGE
§ 1091. Introductory.....	932
§ 1092. Effect of provision in lieu of dower.....	933
§ 1093. Settlement in lieu of dower.....	933
§ 1094. Same—Annuity—Calculation of.....	934
§ 1095. Testamentary provisions in lieu of dower.....	935
§ 1096. Same—Incidents of a bequest in lieu of dower.....	936
§ 1097. Acceptance by the widow.....	937
§ 1098. Failure of provision in lieu of dower.....	938
§ 1099. Forfeiture of provision in lieu of dower.....	939
§ 1100. Election—In case of exchanged lands.....	939
§ 1101. Same—Of provision in lieu of dower.....	940
§ 1102. Same—Right of election a personal one.....	941
§ 1103. Same—When election necessary.....	942
§ 1104. Same—When election not necessary.....	945
§ 1105. Same—What constitutes an election.....	945
§ 1106. Same—Retraction of election.....	948
§ 1107. Same—Effect of an election.....	949

CHAPTER XIX.

JOINTURE.

§ 1108. Definition.....	950
§ 1109. Origin and history.....	951
§ 1110. Kinds of jointure—1. Legal jointure.....	951
§ 1111. Same—2. Equitable jointure.....	952
§ 1112. Requisites of jointure.....	953
§ 1113. Effect of jointure—Bars dower.....	957
§ 1114. Who may limit a jointure.....	958
§ 1115. Who may take a jointure.....	958
§ 1116. Nature of jointure—Not continuation of husband's estate..	959
§ 1117. When made—1. Before marriage.....	959
§ 1118. Same—2. After marriage.....	960
§ 1119. How made.....	960
§ 1120. Election.....	962
§ 1121. Entry.....	963
§ 1122. Favored in equity.....	963
§ 1123. As affected by the statute of uses—Statute in United States.....	964
§ 1124. Bar and forfeiture.....	964
§ 1125. Eviction—Endowment in remainder.....	966
§ 1126. Waste.....	967

CHAPTER XX.

ESTATES FOR YEARS.

SECTION	I.	Origin and nature of estates for years.
SECTION	II.	How estates for years created.
SECTION	III.	The lease.
SECTION	IV.	The lease—The conditions.
SECTION	V.	The lease—The covenants.
SECTION	VI.	The lease—Assignment and subletting.
SECTION	VII.	The lease—Termination, holding over.
SECTION	VIII.	Forfeiture, surrender, and merger.
SECTION	IX.	Eviction, destruction, and use of premises.
SECTION	X.	Fixtures, alterations, improvements, and repairs.
SECTION	XI.	Incidents.
SECTION	XII.	Letting on shares.
SECTION	XIII.	Descent.

SECTION I.—ORIGIN AND NATURE OF ESTATES FOR YEARS.

	PAGE
§ 1127. Definition.....	968
§ 1128. The term.....	970
§ 1129. Same—To begin <i>in futuro</i>	970
§ 1130. Early tenure.....	971
§ 1131. Distinguished from freehold estates.....	972
§ 1132. Origin of estates for years.....	973
§ 1133. How estate for years created.....	973
§ 1134. Tenure of estate for years.....	973
§ 1135. Nature of an estate for years.....	973
§ 1136. Same—Freehold qualities by statute.....	976
§ 1137. No seisin in tenant for years.....	977
§ 1138. <i>Interesse termini</i>	978
§ 1139. Entry by tenant for years.....	978
§ 1140. Liability for rent before entry.....	979
§ 1141. Estate may be assigned before entry.....	979

SECTION II.—HOW ESTATES FOR YEARS CREATED.

§ 1142. By lease and devise.....	980
§ 1143. Character of the estate—A chattel interest.....	981
§ 1144. Reservation of rent.....	981
§ 1145. What may be leased.....	982
§ 1146. Who may be lessors.....	985
§ 1147. Who may be lessees.....	987
§ 1148. Possession by lessee—Effects of.....	988
§ 1149. Landlord and tenant—Consequences of relation of.....	988
§ 1150. Tenure of estate and privity of parties.....	989

SECTION III.—THE LEASE.

	PAGE
§ 1151. Definition.....	990
§ 1152. Lease and agreement to lease.....	991
§ 1153. Lease as affected by statute of frauds.....	994
§ 1154. Same—Parol lease to commence <i>in futuro</i>	997
§ 1155. Same—Memorandum in writing... ..	998
§ 1156. Proper words to create a lease.....	1001
§ 1157. Form of instrument.....	1002
§ 1158. Must be for fixed term.....	1002
§ 1159. Same—Length term may run... ..	1003
§ 1160. Same—Computing time.....	1005
§ 1161. Same—Same—Optional number of years.....	1007
§ 1162. Same—Renewable forever.....	1008
§ 1163. Rent reserved.....	1010
§ 1164. Parol lease.....	1010
§ 1165. What lease embraces	1014
§ 1166. Same—On demise of part of premises.....	1015
§ 1167. Acceptance of lease.....	1016
§ 1168. Entry—Statute of uses.....	1016
§ 1169. Same—Effect of execution and delivery without.....	1017
§ 1170. When lease takes effect.....	1017
§ 1171. Who may make a lease.....	1017
§ 1172. Same—By agents.....	1018
§ 1173. Same—Corporation.....	1018
§ 1174. Same—Executors and administrators.....	1020
§ 1175. Same—Guardian.....	1021
§ 1176. Same—Husband and wife	1024
§ 1177. Same—Joint tenants and tenants in common.....	1026
§ 1178. Same—Mortgagor.....	1027
§ 1179. Same—Mortgagee.... ..	1028
§ 1180. Same—Municipal corporations.....	1028
§ 1181. Same—Partners	1029
§ 1182. Same—Persons under disability—1. Infants... ..	1030
§ 1183. Same—Same—2. Lunatics.....	1032
§ 1184. Same—Same—3. Married women.....	1034
§ 1185. Same—Public officers.....	1035
§ 1186. Same—Receivers.....	1036
§ 1187. Same—Trustees.....	1036
§ 1188. Same—Under powers.... ..	1038
§ 1189. Lessors exceeding power.....	1040
§ 1190. Ratification of leases.....	1041
§ 1191. Signing lease.....	1042
§ 1192. Same—Mode of signing by agent.....	1043
§ 1193. Sealing instrument—Effect.....	1044
§ 1194. Fraud in procuring the execution of lease.....	1045
§ 1195. Recording lease.....	1046
§ 1196. Presumption of lease.... ..	1047
§ 1197. Construction of lease.....	1048

SECTION IV.—THE LEASE—THE CONDITIONS.

	PAGE
§ 1198. Introductory.....	1049
§ 1199. What conditions may be imposed.....	1050
§ 1200. Same—Privilege of renewing lease.....	1052
§ 1201. Same—Privilege of purchasing premises.....	1053
§ 1202. Same—Privilege of terminating by sale.....	1053
§ 1203. Implied conditions—Furnished house	1054
§ 1204. Breach of condition—Involuntary act.....	1056
§ 1205. Same—License to break.....	1057
§ 1206. Same—Entry for.....	1058
§ 1207. Same—Demand.....	1059
§ 1208. Same—Same—For what made.....	1061
§ 1209. Same—Same—Waiver of.....	1062

SECTION V.—THE LEASE—THE COVENANTS.

§ 1210. Definition—How created	1063
§ 1211. Kinds of covenants.....	1063
§ 1212. Same—Express and implied covenants.....	1065
§ 1213. Same—Implied covenants of lessor.....	1065
§ 1214. Same—Same—Effect of.....	1067
§ 1215. Same—Implied covenant of lessee.....	1067
§ 1216. Same—Distinction between express and implied covenants,	1068
§ 1217. Same—Real and personal covenants.....	1069
§ 1218. Covenants running with the land—When covenants run with land.....	1070
§ 1219. Same—Covenants running with part of the land.....	1071
§ 1220. Same—What covenants run with the land.....	1074
§ 1221. Same—Rights of assignee under.....	1076
§ 1222. Same—When assignee bound.....	1078
§ 1223. Covenants usually inserted in lease—On the part of lessor,	1079
§ 1224. Same—Same—Covenant for quiet enjoyment	1079
§ 1225. Same—Same—Implied covenants for quiet enjoyment....	1081
§ 1226. Same—Same—Covenant to repair.....	1082
§ 1227. Same—Same—Same—Effect of lessor's covenant to repair,	1085
§ 1228. Same—Same—Covenant to renew lease.....	1086
§ 1229. Same—Same—Covenant against incumbrances.....	1092
§ 1230. Same—Same—Same—When covenant is broken—Damages for breach.....	1093
§ 1231. Same—Same—Covenant for further assurance.....	1095
§ 1232. Same—On part of lessee.....	1096
§ 1233. Same—Same—Covenant to pay rent.....	1099
§ 1234. Same—Same—Covenant to pay taxes.....	1101
§ 1235. Same—Same—Covenant to insure premises.....	1102
§ 1236. Same—Same—Covenant as to use of premises.....	1103
§ 1237. Same—Same—Covenant not to assign or underlet.....	1104
§ 1238. Same—Same—Covenant to deliver in good repair.....	1105
§ 1239. Same—Same—Covenant against waste.....	1106
§ 1240. Same—On part of assignee and sub-lessee.....	1107

	PAGE
§ 1241. Covenants raised by fraud.....	1109
§ 1242. Construction of covenants.....	1110

SECTION VI.—THE LEASE—ASSIGNMENT AND SUBLETTING.

§ 1243. Assignment of lease.....	1111
§ 1244. Same—Clause prohibiting.....	1112
§ 1245. Same—Statutory restrictions.....	1113
§ 1246. Same—Involuntary assignments.....	1113
§ 1247. Same—By insolvent assignee.....	1114
§ 1248. Same—Transfer of entire term in part of premises.....	1115
§ 1249. Same—Assignee takes subject to burdens....	1116
§ 1250. Same—How made	1118
§ 1251. Same—Of reversion.....	1119
§ 1252. Distinction between assignment and sub-leasing.....	1121
§ 1253. Same—Effect of reservation.....	1122
§ 1254. Sub-leasing.....	1123
§ 1255. Same—Sub-lessee's covenants.....	1124

SECTION VII.—THE LEASE—TERMINATION, HOLDING OVER.

§ 1256. Termination of lease.....	1125
§ 1257. Same—By surrender.....	1126
§ 1258. Same—By eviction of landlord.....	1126
§ 1259. Same—By eviction of tenant by lessor.....	1127
§ 1260. Same—By collateral event.....	1128
§ 1261. Same—By exercise of right of eminent domain.....	1129
§ 1262. Holding over—Definition.....	1130
§ 1263. Same—What constitutes a holding over.....	1130
§ 1264. Same—Effect of holding over.....	1131
§ 1265. Same—Same—On terms of lease.....	1133
§ 1266. Same—Same—On privileges conferred by the lease.	1134
§ 1267. Same—Holding over by consent—Character of tenancy...	1134

SECTION VIII.—FORFEITURE, SURRENDER, AND MERGER.

§ 1268. Forfeiture of lease—Grounds of.....	1137
§ 1269. Same—By alienation.....	1142
§ 1270. Same—Same—Involuntary alienation.....	1142
§ 1271. Same—By assigning or sub-leasing.....	1142
§ 1272. Same—By disclaimer—Common-law doctrine.....	1144
§ 1273. Same—Same—What amounts to a disclaimer.....	1145
§ 1274. Same—Same—Effect on statute of limitations.....	1146
§ 1275. Same—Same—American doctrine.....	1147
§ 1276. Same—Same—Notice to lessor.....	1148
§ 1277. Same—by failure or refusal to pay rent....	1150
§ 1278. Same—Same—Tender saves forfeiture.....	1151
§ 1279. Same—By failure to insure.....	1152
§ 1280. Same—By commission of waste.....	1152

	PAGE
§ 1281. Same—How taken advantage of.....	1153
§ 1282. Same—Waiver of forfeiture.....	1155
§ 1283. Same—Relief against forfeiture.....	1157
§ 1284. Same—Effects of forfeiture.....	1158
§ 1285. Surrender—Necessity of.....	1159
§ 1286. Same—Requisites of.....	1160
§ 1287. Same—Acceptance.....	1160
§ 1288. Same—By operation of law.....	1161
§ 1289. Same—What amounts to a surrender.....	1162
§ 1290. Same—Agreement to surrender—Consideration.....	1162
§ 1291. Same—Effect on third person.....	1163
§ 1292. Merger—Definition.....	1163
§ 1293. Same—When occurs.....	1164

SECTION IX.—EVICTION, DESTRUCTION, AND USE OF PREMISES.

§ 1294. Eviction—What constitutes.....	1166
§ 1295. Same—Actual eviction.....	1167
§ 1296. Same—Constructive eviction.....	1168
§ 1297. Same—By landlord or of landlord.....	1169
§ 1298. Same—By stranger—Duty of lessee.....	1169
§ 1299. Same—Same—May attorn to stranger when.....	1170
§ 1300. Same—By eminent domain.....	1170
§ 1301. Same—Effect of eviction.....	1171
§ 1302. Destruction of premises—Effect on covenants.....	1175
§ 1303. Same—Effect on rent.....	1177
§ 1304. Same—Same—Apportionment of rent.....	1180
§ 1305. Same—Where term commences <i>in futuro</i>	1180
§ 1306. Same—Effect on covenant to repair, etc.....	1181
§ 1307. Same—Same—Effect of lessor's insurance.....	1181
§ 1308. Same—Lessor not bound to repair.....	1182
§ 1309. Same—Liability of lessee for property destroyed.....	1183
§ 1310. Use of premises.....	1183
§ 1311. Same—Restrictions on use.....	1184

SECTION X.—FIXTURES, ALTERATIONS, IMPROVEMENTS, AND REPAIRS.

§ 1312. Fixtures—What are.....	1186
§ 1313. Same—Right of removal.....	1187
§ 1314. Same—Same—On renewal of lease.....	1188
§ 1315. Alterations by lessor.....	1189
§ 1316. Improvements by tenant.....	1189
§ 1317. Repairs—By lessor—Common-law doctrine.....	1190
§ 1318. Same—Same—Statutory variance of the common-law rule.....	1191
§ 1319. Same—Same—May make repairs to prevent ruin.....	1192
§ 1320. Same—Same—Liability for damage on repairing.....	1193
§ 1321. Same—Same—Damages resulting from defective premises.....	1194
§ 1322. Same—Same—Liability to tenant for failure to make repairs.....	1196

	PAGE
§ 1323. Same—Same—Liability to lessee's servant for failure to make repairs.....	1197
§ 1324. Same—Same—Liability to stranger for failure to make repairs.....	1197
§ 1325. Same—Same—Repairing of unhealthy premises.....	1199
§ 1326. Same—By lessee.....	1201
§ 1327. Same—Same—Liability in damages for failure to repair..	1201

SECTION XI.—INCIDENTS OF AN ESTATE FOR YEARS.

§ 1328. Introduction—General rights.....	1203
§ 1329. Alienation—Right of.....	1204
§ 1330. Accidental fire—Liability for.....	1204
§ 1331. Emblements—When tenant is entitled to.....	1205
§ 1332. Same—Lessee's title to crops.....	1207
§ 1333. Same—Same—Away-going crops.....	1208
§ 1334. Incumbrance on reversion.....	1211
§ 1335. Entailment.....	1213
§ 1336. Estoppel to deny title.....	1213
§ 1337. Same—Foundation of doctrine.....	1215
§ 1338. Same—When estoppel arises.....	1216
§ 1339. Same—Against whom estoppel extends.....	1216
§ 1340. Same—Same—Lessee's assignee.....	1217
§ 1341. Same—Where lessee has not gone into possession under lessor.....	1217
§ 1342. Same—Time during which estoppel lasts.....	1218
§ 1343. Same—When may be invoked.....	1219
§ 1344. Same—Acquirement of outside title.....	1220
§ 1345. Same—Equitable title against landlord.....	1220
§ 1346. Same—Expiration of landlord's title.....	1220
§ 1347. Same—Demise of a franchise—Not within rule when....	1220
§ 1348. Same—In lease with joint lessors.....	1221
§ 1349. Same—Personal disability of lessor.....	1221
§ 1350. Same—Purchase of title by lessee.....	1221
§ 1351. Same—Title in state, etc.....	1223
§ 1352. Same—When doctrine does not apply.....	1223
§ 1353. Estovers—Right to take.....	1223
§ 1354. Fixtures—Right to remove.....	1224
§ 1355. Forfeiture.....	1224
§ 1356. Insurable interest.....	1224
§ 1357. Liability for debts.....	1224
§ 1358. Limitation for life with remainder over.....	1226
§ 1359. Merger.....	1226
§ 1360. Notice to quit.....	1227
§ 1361. Rent.....	1227
§ 1362. Taxes.....	1227
§ 1363. Waste.....	1227
§ 1364. Same—"Without impeachment for waste".....	1228

SECTION XII.—LETTING ON SHARES.

	PAGE
§ 1365. Nature of the contract—Where rent payable in share of crop.....	1229
§ 1366. Same—Where land tilled for share of crop.....	1233
§ 1367. Same—Same—Where crop, or a part, to be consumed on premises.....	1235
§ 1368. Same—Same—Where possession of crop to remain in lessor.....	1236
§ 1369. Same—Same—Cropper's interest before division.....	1237
§ 1370. Same—Same—Landlord's lien for rent.....	1238
§ 1371. Same—Distinction between leasing and cropping on the shares.....	1238
§ 1372. Same—Partnership between parties.....	1239
§ 1373. Same—Breach of contract of lease on shares—Damages..	1245
§ 1374. Same—Same—Measure of damages.....	1247

SECTION XIII.—DESCENT OF A TERM FOR YEARS.

§ 1375. Common-law doctrine.....	1248
§ 1376. Disposition of term—By deed.....	1249
§ 1377. Same—By devise.....	1250

CHAPTER XXI.

ESTATES AT WILL.

- SECTION I. Nature of the estate.
 SECTION II. Incidents of the estate.
 SECTION III. How the estate created.
 SECTION IV. Between whom the estate may exist.
 SECTION V. How estate terminated.

SECTION I.—NATURE OF THE ESTATE.

§ 1378. Definition of estate at will.....	1251
§ 1379. Nature of tenancy at will.....	1252
§ 1380. Distinguished from an estate at sufferance.....	1253
§ 1381. Distinguished from an estate from year to year.....	1254
§ 1382. Same—Judicial conversion of estates at will into estates from year to year.....	1255
§ 1383. Kinds of tenancies at will.....	1256
§ 1384. When tenancy at will created.....	1257
§ 1385. Who a tenant at will.....	1257
§ 1386. When a term is a tenancy at will.....	1260

SECTION II.—INCIDENTS OF THE ESTATE.

§ 1387. Introductory.....	1263
§ 1388. Assignment and sub-leasing.....	1266

	PAGE
§ 1389. Lessee's right to emblements.....	1267
§ 1390. Lessee's right to estovers.....	1268
§ 1391. Lessee estopped to deny lessor's title.....	1268
§ 1392. Improvements by lessee—No right in.....	1268
§ 1393. Ingress and egress—To remove crops, etc.....	1268
§ 1394. Notice to quit—Reasonable time to remove.....	1269
§ 1395. Rent—Necessity of and liability for.....	1275
§ 1396. Waste—Liability for.....	1277

SECTION III.—HOW ESTATE CREATED.

§ 1397. Methods of creation—1. By contract and implication of law.....	1278
§ 1398. Same—2. By deed.....	1279
§ 1399. Words and acts of parties creating.....	1279
§ 1400. Same—By agreement.....	1280
§ 1401. Same—By entry under an agreement for a lease.....	1281
§ 1402. Same—By entry under an agreement to sell.....	1282
§ 1403. Same—By entry under a void deed or lease.....	1283
§ 1404. Same—By grantor's retaining possession.....	1284
§ 1405. Same—By holding over.....	1285
§ 1406. Same—By parol gifts of lands.....	1286
§ 1407. Same—By parol lease of lands.....	1286

SECTION IV.—BETWEEN WHOM ESTATE MAY EXIST.

§ 1408. Introductory.....	1287
§ 1409. Between master and servant.....	1287
§ 1410. Between vendor and vendee.....	1239

SECTION V.—HOW TERMINATED.

§ 1411. Introduction—Common-law doctrine.....	1292
§ 1412. Demand and notice—Sufficiency of.....	1294
§ 1413. By act of lessor—Bankruptcy.....	1296
§ 1414. By act of the lessee—Abandonment.....	1296

CHAPTER XXII.

ESTATE FROM YEAR TO YEAR.

SECTION I. Nature and origin of the estate.

SECTION II. Incidents of the estate.

SECTION III. How the estate created.

SECTION IV. Periods of tenancy for less than a year.

SECTION V. Who may be tenants of the estate.

SECTION VI. How the estate terminated.

SECTION I.—NATURE AND ORIGIN OF THE ESTATE.

§ 1415. Definition.....	1298
§ 1416. Origin of the estate.....	1299

	PAGE
§ 1417. Nature of the estate.....	1300
§ 1418. Distinguished from term.....	1301
§ 1419. Distinguished from tenancy at will.....	1302
§ 1420. Reservation of rent necessary.....	1302
§ 1421. Judicial legislation touching.....	1303
§ 1422. Statutory regulation.....	1303

SECTION II.—INCIDENTS OF THE ESTATE.

§ 1423. Introductory.....	1305
§ 1424. Occupation of premises.....	1306
§ 1425. Right to determine.....	1307
§ 1426. Notice to quit—When required.....	1307
§ 1427. Same—Time given in.....	1310
§ 1428. Same—Where term less than a year.....	1311

SECTION III.—HOW THE ESTATE CREATED.

§ 1429. Introductory—Various methods of creation.....	1312
§ 1430. By express agreement—A year or less.....	1314
§ 1431. By holding over—Landlord's assent.....	1315
§ 1432. By implication—Agricultural leases.....	1318
§ 1433. By lease or permissive occupancy for indefinite time.....	1319
§ 1434. By occupancy and payment of rent under a void lease....	1321
§ 1435. By parol lease—Parol continuance of lease.....	1322
§ 1436. By rent reserved—Acceptance and demand.....	1324

SECTION IV.—PERIODS OF TENANCY LESS THAN A YEAR.

§ 1437. Introductory—Periodical holding.....	1326
§ 1438. Quarterly letting—When yearly holding.....	1328
§ 1439. Monthly letting—Common-law doctrine.....	1328
§ 1440. Same—Holding over—Effect on term.....	1329
§ 1441. Weekly letting—Inference of law.....	1330
§ 1442. Statutory regulations—Enlargement of term.....	1331

SECTION V.—WHO MAY BE TENANTS OF THE ESTATE.

§ 1443. Generally—Corporations.....	1331
-------------------------------------	------

SECTION VI.—HOW THE ESTATE TERMINATED.

§ 1444. Methods of determination—Notice.....	1332
§ 1445. Same—Insolvency of the lessor.....	1334
§ 1446. Same—Death of tenant.....	1334
§ 1447. Periodical tenancies.....	1334
§ 1448. Notice to quit—Parol consent.....	1336
§ 1449. Same—Tenancy from year to year.....	1337
§ 1450. Same—Tenancies for less than a year.....	1338

	PAGE
§ 1451. Same—Same—Quarterly tenancy.....	1338
§ 1452. Same—Same—Monthly tenancy.....	1339
§ 1453. Same—Same—Half-monthly tenancy.....	1340
§ 1454. Same—Same—Weekly tenancy.....	1341
§ 1455. Same—By tenant.....	1342
§ 1456. Same—Parol or in writing.....	1343
§ 1457. Same—Service of notice of.....	1344
§ 1458. Same—Waiver of notice.....	1344

CHAPTER XXIII.

ESTATES AT SUFFERANCE.

- SECTION I. Nature of the estate.
 SECTION II. Incidents of the estate.
 SECTION III. How estate created.
 SECTION IV. How estate terminated.

SECTION I.—NATURE OF THE ESTATE.

§ 1459. Definition.....	1346
§ 1460. Nature of the possession.....	1346
§ 1461. Tenure of the estate.....	1347

SECTION II.—INCIDENTS OF THE ESTATE.

§ 1462. Introductory—Rights and liabilities of tenant.....	1347
§ 1463. Estoppel of tenant to deny owner's title.....	1348
§ 1464. Improvements by a tenant at sufferance.....	1349
§ 1465. Notice to quit—Service of.....	1350
§ 1466. Same—Time to remove.....	1351
§ 1467. Trespass and ejectment by tenant.....	1351
§ 1468. Liability and damages.....	1352

SECTION III.—HOW ESTATE CREATED.

§ 1469. By act of law.....	1352
§ 1470. By act of the parties.....	1353
§ 1471. By lawful entry.....	1353
§ 1472. Who are tenants at sufferance.....	1353

SECTION IV.—HOW ESTATE TERMINATED.

§ 1473. Introductory.....	1356
§ 1474. Modes of entry.....	1356

CHAPTER XXIV.

ESTATES BY MARRIAGE.

SECTION	I.	Husband's estate in wife's realty.
SECTION	II.	Husband's estate <i>jure uxoris</i> .
SECTION	III.	Homestead exemption—Introductory.
SECTION	IV.	Homestead exemption—Who entitled to.
SECTION	V.	Homestead exemption—Property subject to.
SECTION	VI.	Homestead exemption—How acquired.
SECTION	VII.	Homestead exemption—Termination.
SECTION	VIII.	Homestead exemption—Construction and procedure.

SECTION I.—HUSBAND'S ESTATE IN WIFE'S REALTY.

		PAGE
§ 1475.	Introductory.....	1358
§ 1476.	Estate during coverture—Effect of death or divorce.....	1359
§ 1477.	Estate in wife's estate of inheritance.....	1359
§ 1478.	Estate in wife's life estate.....	1360
§ 1479.	Estate in wife's dower estate.....	1362

SECTION II.—HUSBAND'S ESTATE JURE UXORIS.

§ 1480.	Introductory—Nature of the estate.....	1363
§ 1481.	Distinguished from curtesy initiate.....	1365
§ 1482.	Incidents of the estate—Generally.....	1366
§ 1483.	Same—1. Right of alienation.....	1367
§ 1484.	Same—2. Right to maintain action.....	1367
§ 1485.	Same—3. Right to lease.....	1368
§ 1486.	Same—4. Right to rents and profits.....	1368
§ 1487.	Same—5. Right to the beneficial seisin.....	1369
§ 1488.	Same—6. Liability for waste.....	1369
§ 1489.	To what estates of wife attach.....	1370
§ 1490.	How estate prevented from attaching.....	1370
§ 1491.	Same—1. By settlement.....	1371
§ 1492.	Same—2. By conveyance during coverture.....	1373
§ 1493.	Same—Same—New York doctrine.....	1373
§ 1494.	Same—Same—In New England states.....	1374
§ 1495.	Same—Same—In other states.....	1375
§ 1496.	Same—3. By statutory enactment.....	1376
§ 1497.	How estate barred.....	1377
§ 1498.	Statutory changes.....	1377

SECTION III.—HOMESTEAD EXEMPTION—INTRODUCTORY.

§ 1499.	Definition.....	1378
§ 1500.	Purpose and policy of.....	1379
§ 1501.	Homesteads favored in law.....	1380
§ 1502.	Nature and incidents of homestead estate.....	1381

	PAGE
§ 1508. What constitutes a homestead.....	1388
§ 1504. Kinds of homesteads—1. Rural and urban.....	1387
§ 1505. Same—2. Mixed homesteads.....	1387
§ 1506. Same—3. Business homesteads.....	1390
§ 1507. Title and tenure necessary to support homestead,.....	1393

SECTION IV.—HOMESTEAD EXEMPTION—WHO ENTITLED TO.

§ 1508. Who may claim homestead exemption—Generally.....	1395
§ 1509. Same—Head of family.....	1396
§ 1510. Same—Same—Unmarried person.....	1400
§ 1511. Same—Same—A wife.....	1401
§ 1512. Same—Same—A widower or widow.....	1402
§ 1513. Executions <i>ex delicto</i> —Not affected by.....	1403
§ 1514. Effect of death or loss of family on.....	1403
§ 1515. Same—Marital survivor.....	1406
§ 1516. Wife's rights in homestead exemption.....	1407
§ 1517. Widow's right in homestead exemption.....	1409
§ 1518. Same—Non-resident widow.....	1410
§ 1519. Same—Effect on, of assignment of dower.....	1411
§ 1520. Same—Ante-nuptial contract and re-marriage.....	1412
§ 1521. Same—Actions affecting.....	1413
§ 1522. Children's rights in homestead exemption.....	1413

SECTION V.—HOMESTEAD EXEMPTION—PROPERTY SUBJECT TO.

§ 1523. What property subject to homestead—Generally.....	1415
§ 1524. Same—Business property.....	1416
§ 1525. Same—Same—Use as a hotel.....	1417
§ 1526. Same—Community property.....	1418
§ 1527. Same—Contiguous premises.....	1418
§ 1528. Same—Double houses.....	1420
§ 1529. Same—Encumbered property.....	1421
§ 1530. Same—Equitable estates.....	1421
§ 1531. Same—Same—Possession under contract of purchase.....	1422
§ 1532. Same—Estates by the curtesy.....	1423
§ 1533. Same—Estates by the entirety.....	1423
§ 1534. Same—Estates for life and for years.....	1424
§ 1535. Same—Leasehold estates.....	1424
§ 1536. Same—Joint tenancies and tenancies in common.....	1424
§ 1537. Same—Land purchased with pension money.....	1427
§ 1538. Same—Same—With proceeds of pension check.....	1430
§ 1539. Same—Offices, shops, and store.....	1431
§ 1540. Same—Partnership realty.....	1432
§ 1541. Same—Same—In house built with partnership funds.....	1432
§ 1542. Same—Tenement houses.....	1433
§ 1543. Same—Wife's separate estate.....	1434
§ 1544. Amount and location of homestead—Introductory.....	1434
§ 1545. Same—Rural homesteads.....	1437
§ 1546. Same—Urban homesteads.....	1438

	PAGE
§ 1547. Same—Contiguous parcels of land.....	1439
§ 1548. Same—Shifting homesteads.....	1440

SECTION VI.—HOMESTEAD EXEMPTION—HOW ACQUIRED.

§ 1549. How homestead acquired.....	1441
§ 1550. Same—1. Occupancy and use.....	1441
§ 1551. Same—Same—Necessity for occupancy.....	1442
§ 1552. Same—Same—Same—Intention to occupy.....	1444
§ 1553. Same—Same—Nature of occupancy.	1445
§ 1554. Same—Same—Same—Exclusive use as a home.....	1446
§ 1555. Same—2. Declaration and election.....	1446
§ 1556. Same—3. Dedication and appropriation.....	1447
§ 1557. Same—4. Setting apart—Judicial proceedings.....	1448
§ 1558. Rights of husband in and over homestead.....	1449
§ 1559. Rights of wife in and over homestead.....	1451

SECTION VII.—HOMESTEAD EXEMPTION—TERMINATION.

§ 1560. How homestead terminated.....	1453
§ 1561. Same—1. By abandonment.....	1454
§ 1562. Same—Same—Temporary removal.....	1456
§ 1563. Same—Same—What amounts to an abandonment.....	1460
§ 1564. Same—Same—Intention to abandon.	1461
§ 1565. Same—Same—Change of intention.....	1462
§ 1566. Same—Same—By husband.....	1462
§ 1567. Same—Same—By wife.....	1463
§ 1568. Same—Same—By widow... ..	1464
§ 1569. Same—Same—By infant children.....	1464
§ 1570. Same—Same—Evidence of abandonment.....	1465
§ 1571. Same—Same—Effect of abandonment.....	1466
§ 1572. Same—2. By alienation.....	1467
§ 1573. Same—Same—By husband.....	1468
§ 1574. Same—Same—Same—Where homestead abandoned.....	1470
§ 1575. Same—Same—Same—Where wife insane or living apart..	1471
§ 1576. Same—Same—Same—After wife's death.....	1472
§ 1577. Same—Same—By wife.....	1472
§ 1578. Same—Same—By husband and wife jointly.....	1473
§ 1579. Same—Same—Relinquishment of homestead.....	1476
§ 1580. Same—Same—Record of instrument.....	1477
§ 1581. Same—Same—Forced alienation.....	1477
§ 1582. Same—Same—Form and sufficiency of instrument.....	1478
§ 1583. Same—Same—Fraudulent conveyance.....	1480
§ 1584. Same—Same—Restraint upon alienation.....	1482
§ 1585. Same—Same—Same—Contract to convey—Specific per- formance.....	1484
§ 1586. Same—Same—Same—Damages for failure to convey.....	1487
§ 1587. Same—3. By incumbrance.....	1487
§ 1588. Same—Same—By husband.....	1489
§ 1589. Same—Same—By husband and wife.....	1490

	PAGE
§ 1590. Same—Same—Purchase-money mortgage and trust-deed,	1491
§ 1591. Same—Same—Sale under mortgage foreclosure	1493
§ 1592. Same—4. By forfeiture.....	1495
§ 1593. Same—5. By liability for claims of creditors.....	1496
§ 1594. Same—Same—Liability for purchase-money.....	1496
§ 1595. Same—Same—Same—What is purchase-money.....	1497
§ 1596. Same—Same—Same—Money used in purchasing outstand- ing title.....	1498
§ 1597. Same—Same—On attachment.....	1499
§ 1598. Same—Same—On execution.....	1501
§ 1599. Same—Same—On judgment.....	1504
§ 1600. Same—6. By waiver of homestead rights.....	1505

SECTION VIII.—HOMESTEAD EXEMPTION—CONSTRUCTION AND PRACTICE.

§ 1601. Introductory—Constitutional and statutory provisions. . .	1506
§ 1602. Constitutionality of statutes creating homesteads.....	1508
§ 1603. Same—Varying constitutional provision.....	1509
§ 1604. Same—Retroactive statutes.....	1509
§ 1605. Construction of homestead statutes.....	1513
§ 1606. Same—Retroactive construction.....	1516
§ 1607. Protection of homesteads—Mortgage not foreclosed when,	1518
§ 1608. Descent of homesteads—Disposition by will.....	1519
§ 1609. Actions affecting homestead—Pleadings ..	1522
§ 1610. Same—Wife as party to.....	1523

CHAPTER XXV

EQUITABLE ESTATES—USES.

- SECTION I. Origin and history of uses.
- SECTION II. Uses before the statute of uses.
- SECTION III. Uses under the statute of uses.
- SECTION IV. Modern doctrine of uses.

SECTION I.—ORIGIN AND HISTORY OF USES.

§ 1611. Introduction of uses—Saving from attainders.....	1525
§ 1612. Same—Effect on system of conveyancing	1527
§ 1613. Same—Time of introduction.....	1527
§ 1614. Derivation of uses— <i>Fidei-commissum</i>	1528
§ 1615. Reason for the <i>fidei-commissum</i>	1528
§ 1616. <i>Hæres fiduciarius</i> — <i>Jus precarium</i>	1529
§ 1617. <i>Fidei-commissa</i> —Historical origin.....	1529
§ 1618. <i>Cestui que use</i> .—Clerical chancellors.....	1530
§ 1619. Secret uses—Chancery could not enforce.....	1531
§ 1620. Introduction of writ of subpoena.....	1531
§ 1621. Same—Checks upon the chancellors	1532
§ 1622. Same—Abuses of writ restrained.....	1533

SECTION II.—USES BEFORE THE STATUTE OF USES.

	PAGE
§ 1623. Definition—Rights and powers of trustee.....	1534
§ 1624. Distinction between uses and trusts.....	1535
§ 1625. How uses created—Separating beneficial use and seisin...	1535
§ 1626. Same—By declaration.....	1535
§ 1627. Same—By feoffment.....	1536
§ 1628. Same—By resulting use.....	1536
§ 1629. Same—Same—In what estates.....	1537
§ 1630. Same—Consideration to support.....	1537
§ 1631. Estates in uses—All common-law estates.....	1538
§ 1632. Who may be grantees to uses.....	1539
§ 1633. Same—Corporations.....	1539
§ 1634. What may be conveyed to uses.....	1541
§ 1635. Incidents of uses—Introductory.....	1541
§ 1636. Same—Alienation.....	1542
§ 1637. Same—Disposition by will.....	1543
§ 1638. Same—Forfeiture for attainder.....	1543
§ 1639. Enforcement of use.....	1544
§ 1640. Lost by forfeiture.....	1545

SECTION III.—UNDER THE STATUTE OF USES.

§ 1641. History of the statute of uses.....	1546
§ 1642. Adoption of the statute in the United States.....	1548
§ 1643. Uses under the statute.....	1550
§ 1644. When statute operates.....	1551
§ 1645. What property may be conveyed to uses.....	1552
§ 1646. Who may be seized to uses.....	1554
§ 1647. Feoffee <i>in esse</i> requisite.....	1555
§ 1648. Feoffee and <i>cestui que</i> use same person—Merger.....	1556
§ 1649. <i>Cestui que</i> use <i>in esse</i> necessary.....	1556
§ 1650. Use <i>in esse</i> necessary.....	1557
§ 1651. Use upon use.....	1558
§ 1652. Active and passive uses.....	1559
§ 1653. Use to married women.....	1560
§ 1654. Words creating use—Limitations.....	1563
§ 1655. Constructions of uses.....	1563
§ 1656. Same—Rules of construction.....	1564
§ 1657. Uses executed when.....	1565
§ 1658. Extinguishment and supervision.....	1566

SECTION IV.—MODERN DOCTRINE OF USES.

§ 1659. Contingent, etc., uses.....	1566
§ 1660. Contingent future uses— <i>Scintilla juris</i>	1567
§ 1661. Same—Meaning of term.....	1568
§ 1662. Same—Springing uses.....	1569
§ 1663. Same—Shifting or secondary use.....	1569
§ 1664. Same—In chattel interests—Future use in.....	1570
§ 1665. Same—Defeating springing and shifting uses.....	1570
§ 1666. Same—Incidents of springing and shifting uses.....	1571

CHAPTER XXVI.

EQUITABLE ESTATES—TRUSTS.

SECTION	I.	Nature and origin.
SECTION	II.	Creation and extent of trust.
SECTION	III.	Delivery and acceptance of trusts.
SECTION	IV.	Kinds of trusts.
SECTION	V.	Trustee—Appointment, resignation, and removal.
SECTION	VI.	Trustee—Power of.
SECTION	VII.	Who may be beneficiary.
SECTION	VIII.	Validity and construction of trusts.
SECTION	IX.	How trusts established.
SECTION	X.	Jurisdiction over trusts.
SECTION	XI.	Rights and liabilities under trusts.
SECTION	XII.	Sale and assignment of trust property.
SECTION	XIII.	Adverse possession.
SECTION	XIV.	Renunciation of trust.
SECTION	XV.	Revocation of trust.
SECTION	XVI.	Extinction and termination of trust.

SECTION I.—NATURE AND ORIGIN.

	PAGE
§ 1667. Introductory—Definition.....	1573
§ 1668. Origin of trusts—Early English statute.	1575
§ 1669. Incidents of trusts—Introductory.....	1576
§ 1670. Same—Right to title.....	1576
§ 1671. Same—Liability for debts.....	1579
§ 1672. Same—Merger.....	1579
§ 1673. In what estates trusts created.....	1581

SECTION II.—CREATION AND EXTENT OF TRUSTS.

§ 1674. Introductory—At common law—First rule.....	1582
§ 1675. Same—Same—Second Rule.....	1583
§ 1676. Same—Same—Third rule.....	1584
§ 1677. Same—In United States.....	1584
§ 1678. Declaration of trust—Necessity for.....	1586
§ 1679. Same—Who may make.....	1587
§ 1680. Same—When made.....	1588
§ 1681. Same—How made.....	1588
§ 1682. Same—By instrument in writing.....	1589
§ 1683. Same—By will.....	1591
§ 1684. Same—Form of words.....	1591
§ 1685. Same—Words of limitation.....	1594
§ 1686. Estate taken by trustee.....	1595
§ 1687. Same—Remainder.....	1596

SECTION III.—DELIVERY AND ACCEPTANCE.

	PAGE
§ 1688. Delivery of instrument.....	1597
§ 1689. Acceptance—By trustee.....	1598
§ 1690. Same—Same—Effect of declination.....	1599
§ 1691. Same—By <i>cestui que trust</i>	1600

SECTION IV.—KINDS OF TRUSTS.

§ 1692. Introductory—Charitable trusts.....	1602
§ 1693. Active and passive trusts.....	1604
§ 1694. Discretionary and directory.....	1608
§ 1695. Executed and executory.....	1608
§ 1696. Express trusts.....	1609
§ 1697. Same—In land.....	1610
§ 1698. Implied trusts—Definition.....	1611
§ 1699. Same—How created.....	1612
§ 1700. Same—Not within the statute of uses.....	1614
§ 1701. Same—Within statute of limitations.....	1615
§ 1702. Same—Constructive trusts.....	1615
§ 1703. Same—Same—Trusts <i>de son tort</i>	1618
§ 1704. Same—Same—Trusts <i>ex malefacio</i>	1619
§ 1705. Same—Same—Acquisition and disposition of property— By trustee.....	1620
§ 1706. Same—Same—Same—Fraud in.....	1622
§ 1707. Same—Voluntary conveyance in fraud of creditors.....	1623
§ 1708. Same—Precatory trusts.....	1626
§ 1709. Same—Same—Words and expressions creating.....	1628
§ 1710. Same—Same—American doctrine.....	1630
§ 1711. Same—Resulting trusts—Introductory.....	1633
§ 1712. Same—How created.....	1634
§ 1713. Same—Same—Exception to the rule.....	1636
§ 1714. Same—Same—Where part of trust only declared, etc.....	1636
§ 1715. Same—Same—By payment of purchase-money.....	1638
§ 1716. Same—Same—Same—Parol proof.....	1641
§ 1717. Same—Same—By purchase with funds of another.....	1642
§ 1718. Same—Same—Same—Requisites.....	1645
§ 1719. Same—Same—Same—Reason for the rule.....	1647
§ 1720. Same—Same—Same—Parol proof.....	1648
§ 1721. Same—Same—By agreement to purchase for another.....	1649
§ 1722. Same—Same—By payment of part of purchase price.....	1650
§ 1723. Same—Statutory provisions.....	1652
§ 1724. Same—When arises.....	1652
§ 1725. Same—Consideration requisite.....	1653
§ 1726. Same—How established—Parol evidence.....	1653
§ 1727. Passive trusts.....	1654

SECTION V.—TRUSTEE—APPOINTMENT, RESIGNATION, AND REMOVAL.

§ 1728. Who may be trustee.....	1655
---------------------------------	------

	PAGE
§ 1729. Appointment and change.....	1659
§ 1730. Resignation of trustee.....	1660
§ 1731. Removal of trustee.....	1661
§ 1732. Survivorship of trust.....	1662

SECTION VI.—TRUSTEES—DUTY AND POWERS OF.

§ 1733. Duties of trustee.....	1663
§ 1734. Same—To furnish support.....	1665
§ 1735. Same—To invest funds.....	1666
§ 1736. Powers of trustees.....	1666
§ 1737. Same—Delegation of personal trust.....	1667
§ 1738. Other powers.....	1667

SECTION VII.—WHO MAY BE BENEFICIARIES.

§ 1739. Introductory.....	1670
§ 1740. Trusts for benefit of third persons.....	1671
§ 1741. Trusts for benefit of married women.....	1672
§ 1742. Same—Pennsylvania rule.....	1672

SECTION VIII.—VALIDITY AND CONSTRUCTION OF TRUSTS.

§ 1743. Introductory.....	1674
§ 1744. Aliens—Trusts by and for.....	1679
§ 1745. Statutory regulations—New York statute.....	1680
§ 1746. Trusts to accumulate income.....	1680
§ 1747. Immoral trusts—Atheistical books.....	1681
§ 1748. Trusts violating rule against perpetuities.....	1681
§ 1749. Trusts void for uncertainty.....	1683
§ 1750. Public charities.....	1684
§ 1751. Trusts to religious uses.....	1686
§ 1752. Bequests to burying-grounds, etc.....	1686
§ 1753. Construction of trusts—Introductory.....	1689
§ 1754. Same—Rules of construction.....	1692
§ 1755. Same—Rule in Shelley's Case.....	1693
§ 1756. When executed by statute—Pennsylvania rule.....	1694

SECTION IX.—HOW TRUSTS ESTABLISHED.

§ 1757. Introductory—Burden of proof.....	1695
§ 1758. Proof of trust—Written instrument.....	1696
§ 1759. Same—Same—Consideration.....	1696
§ 1760. Same—By parol.....	1699
§ 1761. Same—By declaration of trust.....	1702
§ 1762. Same—Same—Declarations of trustee....	1702

SECTION X.—JURISDICTION OF TRUSTS.

§ 1763. Equitable cognizance.....	1703
§ 1764. Reason for the rule.....	1704

SECTION XI.—RIGHTS AND LIABILITIES UNDER TRUSTS.

	PAGE
§ 1765. Introductory.....	1706
§ 1766. Of trustee—In respect to beneficiary.....	1707
§ 1767. Same—In respect to trust property—Estate and title.....	1709
§ 1768. Same—Same—Continuance of estate.....	1711
§ 1769. Same—Same—At common law.....	1711
§ 1770. Same—Same—Right to maintain action.....	1712
§ 1771. Same—In management of estate.....	1713
§ 1772. Same—Same—General powers.....	1717
§ 1773. Same—Same—Investment.....	1718
§ 1774. Same—Same—Same—In name of trustee.....	1719
§ 1775. Same—Same—Same—How investment made.....	1720
§ 1776. Same—Same—Same—In what investment to be made....	1721
§ 1777. Same—Same—Right to sue.....	1722
§ 1778. Same—Same—Liabilities for mismanagement.....	1723
§ 1779. Same—Same—Allowance for improvements.....	1725
§ 1780. Same—Accounting and discharge.....	1727
§ 1781. Of co-tenants—Nature of estate taken—Survivorship....	1729
§ 1782. Same—Duty of.....	1730
§ 1783. Same—Liability of—Generally.....	1732
§ 1784. Same—Same—For acts of each other.....	1734
§ 1785. Of beneficiary—Mutual relations.....	1735
§ 1786. Same—Title and interest of.....	1736
§ 1787. Same—Enforcement of trusts.....	1737
§ 1788. Same—Same—When enforced.....	1739
§ 1789. Same—Rights and powers of.....	1740
§ 1790. Same—Same—To call for legal title.....	1741
§ 1791. Same—Same—Same—When reconveyance presumed....	1742
§ 1792. Same—Same—To maintain ejectment.....	1744
§ 1793. Same—Estoppel of.....	1745
§ 1794. Of third parties—Creditors of beneficiary.....	1746
§ 1795. Same—For performance of trust.....	1749

SECTION XII.—SALE AND ASSIGNMENT OF PROPERTY.

§ 1796. When may be made—Generally.....	1750
§ 1797. Same—Upon demand of beneficiary.....	1752
§ 1798. Same—Power of trustee to sell.....	1754
§ 1799. Same—Same—Notice of sale under trust.....	1755
§ 1800. Same—Conveyance in contravention of trust.....	1756
§ 1801. Same—Same—Liability of trustee.....	1756
§ 1802. Same—Setting sale aside—Inadequacy of price.....	1757
§ 1803. Purchaser or assignee takes subject to trust.....	1759
§ 1804. Same—Following property.....	1759
§ 1805. Same—Purchaser without notice.....	1763
§ 1806. Same—Purchaser with notice.....	1764
§ 1807. Purchase by trustee—Sale voidable.....	1766
§ 1808. Same—Legal or actual fiduciary relations.....	1769
§ 1809. Same—Purchase from <i>cestui que trust</i>	1772

	PAGE
§ 1810. Same—Purchase at sale of co-trustee.....	1772
§ 1811. Same—Purchase at sheriff's sale.....	1773
§ 1812. Same—Purchase through third person.....	1774
§ 1813. Same—Purchase voidable only.....	1775
§ 1814. Same—Same—Who may apply to set aside sale.....	1775
§ 1815. Same—Rights and title of purchaser.....	1776

SECTION XIII.—ADVERSE POSSESSION.

§ 1816. Introductory.....	1779
§ 1817. In express trusts.....	1780
§ 1818. In implied trusts.....	1780
§ 1819. Statute of limitations—Express trusts....	1780
§ 1820. Same—Constructive trusts.....	1783
§ 1821. Same—Running against trustee.....	1784

SECTION XIV.—RENUNCIATION OF TRUST.

§ 1822. Introductory.....	1785
§ 1823. Renunciation by trustee.....	1787
§ 1824. Same—Effect of refusal to act.....	1787
§ 1825. Renunciation by beneficiary.....	1788

SECTION XV.—REVOCATION OF TRUST.

§ 1826. Voluntary trust—Power of revocation in deed.....	1789
§ 1827. Same—Revocation after acceptance.....	1790
§ 1828. Assignment for benefit of creditors.....	1793

SECTION XVI.—EXTINCTION AND TERMINATION OF TRUST.

§ 1829. Introductory.....	1796
§ 1830. Condition for termination—Deed of married woman.....	1798
§ 1831. By surrender of trust.....	1799
§ 1832. By death of beneficiary.....	1800
§ 1833. By reconveyance of property.....	1800
§ 1834. By sale under will.....	1801

CHAPTER XXVII.

EQUITABLE ESTATES—POWERS.

§ 1835. Definition of power.....	1804
§ 1836. Kinds of powers.....	1804
§ 1837. Creation of power—Form of words.....	1806
§ 1838. Same—Instrument creating.....	1807
§ 1839. Same—New York doctrine.....	1807
§ 1840. Powers distinguished from estates.....	1810
§ 1841. Limitation of—Rule against perpetuities.....	1811

	PAGE
§ 1842. Same—Same—Validity of appointment.....	1812
§ 1843. Construction of powers—Introductory.....	1812
§ 1844. Same—Enlarging estate.....	1814
§ 1845. Same—Life estate with power of sale.....	1815
§ 1846. Same—Power to sell and use proceeds.....	1816
§ 1847. Same—Personal confidence.....	1816
§ 1848. Same—Power to trustees “and their heirs”.....	1817
§ 1849. Same—Power to a trustee “and his assigns”.....	1818
§ 1850. Powers of appointment.....	1819
§ 1851. Same—Extent of estate.....	1820
§ 1852. Same—Power of disposal.....	1821
§ 1853. Same—Power to appoint by will.....	1822
§ 1854. Same—Absolute estate vests when.....	1823
§ 1855. Liabilities of estates—For debt of donee.....	1824
§ 1856. Same—For debts of beneficiary.....	1826
§ 1857. Who may be donees.....	1826
§ 1858. Who may be appointees.....	1828
§ 1859. Who may execute powers.....	1829
§ 1860. How executed.....	1830
§ 1861. Same—Power to sell.....	1831
§ 1862. Same—Same—Given to several of a class.....	1833
§ 1863. Power to married women.....	1836
§ 1864. Same—By implication.....	1836
§ 1865. Same—Excessive execution.....	1837
§ 1866. Same—Successive execution.....	1838
§ 1867. Same—Defective execution.....	1839
§ 1868. Non-execution of power.....	1840
§ 1869. Delegation on assignment of power.....	1841
§ 1870. Survival of powers.....	1842
§ 1871. Extinguishment and merger of power.....	1843
§ 1872. Suspension and destruction of power.....	1844

CHAPTER XXVIII.

CONDITIONAL ESTATES.

§ 1873. Introductory.....	1846
§ 1874. Definition of conditional estates.....	1847
§ 1875. Nature of conditional estates.....	1848
§ 1876. Same—Assignment.....	1848
§ 1877. Distinguished from a trust.....	1850
§ 1878. Distinguished from conditional limitation.....	1851
§ 1879. Kinds of conditions.....	1851
§ 1880. Same—Express or in deed.....	1851
§ 1881. Same—Implied or in law.....	1852
§ 1882. Same—Precedent condition.....	1853
§ 1883. Same—Same—Copulative condition.....	1853
§ 1884. Same—Same—Particular estate.....	1854

	PAGE
§ 1885. Same—Subsequent condition.....	1854
§ 1886. How created—Form of words.....	1855
§ 1887. At what time created—As to things executed.....	1856
§ 1888. Same—As to things executory.....	1857
§ 1889. To what estates annexed.....	1857
§ 1890. Valid conditions—Conditions precedent.....	1857
§ 1891. Same—Conditions subsequent.....	1858
§ 1892. Void conditions—Conditions precedent.....	1859
§ 1893. Same—Conditions subsequent.....	1860
§ 1894. Failure to perform condition—Effect.....	1860
§ 1895. Same—Who may enter for breach.....	1861
§ 1896. Same—Same—After conveyance.....	1862
§ 1897. Same—Apportionment.....	1862
§ 1898. Performance of condition.....	1862
§ 1899. Same—Time of performance.....	1864
§ 1900. Same—Place of performance.....	1865
§ 1901. Forfeiture by non-performance.....	1866
§ 1902. Same—Waiver of.....	1867
§ 1903. Same—Excusing non-performance.....	1869
§ 1904. Same—Relief against.....	1869
§ 1905. Same—Who bound by.....	1872

CHAPTER XXIX.

JOINT ESTATES.

SECTION I.	Estates in severalty.
SECTION II.	Estates in joint tenancy.
SECTION III.	Estates in common.
SECTION IV.	Estates in coparcenary.
SECTION V.	Estates in entirety.
SECTION VI.	Estates in copartnership.
SECTION VII.	Incidents common to joint estates.
SECTION VIII.	Partition of joint estates.

SECTION I.—ESTATES IN SEVERALTY.

§ 1906.	Introductory.....	1874
§ 1907.	Holding in severalty.....	1874
§ 1908.	Holding jointly.....	1874

SECTION II.—ESTATES IN JOINT TENANCY.

§ 1909.	Definition.....	1876
§ 1910.	Nature of the estate.....	1876
§ 1911.	How created.....	1877
§ 1912.	Same—Circumstances requisite.....	1878
§ 1913.	Same—Unity of interest.....	1878

	PAGE
§ 1914. Same—Unity of title.....	1879
§ 1915. Same—Unity of time.....	1880
§ 1916. Same—Unity of possession.....	1880
§ 1917. Incidents of joint tenancy—Survivorship.....	1881
§ 1918. Same—Entry.....	1882
§ 1919. Same—Not favored in equity.....	1883
§ 1920. What may be held in joint tenancy.....	1883
§ 1921. Who may be joint tenants.....	1884
§ 1922. Same—Trustees.....	1884
§ 1923. Same—Mortgagees.....	1885
§ 1924. Same—Husband and wife.....	1886
§ 1925. Same—Infants.....	1887
§ 1926. Same—Executors and administrators.....	1887
§ 1927. Same—Corporations.....	1888
§ 1928. Obligations and liabilities.....	1888
§ 1929. Same—To contribute share of purchase price.....	1889
§ 1930. Same—To contribute share of taxes.....	1889
§ 1931. Same—To contribute share of incumbrance.....	1890
§ 1932. Same—To contribute share of expenses for repairs.....	1891
§ 1933. Same—To contribute share of expenses for improvements.....	1892
§ 1934. Same—To pay rent.....	1893
§ 1935. Same—To account for rents and profits.....	1895
§ 1936. Same—To share burdens and losses of common property..	1896
§ 1937. Adverse possession of joint tenant—What constitutes.....	1897
§ 1938. Same—Ouster and disseisin.....	1898
§ 1939. Same—Same—Effect of ouster.....	1899
§ 1940. Same—Statute of limitations.....	1899
§ 1941. Actions by and against joint tenants—By tenants.....	1900
§ 1942. Same—Against tenants.....	1902
§ 1943. Actions between joint tenants.....	1902
§ 1944. Same—At common law.....	1903
§ 1945. Same—In equity.....	1905

SECTION III.—ESTATES IN COMMON.

§ 1946. Definition.....	1907
§ 1947. Nature of the estate.....	1907
§ 1948. Same—Independence of interest.....	1908
§ 1949. Creation of the estate.....	1909
§ 1950. Incidents of the estate.....	1910
§ 1951. Possession by co-tenant.....	1912
§ 1952. Same—Ouster.....	1915
§ 1953. Joint estates—Tenancies in common when.....	1917
§ 1954. Tenancies in common between husband and wife.....	1919
§ 1955. Rights and power of tenants in common.....	1921
§ 1956. Same—To enter into agreements concerning common property.....	1921
§ 1957. Same—To occupy common property.....	1922
§ 1958. Same—To convey common property.....	1922
§ 1959. Same—Same—Whole of property.....	1923

	PAGE
§ 1960. Same—Same—Undivided part of property.....	1923
§ 1961. Same—Same—Specified part of property.....	1924
§ 1962. Same—To lease common property.....	1925
§ 1963. To license acts upon common property.....	1926

SECTION IV.—ESTATES IN COPARCENARY.

§ 1964. Definition.....	1926
§ 1965. When estate vests.....	1927
§ 1966. Distinguished from joint tenancies.....	1928
§ 1967. Incidents of estate.....	1928

SECTION V.—ESTATES IN ENTIRETY.

§ 1968. Definition and origin.....	1929
§ 1969. Distinguished from joint tenancies.....	1930
§ 1970. Common-law rule.....	1931
§ 1971. Same—In what states in force.....	1932
§ 1972. Same—In what states changed by statute.....	1933
§ 1973. Tenants in common—Effect of marriage between.....	1938
§ 1974. Husband and wife—Holding by moieties.....	1938
§ 1975. Survivorship.....	1940
§ 1976. Same—Husband's control—Common-law doctrine... ..	1941
§ 1977. Same—Modern rule.....	1942
§ 1978. Same—Lease by husband.....	1944
§ 1979. Same—Conveyance by husband.....	1945
§ 1980. Same—Liability for husband's debts.....	1945
§ 1981. Same—Wife's inchoate interests.....	1946
§ 1982. Community property—Origin of doctrine of.....	1946
§ 1983. Same—What constitutes.....	1946
§ 1984. Same—Same—Property purchased by husband.....	1947
§ 1985. Same—Same—Property purchased by wife.....	1948
§ 1986. Same—Liability for debts.....	1949
§ 1987. Same—Descent of.....	1950
§ 1988. Effect of statute abolishing joint tenures.....	1950
§ 1989. Effect of married women enabling statutes.....	1951
§ 1990. Effect of divorce.....	1952
§ 1991. Effect of partition.....	1955

SECTION VI.—ESTATES IN COPARTNERSHIP.

§ 1992. Definition.....	1956
§ 1993. Nature of the estate.....	1957
§ 1994. When treated as personal property.....	1957
§ 1995. Interest of partners in.....	1959
§ 1996. Incidents of the estate—Alienation.....	1961
§ 1997. Same—Liability for debts.....	1963
§ 1998. Same—Liability to curtesy and partition.....	1963
§ 1999. Same—Descent of.....	1964

SECTION VII.—INCIDENTS COMMON TO JOINT ESTATES.

	PAGE
§ 2000. Incidents to the estate—The four unities.....	1965
§ 2001. Same—Action by and against tenants.....	1966
§ 2002. Same—Alienation by tenants.....	1967
§ 2003. Same—Lease by tenants.....	1967
§ 2004. Same—Livery of seisin.....	1967
§ 2005. Same—Right of survivorship.....	1968
§ 2006. Same—Same—How destroyed.....	1969
§ 2007. Same—Waste.....	1969

SECTION VIII.—PARTITION OF JOINT ESTATES.

§ 2008. Introductory.....	1970
§ 2009. Definition of partition.....	1971
§ 2010. Partition at common law.....	1973
§ 2011. Partition under statute.....	1974
§ 2012. Kinds of partition.....	1975
§ 2013. Same—Voluntary partition.....	1976
§ 2014. Same—Same—By arbitrators.....	1976
§ 2015. Same—Involuntary partition.....	1977
§ 2016. Same—Parol partition.....	1977
§ 2017. Same—Partial partition.....	1978
§ 2018. Who may have partition.....	1979
§ 2019. Same—Seisin requisite.....	1981
§ 2020. What may be partitioned.....	1982
§ 2021. Parties in action for partition.....	1983
§ 2022. Pleadings and practice in action for partition.....	1985
§ 2023. Trial of title in action in partition.....	1985
§ 2024. Judgment or decree in action for partition.....	1986
§ 2025. Manner of allotment.....	1987
§ 2026. Same—Owelty.....	1988
§ 2027. Same—Sale of land for division.....	1989
§ 2028. Warranty in partition deeds.....	1989
§ 2029. Effect of partition.....	1990

CHAPTER XXX.

MORTGAGES.

SECTION I. Origin and history.

SECTION II. Nature and validity.

SECTION III. Rights and liabilities under.

SECTION IV. Rights and liabilities under—*continued*.

SECTION V. Remedies incident to.

SECTION I.—ORIGIN AND HISTORY.

§ 2030. Definition.....	1992
§ 2031. Origin of mortgages—Civil-law doctrine.....	1994

	PAGE
§ 2032. Same—Common-law doctrine.....	1994
§ 2033. Same—Equity doctrine.....	1995
§ 2034. Same—Same—Equity of redemption.....	1995
§ 2035. Modern English mortgages.....	1996
§ 2036. Doctrine of mortgages in the United States.....	1997
§ 2037. Kinds of mortgages.....	2000
§ 2038. Same—Common-law mortgages.....	2001
§ 2039. Same—Equitable mortgages.....	2001
§ 2040. Same—Same—Deposit of title-deeds.....	2002
§ 2041. Same—Same—Same—In this country.....	2003
§ 2042. Same—Vendor's lien.....	2004
§ 2043. Same—Same—Who may claim.....	2006
§ 2044. Same—Same—Discharge of.....	2007
§ 2045. Same—Vendee's lien.....	2008
§ 2046. Welsh mortgages.....	2009

SECTION II.—NATURE AND VALIDITY.

§ 2047. Who may make mortgage—Common-law doctrine.....	2011
§ 2048. Same—Married woman.....	2011
§ 2049. Same—Imbeciles and lunatics.....	2013
§ 2050. Same—Corporations.....	2013
§ 2051. Same—Guardians, etc.....	2013
§ 2052. Who may take a mortgage.....	2013
§ 2053. What may be mortgaged.....	2015
§ 2054. Same—Improvements.....	2016
§ 2055. Same—After-acquired property.....	2017
§ 2056. Same—Growing crops.....	2020
§ 2057. What mortgage carries.....	2020
§ 2058. Same—Essentials of mortgage—Introductory.....	2022
§ 2059. Same—Parties to mortgage.....	2023
§ 2060. Same—Property to be mortgaged.....	2023
§ 2061. Same—Consideration.....	2024
§ 2062. Same—Same—Payment of money.....	2026
§ 2063. Same—Same—Performance of condition.....	2031
§ 2064. Same—Execution and delivery.....	2033
§ 2065. Same—Registration.....	2035
§ 2066. Form of mortgage.....	2036
§ 2067. Same—Defeasance clause.....	2038
§ 2068. Same—Same—Form of defeasance.....	2039
§ 2069. Same—Same—In equity.....	2042
§ 2070. Conditional sale or mortgage.....	2043
§ 2071. Same—Parol evidence to explain.....	2045
§ 2072. Contemporaneous agreements.....	2050
§ 2073. Same—Agreement to repurchase.....	2051
§ 2074. Subsequent agreements.....	2055
§ 2075. Validity and effect of mortgages.....	2055
§ 2076. Invalidity of mortgages.....	2059

SECTION III.—RIGHTS AND LIABILITIES UNDER.

	PAGE
§ 2077. Mortgagor—Interests and rights.	2062
§ 2078. Same—Same—Right to maintain action.	2063
§ 2079. Same—Same—Before condition broken.	2063
§ 2080. Same—Same—Right to lease.	2064
§ 2081. Same—Same—Right to rents and profits.	2065
§ 2082. Same—Same—Right to emblements.	2067
§ 2083. Same—Same—Right to improve.	2037
§ 2084. Same—Same—Right to convey—Subject to mortgage. ...	2088
§ 2085. Same—Same—Same—Assumption of mortgage.	2069
§ 2086. Same—Same—Right to redemption.	2072
§ 2087. Same—Same—Same—Loss of.	2075
§ 2088. Same—Same—Same—Contribution on redemption.	2075
§ 2089. Same—Same—Right to possession.	2076
§ 2090. Same—Same—Same—Agreement respecting.	2078
§ 2091. Same—Duties of—To pay taxes.	2079
§ 2092. Same—Same—To protect title.	2030
§ 2093. Same—Same—To preserve premises.	2080
§ 2094. Same—Liability of—To action at law.	2081
§ 2095. Same—Same—To sell equity of redemption.	2082
§ 2096. Mortgagee—Interests and rights of—At common law. ...	2084
§ 2097. Same—Same—Under statutes.	2084
§ 2098. Same—Same—Right to rents and profits.	2085
§ 2099. Same—Duty of—To pay taxes.	2086
§ 2100. Same—Same—To make repairs.	2086
§ 2101. Same—Liabilities of—To account for rents and profits. ...	2087
§ 2102. Same—Allowance for improvements and disbursements. ..	2088
§ 2103. Tenure under mortgage.	2090
§ 2104. Same—Adverse possession.	2093
§ 2105. Same—Same—What constitutes.	2094
§ 2106. Same—Merger of interests.	2095

SECTION IV.—RIGHTS AND LIABILITIES UNDER—*continued*.

§ 2107. Assignment of mortgagee's interest—How made.	2099
§ 2108. Same—Who may make.	2101
§ 2109. Same—Under common-law theory.	2102
§ 2110. Same—Under the lien theory.	2104
§ 2111. Same—Equitable assignment.	2105
§ 2112. Same—Consideration.	2108
§ 2113. Same—Notice and record.	2109
§ 2114. Same—Construction of.	2110
§ 2115. Assignment of mortgagor's interest.	2112
§ 2116. Same—Notice to mortgagee.	2112
§ 2117. Insurance of property—By mortgagor.	2113
§ 2118. Same—Same—Misrepresentations in application.	2114
§ 2119. Same—Same—Violation of condition against alienation. ...	2115
§ 2120. Same—By mortgages.	2117
§ 2121. Same—Same—Provision requiring insurance for benefit of. ...	2118

	PAGE
§ 2122. Registry and priority.....	2119
§ 2123. Same—Index to record.....	2122
§ 2124. Same—Priority of registry.....	2123
§ 2125. Payment—By mortgagor.....	2126
§ 2126. Same—Same—Before maturity.....	2127
§ 2127. Same—Same—At maturity.....	2128
§ 2128. Same—Same—After condition broken.....	2128
§ 2129. Same—Same—After decree of foreclosure.....	2129
§ 2130. Same—Same—Directing application.....	2129
§ 2131. Same—By third party—Effect.....	2130
§ 2132. Tender of payment—On law day.....	2131
§ 2133. Same—After default.....	2131
§ 2134. Same—After foreclosure commenced.....	2131
§ 2135. Re-lease and discharge—Form and effect.....	2132
§ 2136. Same—What acts amount to.....	2132
§ 2137. Same—Effect of.....	2134

SECTION V.—REMEDIES INCIDENT.

§ 2138. Subrogating mortgagees.....	2135
§ 2139. Tacking mortgages.....	2138
§ 2140. Enforcing mortgages—Foreclosures.....	2140
§ 2141. Same—Same—Nature of foreclosure.....	2142
§ 2142. Same—Same—Methods of foreclosure.....	2142
§ 2143. Same—Same—Foreclosure by entry and possession.....	2143
§ 2144. Same—Same—Strict foreclosure.....	2143
§ 2145. Same—Same—Statutory foreclosure.....	2145
§ 2146. Same—Same—By action in equity.....	2145
§ 2147. Same—Same—Parties to foreclosure—Parties plaintiff....	2146
§ 2148. Same—Same—Same—Parties defendant.....	2149
§ 2149. Same—Same—Decree of foreclosure.....	2152
§ 2150. Same—Same—Same—Effect upon the land.....	2155
§ 2151. Same—Same—Same—Effect upon the debt.....	2157
§ 2152. Same—Same—Sale of mortgaged premises—Under decree.	2158
§ 2153. Same—Same—Same—Under power.....	2159
§ 2154. Same—Same—Same—Same—Extinguishment of power..	2161
§ 2155. Same—Same—Same—Rights of purchaser.....	2161
§ 2156. Same—Same—Same—Purchase by mortgagee.....	2162
§ 2157. Same—Same—Same—Application of proceeds of sale....	2164
§ 2158. Same—Same—Judgment for deficiency.....	2164
§ 2159. Redemption—Definition and process.....	2167
§ 2160. Same—Who may redeem.....	2169
§ 2161. Same—When redemption may be made.....	2173
§ 2162. Same—When right barred.....	2173
§ 2163. Same—Same—How right of barred or lost.....	2174
§ 2164. Same—Contribution on redemption.....	2176
§ 2165. Same—Same—Between sureties of the mortgagors.....	2177
§ 2166. Same—Same—Between mortgagor and his grantees.....	2178
§ 2167. Same—Same—Between mortgagor's grantees.....	2179

	PAGE
§ 2168. Same—Same—Between mortgagor's personal property and pledged estate.....	2181
§ 2169. Same—Same—Between mortgagor's devisees, heirs, and widow.....	2182
§ 2170. Same—Same—Agreements affecting rights of.....	2182
§ 2171. Same—Accounting by mortgagee.....	2184
§ 2172. Waste—Action for damages.....	2185
§ 2173. Same—Injunction against.....	2187

BOOK IV.

INCORPOREAL HEREDITAMENTS.

CHAPTER I.

INTRODUCTORY.

§ 2174. Incorporeal hereditaments—Definition.....	2188
§ 2175. Same—Kinds.....	2188
§ 2176. Same—How created.....	2189
§ 2177. Same—How lost.....	2189

CHAPTER II.

RIGHTS OF COMMON.

§ 2178. Definition.....	2190
§ 2179. Kinds of.....	2192
§ 2180. Common of pasture.....	2192
§ 2181. Same—Common appendant.....	2192
§ 2182. Same—Common appurtenant.....	2192
§ 2183. Same—Common of vicinage.....	2194
§ 2184. Same—Common in gross.....	2194
§ 2185. Common of estovers.....	2195
§ 2186. Same—Not severable or apportionable.....	2196
§ 2187. Common of turbary.....	2196
§ 2188. Common of piscary.....	2197
§ 2189. Divesting right of common.....	2198
§ 2190. Apportionment of common.....	2198
§ 2191. Same—Common of pasture.....	2199
§ 2192. Same—Common of estovers and piscary.....	2200

	PAGE
§ 2193. Extinguishment of common—By release.....	2200
§ 2194. Same—By conveyance.....	2200
§ 2195. Same—Unity of possession.....	2201
§ 2196. Same—By severance... ..	2201

CHAPTER III.

WAYS.

§ 2197. Introductory—Ways of two kinds—Public and private... ..	2203
§ 2198. Kinds of ways.....	2204
§ 2199. How acquired	2205
§ 2200. Same—By prescription.....	2205
§ 2201. Same—By dedication and condemnation.....	2205
§ 2202. Same—By grant.....	2206
§ 2203. Same—From necessity	2207
§ 2204. Divesting ways.....	2208
§ 2205. Repairing ways.....	2208
§ 2206. Extinguishing right of way.....	2208
§ 2207. How revived.....	2209

CHAPTER IV.

EASEMENTS AND SERVITUDES.

§ 2208. Definition	2210
§ 2209. Distinguished from license.....	2212
§ 2210. Distinguished from profits <i>a prendre</i>	2213
§ 2211. Distinguished from covenants.....	2214
§ 2212. Nature and incidents of.....	2215
§ 2213. Kinds of easements—Introductory.....	2216
§ 2214. Same—Private ways.....	2217
§ 2215. Same—Same—By grant.....	2218
§ 2216. Same—Same—By prescription.....	2219
§ 2217. Same—Same—By necessity.....	2220
§ 2218. Same—Air and light.....	2222
§ 2219. Same—Same—How acquired.....	2222
§ 2220. Same—In waters.....	2224
§ 2221. Same—Same—How acquired.....	2225
§ 2222. Same—Same—In natural water-course.....	2227
§ 2223. Same—Same—In artificial water-course... ..	2228
§ 2224. Same—Same—Percolating waters and swamps.....	2229
§ 2225. Same—To lateral support.....	2231
§ 2226. Same—Same—How acquired.....	2234
§ 2227. Same—Same—Implied grant of lateral support.....	2234
§ 2228. Same—Party walls.....	2234

	PAGE
§ 2229. Same—Mines and mining.....	2237
§ 2230. Same—Legalized nuisance.....	2239
§ 2231. How created.....	2240
§ 2232. How lost or extinguished.....	2243
§ 2233. Same—How merged.....	2244
§ 2234. Same—By act of parties.....	2245
§ 2235. Same—By release.....	2247
§ 2236. Rights and liabilities of parties.....	2247

CHAPTER V.

RENTS.

§ 2237. Definition	2249
§ 2238. Nature of the estate.....	2250
§ 2239. Kinds of rents.....	2253
§ 2240. How payable.....	2253
§ 2241. When payable.....	2255
§ 2242. Where payable.....	2256
§ 2243. To whom payable.....	2256
§ 2244. Who liable for—The tenant.....	2259
§ 2245. Same—Parties continuing to occupy... ..	2261
§ 2246. Same—Assignee of tenant.....	2261
§ 2247. Same—Assignee for benefit of creditors.....	2265
§ 2248. Same—Surety.....	2266
§ 2249. Apportionment.....	2267
§ 2250. Remedies of landlord.....	2270
§ 2251. Same—Suit for use and occupation.....	2270
§ 2252. Same—Suit for rent.....	2271
§ 2253. Same—Distress for rent.....	2273

BOOK V.

TITLE.

CHAPTER I.

FOUNDATION OF TITLE.

§ 2254. Introductory.....	2275
§ 2255. Government grants.....	2276
§ 2256. Other sources of title.....	2277

CHAPTER II.

HOW ACQUIRED.

SECTION I. By descent.

SECTION II. By original acquisition.

SECTION III. By public grant.

SECTION IV. By private grant.

SECTION V. By involuntary alienation.

SECTION I.—BY DESCENT.

	PAGE
§ 2257. Introductory	2278
§ 2258. Rules of descent.	2279
§ 2259. Same—To lineal descendants.	2279
§ 2260. Same—Same—Posthumous children.	2279
§ 2261. Same—Same—Illegitimate children.	2280
§ 2262. Same—Same—Adopted children.	2282
§ 2263. Same—To lineal ancestors.	2283
§ 2264. Same—Same—To father.	2283
§ 2265. Same—Same—To mother.	2284
§ 2266. Same—Same—To brothers and sisters.	2285
§ 2267. Same—Same—Same—Of the whole and half-blood.	2286
§ 2268. Law governing descent of real property.	2288
§ 2269. Alienage as a bar.	2289

SECTION II.—BY ORIGINAL ACQUISITION.

§ 2270. Introductory.	2290
§ 2271. By prescription.	2290
§ 2272. By accretion.	2293
§ 2273. By adverse possession.	2294
§ 2274. By statute of limitations.	2298
§ 2275. By estoppel.	2300
§ 2276. By abandonment.	2303

SECTION III.—BY PUBLIC GRANT.

§ 2277. Introductory.	2304
§ 2278. Methods by which acquired.	2305
§ 2279. Same—By pre-emption.	2306
§ 2280. Same—By homestead entry.	2308
§ 2281. Same—By timber culture entry.	2309
§ 2282. Same—By desert land entry.	2309
§ 2283. Same—By entry under bounty or military land warrants.	2310
§ 2284. Same—By purchase at public auction or private sale.	2311

SECTION IV.—BY PRIVATE GRANT.

§ 2285. Introductory.	2311
-------------------------------	------

	PAGE
§ 2286. Common-law conveyances.....	2312
§ 2287. Same—By feoffment.....	2312
§ 2288. Same—By gift.....	2313
§ 2289. Same—By grant.....	2313
§ 2290. Same—By lease.....	2314
§ 2291. Under statute of uses.....	2314
§ 2292. Same—Covenant to stand seized.....	2315
§ 2293. Same—Bargain and sale.....	2318
§ 2294. Same—Same—Limiting estate to commence <i>in futuro</i>	2318
§ 2295. Same—Lease and re-lease.....	2320
§ 2296. Modern conveyances—By warranty deed.....	2320
§ 2297. Same—By quit-claim deed.....	2321

SECTION V.—BY INVOLUNTARY ALIENATION.

§ 2298. Introductory.....	2323
§ 2299. Under exercise of eminent domain.....	2326
§ 2300. Where persons under disability.....	2328
§ 2301. Where title is defective.....	2330
§ 2302. Where owner dies intestate....	2333
§ 2303. Where owner fails or refuses to pay just debts.....	2333
§ 2304. Where owner fails or refuses to pay taxes.....	2335

CHAPTER III.

DEEDS.

§ 2305. Introductory.....	2338
§ 2306. Essentials of deeds.....	2338
§ 2307. On what to be written.....	2339
§ 2308. Sufficiency of writing.....	2339
§ 2309. Same—Filling blanks.....	2340
§ 2310. Who may convey by deed.....	2341
§ 2311. Same—Persons blind, deaf, and dumb.....	2341
§ 2312. Same—Corporations....	2341
§ 2313. Who may not execute deeds—Infants.....	2342
§ 2314. Same—Same—Female infants.....	2344
§ 2315. Same—Same—Male infants.....	2344
§ 2316. Same—Idiots and lunatics.....	2344
§ 2317. Same—Married women.....	2345
§ 2318. Same—Persons attainted.....	2346
§ 2319. Who may be grantees—Aliens.....	2347
§ 2320. Same—The wife... ..	2347
§ 2321. Same—Corporations.....	2348
§ 2322. Consideration for deed.....	2348
§ 2323. Description of property.....	2350
§ 2324. Orderly parts of deed.....	2351
§ 2325. Reading before signing.....	2351

	PAGE
§ 2326. Signing and sealing.....	2352
§ 2327. Delivery of deed.....	2353
§ 2328. Same—Mode of delivery.....	2353
§ 2329. Same—Delivery in escrow.....	2354
§ 2330. Attestation.....	2354
§ 2331. Formal parts of a deed.....	2355
§ 2332. Same—The date.....	2355
§ 2333. Same—The parties to the instrument.....	2355
§ 2334. Same—Same—Description of parties.....	2356
§ 2335. Same—The description of the property.....	2356
§ 2336. Same—The recital.....	2358
§ 2337. Same—The consideration.....	2359
§ 2338. Same—The granting clause.....	2359
§ 2339. Same—The habendum.....	2360
§ 2340. Same—The reddendum.....	2361
§ 2341. Same—The covenants.....	2361
§ 2342. Same—The testimonium clause.....	2362
§ 2343. Same—The acknowledgment.....	2363
§ 2344. Recording deeds.....	2365

TABLE OF CASES.

References are to pages.

A.

- Aaron *v.* Bayne, 760, 761
 Abbe *v.* Goodwin, 2173, 2128
 v. Neuton, 1625
 Abendroth *v.* Greenwich, 2216
 Abbot *v.* American Hard Rubber Co., 1758
 Abbott *v.* Abbott, 1919, 2298
 v. Allen, 2061
 v. Bagley, 2346
 v. Berry, 1987
 v. Bosworth, 977, 1249
 v. Cromartie, 1382, 1502
 v. Gatch, 1247, 1248
 v. Godfrey, 2038
 v. Hampden Ins. Co., 2116
 v. Heard, 2348
 v. Jenkins, 423
 v. Kesson, 2130, 2131
 v. Parsons, 1030, 1031
 v. Stearns, 1173, 2266
 v. Sworder, 1697
 v. The Essex Co., 308, 320, 321, 335, 418
 Abbott's Exr. *v.* Reeves, 1750
 Abbott of Bury *v.* Bokenham, 521
 Abby *v.* Billups, 1068, 1098, 1107, 1108
 Abdy, Doe d. *v.* Stevens, 1139, 1146
 Abeel *v.* Radcliff, 1003, 1087, 1088, 1590, 1591
 Abel *v.* Heathcote, 1669, 1670
 Abell *v.* Douglass, 368, 2058, 2289
 v. Lothrop, 1475
 Abercrombie *v.* Baldwin, 211, 1914
 v. Bradford, 1794
 v. Redpath, 2260
 v. Riddle, 746
 Aberdeen *v.* Blackmar, 1101
 Abernethy *v.* Society of Church of Puritans,
 32, 36, 37, 38, 39
 Abington *v.* Boston, 1456
 v. Inhabitants of North Bridgewater,
 1456
 Abraham *v.* Bubb, 559, 576
 v. Buff, 544
 v. Twig, 1564
 Abrahams *v.* Tappe, 1139
 Abrams *v.* Winshup, 342
 Abshire *v.* State, 1019
 Academy of Music *v.* Hackett, 1061, 1154, 1155
 Acer *v.* Westcott, 1777, 2359
 Acheson *v.* Miller, 1517
 Achilles *v.* Willis, 1439
 Acker *v.* Acker, 2175
 v. Trueland, 1445
 Ackerly *v.* Dygert, 515
 Ackerman *v.* Burrows, 1909
 v. Emott, 1721, 1722
 v. Gorton, 1809
 v. Hensicker, 2120
 v. Horicon Co., 2248
 Ackerman *v.* Hunsicker, 2030
 v. Lyman, 2271
 v. Smiley, 1164
 Ackland *v.* Ackland, 340
 v. Lutley, 515, 969, 1006, 1506, 1605
 v. Pring, 975
 Ackley *v.* Chamberlain, 1386, 1387, 1392, 1416,
 1417, 1418, 1442, 1445, 1501, 1502,
 1504, 1518
 Ackroyd *v.* Smith, 2217, 2238
 v. Smithson, 1638
 Acocks *v.* Phillips, 1061, 1154
 Acton *v.* Blundell, 2231
 v. Woodgate, 1713, 1793, 1794
 Adair *v.* Adair, 2108
 v. Bogle, 1245, 1246
 v. Brimmer, 1721
 v. Lott, 585, 598, 600, 601, 603, 612, 624,
 626, 629, 679, 682, 692, 693, 703
 v. Shaw, 1764
 v. Stone, 1290
 Adams, *Re*, 1824
 Adams *v.* Adams, 486, 751, 752, 940, 1021, 1357,
 1411, 1589, 1594, 1598, 1659, 1661,
 1786, 1788, 1797, 2252, 2257
 v. Ames Iron Co., 1975, 1981, 1982
 v. Andrews, 2240
 v. Angell, 2098
 v. Barron, 852, 856
 v. Beach, 1116, 1122, 1123
 v. Beadle, 132
 v. Beale, 119, 1408, 1451, 1452
 v. Bean, 2267
 v. Beekman, 781, 815, 820, 826, 889
 v. Brackett, 647
 v. Bradley, 2151
 v. Brereton, 555, 569
 v. Briggs Iron Co., 2237
 v. Buchanan, 2008
 v. Buckland, 1888
 v. Bucklin, 1004
 v. Carter, 1245
 v. Chaplin, 383
 v. Corriston, 1999, 2030, 2078, 2187
 v. Cowherd, 2007
 v. Cruft, 434
 v. Decker, 1319
 v. French, 976
 v. Frothingham, 1922, 2293
 v. Gale, 1715
 v. Gay, 2061
 v. Goddard, 1163
 v. Guerard, 297, 1548, 1649, 1694, 1700
 v. Hagger, 1301
 v. Jenkins, 1419
 v. Johnson, 2001
 v. Logan, 601, 603, 692, 693, 703
 v. Mackey, 1375
 v. McKesson, 1234, 1237

- Adams v. McPartlin*, 2138
v. Marshall, 64, 65, 507, 2241
v. Palmer, 905, 908, 1906, 2323, 232^o, 2333
v. Parker, 2102, 2103
v. Pease, 68, 2198
v. Perry, 299, 1548, 1606
v. Rockwell, 2303
v. Ross, 281, 284, 286, 531, 532
v. Savage, 1538, 1568, 1569
v. Smith, 53
v. Stevens, 2038
v. Storey, 882, 919
v. Tanner, 2020
v. Taunton, 1788
v. The Briggs Iron Co., 84, 88, 89, 811, 1924, 1988
v. Wadham, 2070
v. Wilson, 1701
Adams Ex. Co. v. McDonald, 1315
Adamson v. Armitage, 1371
v. Ayers, 708
Addison v. Bowie, 1806
v. Crow, 2152
v. Dawson, 1032, 1033
v. Hack, 2212, 2246
v. Leavy, 2088
Adrianse v. Hafkemeyer, 1131
Adsit v. Adsit, 880, 917, 918, 919, 935, 940, 946, 952, 955
Ætna Fire Ins. Co. v. Resh, 1932
Ætna Life Ins. Co. v. Corn, 810
v. Tyler, 2115, 2116, 2117, 2118
Agar v. Young, 1149
Agate v. Gignoux, 996
v. Lowenbein, 564
Agee v. Agee, 1815
Ager v. Young, 1148
Agnew v. Johnson, 1247, 1904
v. Renwick, 1132
Agricultural Ins. Co. v. Barnard, 2159
v. Montague, 632
Agricultural, Mechanical, etc., Assoc. v. Brewster, 1648
Ahearn v. Freeman, 2138
Ah Hee v. Crippen, 88
Ah Lew v. Choate, 88
Ahrend v. Odiorno, 2004, 2005
Aiken v. Aiken, 974
v. Albany R. Co., 1070, 1075, 1078
v. Bridgeford, 2171
v. Bruen, 2153, 2180
v. Gale, 2180, 2181
v. Milwaukee, 2155
v. Milwaukee & St. P. R. R. Co., 811
v. Morris, 2061
v. Smith, 1232, 1234, 1238, 1239, 1605, 1707, 1742, 1909
Aikman v. Harsell, 838, 847, 848
Ainsworth v. Rit, 66, 1015, 1176
Airey v. Buchanan, 1431
Akeel v. Spraker, 2154
Akerly v. Vilas, 2025
Akin v. Jefferson, 1894
Alabama G. L. I. Co. v. Oliver, 2250, 2251, 2258
Alabama G. S. R. Co. v. South & North R. Co., 2067
Albany's Case, 1894
Albany Fire Ins. Co. v. Bay, 402, 447, 1832, 2152
Albany Saving Inst. v. Burdick, 2330, 2331
Albany Street, Re, 2328
Albatross v. Wayne, 1209
Albee v. Carpenter, 351, 415, 423, 436
Albergottie v. Chaplin, 1975
Albert v. Bleeker St., etc., R. Co., 1247
Albertson v. White, 2052
Albin v. Lord, 896, 1035
v. Riegel, 46
Albright v. Cobb, 2102
Alcorn v. Morgan, 1001, 1271
Alden v. Gilmore, 212
v. Wilkins, 2090
Aldershaw v. Breach, 1113
Alderson v. Henderson, 856
v. Schulze, 1905
Aldred's Case, 2240
Aldrich v. Albee, 1865
v. Husband, 2021
v. Martin, 1919
v. Reynolds, 47
v. Thurston, 1440
Aldridge v. Tuscumbia C. & D. Ry., 571
Alexander v. Alexander, 651, 661, 1040, 1667, 1775, 1837, 1838
v. Bishop, 1245
v. Carew, 1294
v. Cunningham, 820, 821
v. Dorsey, 1176
v. Ellison, 1891
v. Hamilton, 841
v. Hodges, 1141, 1156
v. Jackson, 1418, 1421, 1422
v. Kennedy, 1882, 1913, 1914, 1915
v. Miller, 78
v. Pendleton, 2299
v. Polk, 501, 2298
v. Rodriguez, 2055
v. Tams, 1646, 1653
v. Touhy, 1138
v. Vennum, 1471
v. Walter, 517
v. Warrance, 586, 679, 680, 689, 779, 1004, 1658
v. Williams, 1782
Alexander's Exrs. v. Bradley, 746
v. Selden, 876
Alford v. Lehman, 1845
v. Vickery, 2252
Alger v. Kennedy, 1128, 1166, 1168, 1169
Allan v. Smith, 823, 843
Allard v. Carleton, 1975
Allbyer v. State, 671
Alleghany v. Ohio & P. R. Co., 2191
Alleghany Oil Co. v. Bradford, 272, 1867
Allen v. Allen, 525, 955
v. Allen's Admr., 767, 2166
v. Anderson, 520
v. Ashley School Fund, 465
v. Backhouse, 1832
v. Bartlett, 1316
v. Bennett, 998, 1043
v. Berryhill, 986
v. Billings, 2345
v. Brown, 2147
v. Bryan, 2270
v. Caldwell, 1422
v. Calvert, 1039, 1040
v. Carpenter, 1350, 1351, 1354
v. Chase, 1443, 1445
v. Chatfield, 2164
v. Clark, 2076, 2153, 2178, 2180
v. Craft, 302, 401, 1821
v. Culver, 984, 1084, 1085, 1099, 2267
v. Dent, 1138
v. Elderkin, 2067
v. England, 1288
v. Everly, 1998, 2078
v. Gibson, 1909
v. Gomme, 2219, 2220
v. Hall, 757, 758, 759, 1897
v. Harley, 1513
v. Hawley, 1407, 1408, 1421, 1422
v. Henderson, 420
v. Hill, 1355
v. Holten, 210, 1877, 2296
v. Hooker, 1035
v. Hooper, 647, 1360, 1361, 1364, 1367, 1368
v. Howe, 1864
v. Hoyt, 1979
v. Imlet, 1707
v. Jaquish, 1126, 1160, 1162, 1310

Allen *v.* Kennedy, 130, 145
v. Lamden, 970, 981
v. Lanier, 1225
v. Lathrop, 2030
v. Lee, 1701
v. McCoy, 742, 776, 789, 806, 841, 842, 844
v. McCullough, 771
v. Mansfield, 1280, 1283, 1286
v. Markle, 423
v. Parish, 2303
v. Paul, 1214
v. Peay, 935
v. Pegram, 42
v. Poole, 2011
v. Pray, 935
v. Reynolds, 901, 911
v. Rhodebaugh's Admr., 1288
v. Sayer, 1785
v. Shackleton, 2061
v. Sun Mut. Ins. Co., 1224
v. Tate, 1919
v. Thayer, 211
v. Trustees of Ashley School, 418
v. Van Houten, 2252, 2257, 2259
v. Van Meter, 315
v. Withrow, 1590
v. Woodward, 2021
v. Wooley, 1070
Allender's Lessee *v.* Sussan, 396, 974, 975, 1249
Allendorff *v.* Gaugengigl, 591
Alley *v.* Bay, 1450, 1475, 1478
v. Lawrence, 1831
Allie *v.* Schmitz, 1920
Allin *v.* Bunce, 448
Alling *v.* Chatfield, 916, 934, 955
Allis *v.* Billings, 757, 986, 1032
Allison *v.* Armstrong, 2079
v. Kurtz, 1700
v. McCune, 2086
v. Shilling, 1465, 1484, 1485, 1486, 1495
v. Sutherland, 2177
v. Wilson's Exrs., 1826, 1844
Allore *v.* Jewell, 1034
Alloway *v.* Barbineau, 757
Allwood *v.* Heywood, 491
Allyn *v.* Mather, 211, 401, 447, 448
Alman *v.* Duke of St. Albans, 1034
Almond *v.* Bonnell, 1376, 1919
Almy *v.* Daniels, 1894, 1895
Alpass *v.* Watkins, 424
Alpaugh *v.* Roberson, 1795
Alsberry *v.* Hawkins, 750, 774
Alston *v.* Alston, 2125, 2286
v. Grant, 1200
v. Ullman, 1395
Alsworth *v.* Cordtz, 1636
Altamas *v.* Campbell, 208
Alten *v.* Jaynish, 1271
Altes *v.* Hinckler, 47
Altham *v.* Anglesea, 1538
Altham's Case, 408, 446
Althof *v.* Conheim, 1947
Althorf *v.* Wolfe, 568
Alton *v.* Pickering, 1292, 1293, 1296, 2251, 2260
Alvis *v.* Morrison, 2125
Alvord *v.* Lent, 1514
Alvord Carriage Manf. Co. *v.* Gleason, 104, 136
Alwood *v.* Mansfield, 1212, 1230, 1231, 1233
Ambler *v.* Bradley, 1242
v. Norton, 955, 956, 957, 961, 964, 966
v. Skinner, 1103, 1184
Ambrose *v.* Ambrose, 1590, 1690
v. Otty, 1590
Ambs *v.* Hill, 130
Amelung *v.* Dorneyer, 414, 416
American Buttonhole Co. *v.* The Burlington Assoc., 2171
American Central Ins. Co. *v.* McLanathan, 632

American Emigrant Co. *v.* Wright County, 1765
American Print Works *v.* Lawrence, 5, 2326
American & Foreign Christian Union *v.* Yount, 720, 2057, 2288
Ames, *Ex parte*, 146
v. Chew, 2346
v. Norman, 1024, 1920, 1931, 1933, 1938, 1941, 1942, 1945, 1954
v. Norton, 1423
v. Port Huron L. D. B. Co., 1707, 1769
v. Richardson, 2118, 2119
v. Schuesler, 1134, 1135, 1136, 1315, 1316
Amesbury *v.* Brown, 445, 509
Amherst Academy *v.* Cows, 1541, 1670
Amick *v.* Brubaker, 1227
Amonett *v.* Amis, 2018
Amory *v.* Kamnoffsky, 1161
v. Meredith, 1837
v. Reilly, 2005
Amphlett *v.* Hibbard, 1425, 1426, 1432, 1450, 1475, 1478
Amsby *v.* Woodward, 1107, 1124
Amsden *v.* Blaisdell, 1340
Amst *v.* Alexander, 1087
Anandale *v.* Anandale, 95
Ancona *v.* Waddell, 501
Andend Reid *v.* Woodward, 2254
Anders *v.* Meredith, 1905, 1969
Andersoise *v.* Bennett, 947
Anderson's Appeal, 938, 946, 948
Anderson *v.* Baumgartner, 1995, 2105, 2147
v. Buchanan, 2217
v. Burwell, 1782
v. Carey, 499
v. Cary, 249, 259, 261
v. Chicago Ins. Co., 1174
v. Clanch, 1883, 1889, 1894, 1896
v. Comeau, 2259
v. Critcher, 1047
v. Culvert, 1476, 1484
v. Darby, 1023, 1213, 1215, 1217
v. Dawson, 318, 329, 1836
v. Dodd, 2298
v. Duckie, 1199
v. Dugess, 2363
v. Greble, 310, 1890
v. Hammond, 1228, 1591
v. Harold, 998, 1042
v. Harris, 1046
v. Herold, 1017
v. Hughes, 1986
v. Jackson, 471
v. Kent, 1465
v. Kryter, 1085, 1197, 1198
v. Layton, 2359
v. McGowan, 1752, 1814
v. Mather, 1577, 1798
v. Midland Railway Co., 1258, 1275, 1282, 1292
v. Neff, 2127, 2128
v. Odell, 1431
v. Oppenheimer, 1081
v. Prindle, 996, 1257, 1282, 1327, 1335, 1340
v. Smith, 1159, 2258
v. Tannerhill, 1919, 1930, 1952
v. Taylor, 1274
v. Tydings, 588, 635
Anderson School Township *v.* Milroy Lodge F. & A. M., 1983
Anding *v.* Davis, 1699, 2045
Andrae *v.* Haseltine, 2235
Andrew's Case, 1080, 1807
Andrew *v.* Newcomb, 2020
v. Royce, 1831
v. Wrigley, 1784
Andrew's Heirs *v.* Brown, 786, 787
Andrews *v.* Aetna Life Ins. Co., 2300
v. Alcorn, 1452
v. Andrews, 718, 898, 954, 957, 964
v. Blumfield, 1814

Andrews *v.* Brumfield, 337, 536
v. Brunefield, 1837
v. D. B. Co., 1187
v. Fiske, 2083, 2107, 2112, 2147, 2164
v. Gillispie, 2147
v. Hagadon, 1419
v. Hart, 2014, 2016, 2105, 2107
v. Herriot, 367, 2288
v. Hobson, 1593
v. Jones, 959
v. Page, 595, 597
v. Paradise, 1166
v. Pearson, 2358
v. Pond, 2057
v. Scott, 2157, 2158
v. Senter, 1867, 1868
v. Sparhawk, 1749
v. Stelle, 2150
v. Thayer, 2033, 2035
v. Torrey, 2056
v. Townsend, 2107, 2111
 Androscoggin Bank *v.* Kimball, 2352
 Angel *v.* Boner, 811
 Angell *v.* Rosenbury, 289, 290, 1594
 Angier, *Re*, 890, 891
 Angier *v.* Masterson, 2009
 Ankeny *v.* Pierce, 1212
 Anketel *v.* Converse, 2005
 Annable *v.* Patch, 310, 1910
 Annapolis R. Co. *v.* Gantt, 1998
 Annapolis & E. R. Co. *v.* Gault, 2076, 2077
 Anonymous Case, 53, 57, 260, 267, 319, 372,
 442, 653, 769, 1729, 1732, 2152
 Ansey *v.* Ansey, 661
 Anstice *v.* Brown, 94, 218, 1612, 1781
 Answorth *v.* Johnson, 563
 Anthony *v.* Anthony, 2045
v. Lapham, 2225, 2227
v. Rees, 299, 1606
v. Rogers, 2085, 2087, 2088
v. Smith, 2008
v. Wade, 1481
 Antomarchi *v.* Russel, 2237
 Antoni *v.* Belknap, 147, 1138, 1351, 1354
 Antory *v.* Frieze, 1245
 Apethorp *v.* Comstock, 2331
 Apperson *v.* Moore, 2018, 2020
 Apperson's Exrs. *v.* Bolton, 719, 720, 869, 955
 Apple *v.* Apple, 776, 777, 778, 815, 819
 Applegate *v.* Mason, 2133
 Appleton *v.* Boyd, 1881, 1885, 1886, 2014, 2101
v. Rawley, 580, 684, 1372
v. Warner, 383
 Athrop *v.* Dackus, 214, 672, 774
 Arbuckle *v.* Nehms, 2272
v. Ward, 2293
 Archambau *v.* Green, 2038, 2133
 Archdeacon *v.* Bowes, 2087
 Archer's Case, 1570
 Archer *v.* Deneale, 201, 202
v. Jones, 489, 2148
v. Phoenix, 2314
 Archibald *v.* Scully, 2357
 Arden *v.* Pullen, 1083, 1182, 1196
 Ardesco Oil Co. *v.* North American Oil Co.,
 2252, 2256
 Areson *v.* Areson, 534
 Arkwright *v.* Gell, 2229
 Arlin *v.* Brown, 2005
 Arls *v.* Cummings, 2325
 Armfield *v.* Armfield
v. Moore, 2300
 Armorer *v.* Case, 327, 1948
 Armory *v.* Fairbanks, 2157
 Armour *v.* Alexander, 1090, 1091, 1738
v. McMichael, 2056
 Arms *v.* Ashley, 1589, 1592
v. Burt, 285, 1005
v. Lyman, 1979
 Armstrong . Armstrong, 1878, 1884
v. Bach, 1135, 1316
v. Bicknell, 1229

Armstrong *v.* Caldwell, 88
v. Campbell, 1615, 1766, 1770, 1774, 1782
v. Cummings, 984
v. Kattenhorn, 994
v. Lawson, 55
v. Morrill, 1598, 1599, 1786
v. Pearce, 2363
v. Ristau, 211, 2299
v. Ross, 2152
v. Schermerhour, 1166
v. Sovall, 2353
v. Toler, 518
v. Wheeler, 1114, 1117, 1119, 1121, 2264
v. Wholesey, 1566
v. Wilson, 586, 633, 639, 669, 1367
 Arnett *v.* Munnerlyn, 1906
 Arnold *v.* Arnold, 761, 815, 1930, 1932, 1942,
 1952
v. Brown, 416, 577
v. Clark, 1110
v. Cord, 1676
v. Cornham, 2245
v. Crowder, 105, 107, 131, 132, 2080
v. Elmore, 69
v. Foot, 2228
v. Foote, 2225
v. Gilbert, 75, 434, 1740, 1798
v. Gotshall, 1420, 1435
v. Green, 2173
v. Hempstead, 943
v. Jack's Exrs., 1882
v. Jones, 1424
v. Lincoln, 308, 312
v. Mattison, 2047, 2048
v. Nash, 1273, 1294
v. Richmond Iron Works, 986, 1032, 2345
v. Ruggles, 42, 43, 817
v. Stearn, 2240
v. Stevens, 90, 2245, 2247
v. Wainwright, 786, 1963
v. Waltz, 1400
v. Woodard, 1212
 Arnot *v.* Beadle, 1922
v. Post, 2129
v. Woodburn, 2177
 Armsby *v.* Woodward, 1058, 1138, 1143, 1159
 Armstett *v.* Armstett, 1951
 Armwine *v.* Carroll, 253, 273
 Arp *v.* Jacobs, 1406
 Arques *v.* Wasson, 2020
 Arrington *v.* Cherry, 1577, 1753
v. Liscom, 2175, 2297
 Arrison *v.* Harstad, 195
 Arrowsmith *v.* Burlingim, 2324
 Arthur *v.* Broadnax, 2346
v. Homestead Fire Ins. Co., 2330
 Arto *v.* Maydole, 1419
 Artz *v.* Grove, 2047
 Arundel *v.* Steere, 2196
 Arundell *v.* Phipps, 647
 Asay *v.* Hoover, 689, 2062
 Ash's Case, 756
 Ash *v.* Bowen, 1656
v. Cummings, 197
 Ashbaugh *v.* Ashbaugh, 1402
 Ashbury *v.* Sanders, 522
 Ashby *v.* Palmer, 75, 76
 Ashcroft *v.* Eastern Ark. Co., 283
v. Eastern Railroad Co., 283, 2240,
 2361
 Ashe *v.* Cummins, 2327
v. De Rossett, 1247, 1248
 Asher *v.* Mitchell, 1502, 2067
 Ashfield *v.* Ashfield, 1030
 Ashhurst's Appeal, 1748
 Ashhurst *v.* Given, 1564, 1637, 1670, 1674
v. Potter, 77
 Ashley *v.* Warner, 1027, 1274, 1275, 1281, 1289,
 1297, 1851
 Ashley's Admr. *v.* Robinson, 1789, 1794
 Ashmun *v.* Williams, 125, 140, 142
 Ashton's Case, 958

- Ashton *v.* Ingle, 1434
v. Langdale, 42
v. Wood, 1638
- Ashley *v.* Ashley, 2295
- Ashuelot R. Co. *v.* Elliott, 2331
- Ashurst *v.* Given, 254, 273, 300, 500, 1552, 1556,
 1557, 1606, 1675, 1748
- Askew *v.* Dupree, 596, 752
- Aslin, Doe d., *v.* Summersett, 1027
- Aspden *v.* Seddon, 93
- Astley *v.* Essex, 265
- Aston *v.* Aston, 544, 559, 572
v. Britland, 1009
v. Smallman, 1882
- Astor *v.* Hoyt, 688, 800, 1117, 2000
v. L'Amoreux, 2264
v. Miller, 1071, 1072, 1075, 1112, 1117,
 2000
v. Turner, 2066, 2162
- Astrom *v.* Hammond, 2304
- Atcheson *v.* Atcheson, 1939
- Atchinson *v.* McCulloch, 2303
v. Peterson, 2238
v. Surguine, 2148
v. Wheeler, 1465
- Atherton *v.* Corliss, 946
v. Fowler, 2308, 2309
v. Johnson, 212, 2295
- Atkins *v.* Boardman, 2218
v. Bordman, 2218
v. Byrnes, 2273
v. Chilson, 1151, 1157, 1866, 1870, 1871
v. Humphrey, 1343
v. Kinnan, 2335
v. Kron, 218, 520
v. Merrill, 781
v. Sleeper, 1005, 1006, 2256
v. Yeoman, 870, 876
- Atkinson, *Re*, 1588, 1790
- Atkinson *v.* Atkinson, 1405, 1407, 1410, 1412,
 1413, 1462, 1463, 1472, 1522
v. Baker, 527, 528, 784
v. Hewett, 2086
v. Hutchinson, 433, 437
v. Miller, 2059
v. Morrissey, 811
v. Patterson, 2101
v. Stewart, 803
- Atkyn's Lessee *v.* Horde, 651, 1039, 1040
- Atlantic Dock Co. *v.* Leavitt, 259, 267, 269,
 2068, 2071
v. Libby, 267, 269
- Atlantic & St. L. R. R. Co. *v.* State, 976
- Atlin *v.* Bunce, 401, 405, 408, 411, 413
- Attenborough *v.* Thompson, 265
- Attersoll *v.* Stevens, 553, 1152, 1153, 1228
- Attorney-at-law *v.* Andrew, 1347
- Attorney-General *v.* Ailesbury, 1811
v. Andrews, 1872
v. Bishop of Chester, 1688
v. Brooks, 1009, 1088
v. Chambers, 2293
v. Christ's Hospital, 267, 1660, 1784,
 1872
v. Crispin, 314
v. Dixie, 1664
v. Exeter, 1782
v. Federal Street Meeting-house, 1796
v. Gill, 322, 324
v. Grasett, 1690
v. Griffiths, 1037
v. Hall, 344, 1684
v. Hamilton, 1670
v. Hinxman, 1604
v. Hungerford, 1037
v. Ironmongers' Co., 1685
v. Kent, 1456
v. Landersfield, 1540
v. Marlborough, 442, 443
v. Masters of Oath Hall, 258, 1860
v. Mayor of Exeter, 1783
v. Merrimack Mfg. Co., 1850
- Attorney-General *v.* Moses, 1019
v. Mylchrest, 83, 84
v. New Castle, 1555
v. Northumberland, 1685
v. Owens, 1037, 1038
v. Proprietors Meeting-house in Federal
 Street, 31, 35, 36, 289, 1553, 1563,
 1594
v. Purmort, 2015
v. Putland, 1040
v. Rochester, 1037
v. Scott, 1559
v. Skinners' Co., 1540
v. Smith, 1008, 1037
v. South Sea Co., 1037
v. Stawell, 557
v. Tudor Ice Co., 5
v. Utica Insurance Co., 1540
v. Vigor, 2084
v. Windsor, 1638
- Attwater *v.* Attwater, 249, 261, 262, 263, 1858
v. Bodfish, 2219, 2244
v. Butler, 882, 907, 909
v. Manchester, 2170, 2171
v. Manchester Sav. Bank, 2073, 2169,
 2170, 2171
v. Walker, 2056
- Atwood *v.* Atwood, 711, 759, 760, 763, 819, 868
v. Fisk, 2059
v. Norton, 998, 1013, 1323
v. Vincent, 2005, 2177
- Aubin *v.* Daly, 435, 790, 814, 819
- Aubuchon *v.* Bender, 1791
- Auburn & C. P. R. Co. *v.* Douglass, 20, 2232
- Auding *v.* Davis, 2175, 2176
- Auer *v.* Penn, 1160
- Aughinlaugh *v.* Coppenheffer, 1067
- Aughtie *v.* Aughtie, 770
- Augusta Ins. Co. *v.* Morton, 367, 720, 2057,
 2288
- Auld *v.* Butcher, 1511
- Aull *v.* Lee, 2027, 2029
- Aull Savings Bank *v.* Aull's Admr., 1277, 1700
- Aultman *v.* Obermeyer, 646, 647, 895, 1938
- Auriol *v.* Mills, 1069, 2263, 2265
- Austen *v.* Halsey, 2008
- Austin *v.* Ahearn, 1026
v. Austin, 835, 847, 861, 862, 2032
v. Burbank, 2105, 2142
v. Cambridge Parish, 1849, 1856, 1861,
 1867
v. Downer, 2040
v. Field, 1015, 1176
v. Grant, 2025
v. Hall, 1909
v. Hudson R. R. Co., 553, 2232
v. Huntsville Coal & Mining Co., 979,
 983, 1002, 1017
v. Rutland, 202, 515, 1982
v. Sawyer, 46, 49, 50, 51, 52, 104
v. Shaw, 1885, 2101
v. Stanley, 1378, 1445, 1454, 1457, 1460,
 1499
v. Stevens, 489, 514, 564, 565, 1364
v. Swann, 948
v. Taylor, 1609
v. Thompson, 1251, 1266, 1306
v. Underwood, 1491, 1492, 1497, 1498
v. Wilson, 1292
- Auworth *v.* Johnson, 1067, 1068, 1153
- Avans *v.* Everett, 1426
- Aveling *v.* Knife, 1876
- Avelyn *v.* Ward, 1849
- Averall *v.* Wade, 2155
- Averill *v.* Guthrie, 2139
v. Taylor, 976, 2073, 2074, 2150, 2169, 2172,
 2173
v. Wilson, 1580
- Avery *v.* Chappel, 1648
v. Judd, 2080, 2091
v. Payne, 1973
v. Ryerson, 2172

Avery *v.* Scott, 1051
v. Stephens, 1499
 Avon Mfg. Co. *v.* Andrews, 2226
 Awdley *v.* Awdley, 77
 Ayer *v.* Ayer, 1574, 1672, 1673
v. Emery, 1856
v. Hawkes, 1291, 1479, 1506
v. Spring, 791, 822, 841, 842, 843, 845, 891
v. The Methodist Episcopal Church, 225, 1549
 Ayers *v.* Dixon, 2071
v. Waite, 2091
 Aylesford's Case, 994
 Aylett *v.* Ashton, 1034
 Aylsworth *v.* Whitcomb, 1792
 Aymer *v.* Bill, 2101, 2103, 2111
 Aynsley *v.* Glover, 2246
v. Grover, 2248
v. Reed, 2173
 Ayres *v.* Hartford Fire Ins. Co., 240
v. Husted, 2164
v. M. E. Church, 1555, 1603
v. Probasco, 1450, 1475, 1478
v. Waite, 2095, 2175, 2174

B.

Babb *v.* Perley, 1363, 1364, 1365, 1368, 1369, 1370
 Babbitt *v.* Day, 823
v. Scroggin, 1931, 1932, 1935, 1938, 1940
 Babcock *v.* Babcock, 794, 912, 913
v. Hoey, 1450, 1479, 1488
v. Kennedy, 1027, 1028, 2065
v. Lisk, 2029, 2030
v. Montgomery Co. Mut. Ins. Co., 2223
v. Scoville, 1108, 1116
v. Wyman, 1676, 2175
 Baca *v.* Ramos, 1962
 Bache *v.* Doscher, 2165, 2167
 Bachino *v.* Coste, 1947
 Bachman *v.* Crawford, 1399
 Back *v.* Andrews, 779, 1920, 1930, 1939, 1940
 Backenstoss *v.* Stahler's Admr., 46, 52
 Backer *v.* Payne, 1045
 Backhouse *v.* Bonomi, 2232
 Backman *v.* Crawford, 1403
 Backus *v.* Shepherd, 2324
 Bacon's Appeal, 1607, 1656, 1675
 Bacon *v.* Bacon, 1180
v. Bowdin, 2169
v. Bowdoin, 971, 992, 1000, 1014, 2073, 2074, 2170, 2173
v. Brown, 1131, 1132, 1316, 1346, 1347
v. Cottrell, 2185
v. Howell, 1292
v. Huntington, 1870, 1872
v. McIntyre, 2093, 2094
v. Parker, 996, 2271
v. Rives, 1782, 1783
v. West Furniture Co., 1060, 1154, 1155
v. Woodward, 355, 308, 335
 Badger *v.* Batavia Mfg. Co., 143
v. Holmes, 1026, 1027
v. Keating, 1580, 1654
 Badgley *v.* Bruce, 868
v. Voltrain, 1612
 Badlam *v.* Tucker, 1820
 Badon *v.* Brown, 2052
 Baer *v.* Martin, 72
 Baggett *v.* Meux, 251, 257, 1561
 Bagley *v.* Freeman, 1073, 1108, 1115, 1117, 1121
 Bagnall *v.* Villar, 2080
 Bagot *v.* Bagot, 495
 Bagshaw *v.* Spencer, 288, 289, 300, 373, 1583, 1595, 1606, 1693, 1856
 Baher *v.* Harris, 1080
 Bailey's Petition, 1730, 1842, 1843
 Cailey *v.* Bailey, 291, 1662, 1699, 1798, 2050

Bailey *v.* Brown, 1752
v. Carten, 2075
v. Carter, 2175
v. Clark, 1242
v. Comings, 1457
v. Duncan, 782, 820, 1363, 1368, 1369
v. Fillebrown, 1234, 1267
v. Gentry, 1217
v. Gould, 2103, 2111
v. Hobson, 1903, 1906
v. Hoppin, 2301
v. Kilburn, 1149
v. Metcalf, 2131
v. Miltenberger, 197
v. Mittenberger, 2326
v. Myrick, 2151, 2181
v. Ogden, 998, 1017, 1042, 1087
v. Richardson, 2097, 2098, 2262
v. Robinson, 1717, 1766
v. Rust, 1982
v. Sisson, 1975
v. Timberlake, 2171
v. Tyrrell, 984
v. Ward, 997, 1283, 1286
v. Wells, 1159, 1161, 1164, 2263, 2264
v. West, 718
v. White, 2357
 Bailie *v.* McWhorter, 253
 Bailis *v.* Gale, 335
 Bailley *v.* Litten, 910
 Bain *v.* Clark, 1172, 1205, 1210, 1218
 Bainbridge *v.* Blair, 1600
v. Owen, 2184
v. Wilcocks, 2056
 Baines *v.* Barnes, 1717
 Bainton *v.* Ward, 1825
 Bainway *v.* Cobb, 129, 146
 Baird's Appeal, 1968
 Baird *v.* Baird's Heirs, 1671, 1913, 1957
v. Jackson, 2067
v. McConkey, 2165, 2167
v. Rowan, 1810
v. Shipman, 1194, 1195
v. Stearne, 912, 913
 Baken *v.* Harder, 2012
 Baker *v.* Adams, 1337
v. Armstrong, 2102
v. Baker, 737, 740, 835, 847, 851, 868, 1647, 1652
v. Bank of Louisiana, 2024
v. Bishop, 2015
v. Bridge, 305, 330, 335, 340
v. Chase, 728, 794, 795, 912
v. Collins, 2059
v. Copenbarger, 75, 1750
v. Davis, 138
v. Dayton, 892, 1462
v. Dickson, 1288
v. Evans, 1738
v. Fetters, 925
v. Flourmey, 1363
v. Frick, 72
v. Greenhill, 1102
v. Hale, 1215
v. Harlan, 1795
v. Heiskell, 654, 656, 677, 679, 683, 2286
v. Holtzpaffel, 1179
v. Humphrey, 1585
v. Hunt, 284
v. Jordan, 46, 654
v. Kennett, 1030, 1031
v. Lamb, 1920
v. Lewis, 54
v. Massey, 2331
v. Matcher, 2359
v. Mather, 1777
v. Mattocks, 149
v. Nall, 679, 1216
v. Newton, 1371
v. Oakwood, 702
v. Pierson, 2136
v. Pratt, 1161

- Baker v. Ramey**, 1497
v. Red, 1614
v. Scott, 408
v. Shepherd, 2147
v. Stewart, 1931, 1932, 1934, 1939, 1952, 1954
v. Swon, 2295
v. Terrell, 2150, 2178
v. Thrasher, 1993, 2044, 2054
v. Vining, 1634, 1638, 1641, 1647, 1648, 1651, 1652, 1653, 1683, 1699
v. Wall, 380
v. Washington, 2366
v. Westcot, 217
v. Wheeler, 1926, 1962, 1963
v. Whiteside, 1044
v. Whiting, 1644, 1782
v. Willis, 389
v. Wind, 2038, 2039
Balder v. Blackburn, 1023, 1024
Baldwin v. Allison, 1620, 1644
v. Bean, 353
v. Boyd, 2309
v. Breed, 113
v. Brown, 2298
v. Campfield, 1636
v. Carter, 1701
v. City of Newark, 671, 1518
v. Gray, 755
v. Hatchett, 2101
v. Humphrey, 1587, 1592
v. Jenkins, 2039
v. Johnson, 1888
v. Peet, 1794
v. Porter, 1598, 1785
v. Raplee, 2023
v. Rees, 1151
v. Reiss, 1158
v. Rogers, 1431
v. Stark, 2304
v. Thompson, 975
v. Timmins, 2101
v. United States Tel. Co., 1248
v. Van Vorst, 1157
v. Walker, 1027, 1028, 1046, 1071, 1120, 2064, 2249
v. Whiting, 1967
Baldy's Appeal, 1510
Bale v. Newton, 1791
Balfe v. West, 1183, 1191
Balford v. Crane, 915
Balgrave v. Balgrave, 1596
v. Hancock, 1692
Balir v. Van Blaricum, 534
Balkum v. Wood, 1475
Ball v. Ball, 954
v. Covington, 2251
v. Cullimore, 1259, 1278, 1290, 1294
v. Deas, 1968
v. Dunsterville, 1044
v. First National Bank of Covington, 2251, 2257, 2258
v. Harris, 1832
v. Palmer, 1898
v. Payne, 416, 447, 472
v. Wyeth, 1181
Ballance v. Fortier, 1308, 1338
Ballard v. Ballard, 2063
v. Burgett, 1746
v. Dyson, 2219, 2220
v. Harrison, 2207
v. Nichols, 917
v. Perry, 2365
Ballentine v. Clark, 2331
v. Poyner, 495, 554
Ballet v. Sprainger, 510, 518
Ballew v. Clark, 1032
Balley v. Welles, 1070
Ballin v. Dillaye, 896
Ballou v. Hale, 1905, 1924
v. Jones, 117
Balls v. Dampman, 1822
Bally v. Wells, 1074
Balman v. Shore, 314
Baltimore v. Chester, 624
v. May, 1515
v. Porter, 1804
Baltimore Annual Conference v. Schell, 1504
Baltimore & O. R. Co. v. Polly, 1853
Bambaugh v. Bambaugh, 1881, 1883, 1910
Bancroft v. Cambridge, 4, 5
v. Consen, 214, 672, 1622
v. Wardell, 1276, 1283, 1291, 2271
v. White, 764
Bandy v. Cartwright, 2362
Bange v. Flint, 2107
Bangs v. Smith, 1836
Bank v. Anderson, 2109
v. Arnold, 800, 801
v. Carpenter, 2001
v. Chamberlain, 2011
v. Finch, 2033
v. Fordyce, 1699, 1702
v. Haskie, 1008
v. Houseman, 2316
v. May, 2314
Bank of America v. Banks, 1215, 2260
Bank of Augusta v. Earle, 224
Bank of Brighton v. Smith, 2014
Bank of Buffalo v. Hortwright, 2339
Bank of Columbia v. Okley, 2324
Bank of Commerce v. Lanahan, 2076
v. Owen, 803, 806, 813, 814, 817
Bank of England v. Tarterton, 1763
Bank of Greensboro v. Clapp, 2120
Bank of Indiana v. Anderson, 2104, 2106
Bank of Ithaca v. King, 1554
Bank of Lansinburg v. Crary, 53, 54, 55, 2020
Bank of Louisville v. Hall, 1964
Bank of Metropolis v. Huttschlick, 782, 1600, 1601
Bank of Niagara v. Rosevelt, 2170
Bank of Ogdensburg v. Arnold, 1027, 2066, 2067
Bank of the Old Dominion v. McVeigh, 1512
Bank of Pennsylvania v. Wise, 46, 1120, 2259
Bank of Rochester v. Emerson, 2165, 2167
Bank of South Carolina v. Rose, 2133
Bank of United States v. Benning, 1777
v. Dandridge, 2014
v. Daniels, 2057
v. Donnally, 2057
v. Dunseth, 836, 874
v. Housman, 1538, 1625
v. Huth, 1794
v. Peters, 2136, 2137
Bank of Utica v. Mersereau, 1027, 1160, 1221, 1888
Bank of Waltham v. Waltham, 42
Bank of Westminster v. Whyte, 2037
Banker v. Braker, 1009, 1088
Bankes v. Le Despencer, 1692, 1740
Bankhead v. Brown, 2327
Banks v. American Tract Society, 2213, 2223
v. Carter, 1262, 1274, 1329, 1335, 1340
v. Haskie, 1009, 1091
v. Ogden, 2293
v. Poitiaux, 224
v. Sutton, 581, 705, 708, 714, 715, 840, 1575, 1704, 1736
v. Walker, 2025
v. Wilkes, 1732, 1734
Banman v. James, 999
Banning v. Taylor, 2324
Bannon v. Angier, 2246
v. Bean, 1643
v. Brandon, 1355
v. State, 198
Banrfield, Doe ex d., v. Wetton, 424
Bansiat v. Murrin, 732
Banton v. Campbell, 1919
v. Shorey, 54
Ranyster v. Trussel, 625
Baptist Association v. Hart, 1684

- Baptist Church of Hartford *v.* Witherell, 32,
34, 40, 1557
- Barber *v.* Babel, 1450, 1475, 1478, 1934
v. Cary, 1808, 1809
v. Harris, 1024, 1025, 1931, 1939, 1941,
1942, 1945, 2362
v. Root, 661, 662, 664, 771, 919, 1359,
1360, 1363, 1364, 1368, 1369, 1370
v. Rorabeck, 1500
v. Williams, 733, 838
- Barbour *v.* Barbour, 721, 725, 771, 783, 802, 803,
919, 940
- Barclay, *Ex parte*, 125
v. Cameron, 354
v. Hendrick, 1881, 1968
v. Pickles, 1171
v. Wainwright, 1211
- Barcroft *v.* Snodgrass, 1965
- Bard *v.* Elston, 996
- Barden *v.* Grady, 2155
- Bardish *v.* Schenck, 1229
- Bardstown R. Co. *v.* Metcalfe, 1722
- Bardswell *v.* Bardswell, 347, 1632
- Bardwell *v.* Howe, 2060
- Barford *v.* Street, 1825
- Barger *v.* Hobbs, 501
- Barheydt *v.* Barheydt, 332, 342, 533, 536
- Barhydt *v.* Burgess, 2263, 2264
- Baring *v.* Nash, 515, 1973, 1984
- Barker, *Re*, 95
- Barker *v.* Allen, 999
v. Barker, 675, 697, 1372, 1623
v. Bates, 99
v. Bell, 1997, 1998, 2119, 2126, 2133
v. Blake, 869, 870
v. Cobb, 1857
v. Crandall, 1605
v. Dale, 976, 983, 1138, 1150
v. Dayton, 195, 1407, 1462, 1471
v. Flood, 2096
v. Frye, 1691
v. Greenwood, 300, 1553, 1583, 1597, 1606,
1607, 1797
v. Keate, 1566
v. Parker, 791, 815, 820, 826, 891, 927
v. Salmon, 2303
v. State ex rel. Mills, 2
v. Taylor, 743
- Barkley *v.* Lane's Exrs., 1592
- Barksdale *v.* Finney, 42
v. Garret, 717, 871, 872, 930
- Barksworth *v.* Young, 1691
- Barlett *v.* Prescott, 2207
- Barley *v.* Cook, 1883
- Barlow *v.* Bateman, 265
v. Bell, 1310, 1350
v. Gaines, 2081
v. Lambert, 195
v. Rhodes, 2215, 2356
v. Salter, 322
v. Wainwright, 1014, 1264, 1295, 1300,
1301, 1303, 1312, 1313, 1322, 1325,
1326, 1337, 1342, 1343
- Barn *v.* Clark, 538
- Barnaby *v.* Barnaby, 1030
- Barnard *v.* Bailey, 348
v. Eaton, 2017
v. Edwards, 870, 873, 930, 931
v. Godcall, 2264
v. Jewett, 1635, 1653
v. Norwich R. Co., 2018
v. Poor, 567
v. Pope, 1913, 1982
v. Whipple, 31
- Barnard's Heirs *v.* Ashley's Heirs, 2307
- Barnardston *v.* Fane, 1870
- Barnes *v.* Addy, 1621, 1761
v. Allen, 2282
v. Barnes, 56, 2213
v. Boardman, 2100, 2103, 2127, 2128
v. East London W. W. Co., 1038
v. Ehrman, 2159
- Barnes *v.* Gay, 781, 804, 828, 1491, 1497
v. Grant, 1630
v. Gray, 777, 814
v. Huson, 234
v. Irwin, 1829
v. Lee, 2084
v. Lloyd, 1919, 2242
v. Mawson, 88
v. Mott, 2154
v. Raester, 2155
v. Shinholster, 1281, 2261
v. Simms, 1702
v. Taylor, 1589
v. Underwood, 585, 670
v. White, 1444
- Barnet *v.* Barnet, 836, 874, 876, 911
v. Dougherty, 1646, 1653
- Barnett's Appeal, 254, 299, 500, 1560, 1605, 1606,
1607, 1655, 1656, 1674, 1675, 1682,
1748, 1753
- Barnett *v.* Barnes, 1044
v. Barnett, 2332
v. French, 237
v. Gaines, 729
v. Goings, 962
v. Harshbarger, 646
v. Johnson, 20, 2223
v. Knight, 1513
v. Mendenhall, 1475, 1476, 1484
v. Nelson, 2184, 2185
v. Riser, 2004
- Barney *v.* Baltimore, 1983
v. Frowner, 841, 842, 843
v. Gay, 1497
v. Keith, 1080, 1081
v. Keokuk, 69, 2294
v. Leeds, 1378, 1399, 1403
v. Little, 2366
v. Myers, 2181
v. Patterson, 1751
v. Saunders, 1665, 1720
v. Sutton, 2120, 2365
v. Trowner, 870
- Barnfather *v.* Jordan, 2265
- Barnhart *v.* Campbell, 1924
- Barns *v.* Hatch, 1016
- Barnum *v.* Barnum, 508, 509, 757, 1682,
1683
v. Childs, 1700
v. Landon, 1026, 1046, 1922
v. Mayor of Baltimore, 265
- Baron *v.* Sollivello, 1425
- Barr *v.* Doe ex d. Binford, 1225
v. Doe ex d. Burford, 975
v. Galloway, 600, 603, 613
v. Gratz, 206, 207, 209, 1917
v. Gratz's Heirs, 1752
v. Graves, 1225
v. Valanstone, 2176
- Barr, Lessee of, *v.* Galloway, 601, 602, 702
- Barrage *v.* Merchants' Ex. Co., 2342
- Barrell *v.* Barrell, 1894
v. Handrick, 1701
v. Joy, 1588, 1590, 1592, 1600, 1691
- Barren *v.* Barren, 1651, 1938
- Barren Creek Ditching Co. *v.* Beck, 1944
- Barrett's Appeal, 1584
- Barrett *v.* Bamber, 1621, 1623
v. Bedford, 1102
v. Blackman, 2148
v. Blagrove, 1107
v. Buxton, 1033
v. Churchill, 890
v. Failing, 770, 771, 919, 920
v. French, 1548, 2316, 2319
v. Gomesserra, 1758
v. Hinckley, 2106
v. Marsh, 1591, 1824
v. Richardson, 1510
v. Rockport Ice Co., 74
v. Sims, 1502, 1504, 1518
- Barroilhet *v.* Battelle, 2002

Barron *v.* Martin, 2095, 2174
v. Paulling, 2088
 Barrow *v.* Barrow, 959
v. Isaacs, 1091, 1871
v. Richards, 267, 268, 269, 1184, 2214
 Barruso *v.* Wodan, 1854
 Barry *v.* Adams, 2092
v. Edgenorth, 202
v. Glover, 1154
v. Lambert, 1700
v. Marriott, 1721
v. Nesham, 1242
v. Shelby, 535
 Barteau *v.* West, 2206
 Bartee *v.* Thompkins, 890
 Bartels *v.* Creditors, 1164, 2263
 Bartenback, *Re*, 890
 Barthe *v.* Lines, 899
 Barthell *v.* Syverson, 2086
 Bartholomew *v.* Edwards, 2296
v. Hamilton, 143
v. Hook, 1408, 1409
v. West, 1415, 1421, 1422, 1424
 Bartle's Case, 234
 Bartles *v.* Nunan, 646
 Bartlett *v.* Baker, 1300
v. Bartlett, 1537, 1589
v. Brake, 987
v. Downes, 1743
v. Drake, 1365
v. Drew, 1760
v. Gouge, 760, 788, 831
v. Harlow, 1492, 1924, 1967
v. Jones, 1243, 1244
v. Pickersgill, 2035
v. Van Zandt, 726, 746
v. Wood, 133
 Bartol *v.* Calvert, 969, 1006
 Barton's Estate, 1721
 Barton *v.* Bartou, 271
v. Briscoe, 1844
v. Drake, 1475, 1476, 1482, 1484, 1486
v. King, 225
v. Williams, 1246, 1247
 Barziza *v.* Story, 1643
 Bascom *v.* Albertson, 1603
v. Smith, 520, 810, 1580, 2097
 Bashaw *v.* State, 595
 Bashford *v.* Pierson, 2339
 Baskins' Appeal, 328
 Baskins *v.* Giles, 645
 Bass *v.* Edwards, 2220
v. Estill, 2366
v. Scott, 1550, 1560, 1577, 1672, 1673
 Basse *v.* Gallegger, 2051
v. Mitchell, 2357
 Basset *v.* Basset, 618, 646, 967, 2028, 2046
 Basset *v.* Bradley, 2166
v. Brown, 987
v. Mason, 810, 2096, 2157
v. Messner, 1388, 1390
 Bastow, *Doe ex d.*, *v.* Cox, 1256, 1265, 1275, 1278, 1294, 1295, 1318, 1326
 Batchelder *v.* Batchelder, 1275, 1307, 1342
v. Dean, 970, 971, 1003
v. Sanborn, 2212
v. Sturgis, 730, 1095
 Batcheler *v.* Middleton, 2171
 Batchelor *v.* Macon, 346
v. Whitaker, 284
 Bate *v.* Scales, 1733
 Bateman *v.* Allen, 1024
v. Bateman, 1806
v. Hotchkin, 560
v. Pool, 1488
 Baten's Case, 21
 Bates *v.* Austin, 1146, 1309
v. Ball, 1033
v. Bates, 761, 816, 826, 886, 1411, 1425, 1686, 1687
v. Coe, 1997
v. Conrow, 1222

Bates *v.* Dandy, 1360
v. Equitable F. & M. Ins. Co., 2116
v. Graves, 271
v. Hurd, 1589, 1592
v. Miller, 2146
v. Nellis, 2274
v. Norcross, 207, 884, 2365
v. Phinney, 2247, 2271
v. Ruddick, 2151, 2155, 2174, 2181
v. Seely, 1887, 1920, 1931, 1940, 1952
v. Shraeder, 629, 639, 640
v. Sparrell, 31, 32
 Batesville Institute *v.* Kauffman, 1660, 2106
 Bath *v.* Valdez, 1898
 Batin *v.* Bigelow, 522
 Batstone *v.* Slater, 1581, 1617
 Battersbee *v.* Farrington, 648
 Batterton *v.* Chiles, 1973
 Batteste *v.* Maunsell, 1693
 Battey *v.* Hopkins, 1569
v. Snook, 1996, 2040, 2050
 Battin *v.* Woods, 1618
 Battle *v.* Petway, 1577, 1578, 1741, 1742, 1753
 Battle Square Church *v.* Grant, 324, 371
 Batty *v.* Snook, 1996, 2168
 Baugh *v.* Barrett, 1428
 Baugher *v.* Merryman, 2047, 2052, 2055, 2168
v. Nelson, 1517
v. Wilkins, 1079, 1081
 Baughman *v.* Baughman, 408
 Baum *v.* Baum, 759
v. Grisby, 2006, 2007
 Baumgartner *v.* Guessfield, 1646
 Bavington *v.* Clarke, 1671, 1699, 1978
 Baxendale *v.* McMurray, 2238, 2240
 Baxter *v.* Boyer, 965
v. Bradbury, 355
v. Browne, 993
v. Bush, 1030
v. Child, 2050
v. Dear, 2038, 2039
v. Dyer, 2063
v. Gilbert, 2110
v. Knowles, 2073
v. Lansing, 1140, 1872
v. McIntire, 2027, 2029, 2133
v. Rodman, 1240
v. Taylor, 550, 553, 567
 Bay *v.* Gage, 671
v. Williams, 2166
 Bay City Gaslight Co. *v.* Industrial Works, 68
 Bay State Bank *v.* Kiley, 1275
 Bayard *v.* Colefax, 1756
v. Morshew, 883
 Bayer *v.* Cockrill, 1563
 Bayles *v.* Baxter, 1651
 Bayley *v.* Bailey, 2041, 2119
v. Fitzmaurice, 999, 1252
v. Glenn, 2106
v. Gould, 2104
v. Greenleaf, 2005, 2006
v. Homan, 1869
v. Lawrence, 1168, 1178
v. McGraw, 2138
v. Mollard, 2281
v. Richardson, 1123
 Baylies *v.* Payson, 1665, 1689, 1691
v. Peyton, 1690
v. San Antonio Nat. Bank, 1510
v. Sinex, 1211
 Bayne *v.* United States, 1761
 Baynton *v.* Finnall, 1024, 1033, 1364
 Bazemore *v.* Davis, 1893, 1909
 Beach *v.* Beach, 1595, 1707, 1713, 1742
v. Campbell, 1758
v. Child, 1905
v. Farish, 1083, 1175, 1177
v. Frankenberger, 2206
v. Hollister, 1887, 1951
v. Miller, 587
v. Nixon, 1138
v. Packard, 1698, 1702, 2349

- Beach *v.* Shaw, 2169
 Beachcroft *v.* Beachcroft, 307
 Beal *v.* Miller, 918, 942
 v. Warren, 1625
 Beale *v.* Beale, 618
 v. Holmes, 536
 v. Knowles, 1364, 1366, 1367
 Beall *v.* Holmes, 306, 332
 v. White, 2018
 v. Williamson, 2056
 Bealor *v.* Hahn, 663, 664
 Beals *v.* Providence Rubber Co., 1102
 Beamish *v.* Beamish, 595
 v. Cox, 1311, 1339
 v. Hoyt, 585, 670
 v. Overseers, 689, 2062
 Bean *v.* Boothby, 2096
 v. Coleman, 72, 2361
 v. Dickerson, 1071, 1078
 v. Edge, 984, 2273
 v. French, 281, 283, 284
 v. Mayo, 1094
 v. Morgan, 2346
 v. Murphy, 2231
 v. Pettingill, 2302
 v. Smith, 1481
 v. Valle, 1697
 v. Whitcomb, 2157
 Bear *v.* Bitzer, 46, 52
 v. Snyder, 712, 762, 819, 868
 v. Whisler, 1588, 1852
 Bearce *v.* Barstow, 2071
 v. Jackson, 206
 Beard *v.* Beard, 647
 v. Blum, 1502
 v. Federy, 217, 218
 v. Fitzgerald, 2153, 2178, 2180
 v. Griggs, 961
 v. Knowlton, 712
 v. Knox, 711, 918, 943
 v. Linthicum, 1649
 v. Murphy, 2231, 2232, 2233
 v. Nuthall, 953, 966
 v. State, 2020
 Beardman *v.* Wilson, 1057, 1111, 1112, 1118,
 1159
 Beardslee *v.* Beardslee, 761, 780, 815, 820, 883,
 884, 885
 v. French, 57
 v. Underhill, 730
 Beardsley *v.* Knight, 1991
 v. Ontario Bank, 61, 113
 v. Selectmen of Bridgeport, 1604
 Bears *v.* Ambler, 1201
 v. Covilland, 1923
 Bearss *v.* Ford, 2168
 Beatson *v.* Beatson, 1791
 Beattie *v.* Butler, 756
 Beatty *v.* Gregory, 1280
 v. Mason, 2296, 2297
 v. Wray, 1889
 Beaty *v.* Bordwell, 1891, 1892
 v. Gibbons, 82
 v. Harkey, 1870
 Beaufort *v.* Bert, 1021
 v. Collier, 1361
 Beaumont's Case, 389, 756
 Beaumont *v.* Thorpe, 1626
 Beavan *v.* Delahay, 540
 v. McDonnell, 987, 1034
 v. Speed, 1467
 Beavans *v.* Briscoe, 539, 540
 Beaver *v.* Lane, 1363, 1369
 v. Nutter, 2235
 v. Snyder, 868
 Beaver Falls Water Power Co. *v.* Wilson, 889
 Beavers *v.* Smith, 729, 814, 841, 844, 858
 Bebb *v.* Crowe, 1436
 Becar *v.* Fues, 971, 978, 997, 1111, 2260
 Beck's Estate, *Re*, 221, 222
 Beck *v.* Allison, 1083
 v. McGillis, 216, 217
 Beck *v.* Rebow, 109, 121, 127
 v. Uhrich, 1638, 1642, 1643, 1763, 1779
 Becker *v.* Becker, 1514
 v. De Forest, 979, 993
 v. Werner, 1140, 1141, 1158
 Beckerdite *v.* Arnold, 1231
 Beckett *v.* Cordley, 2124
 Beckford *v.* Beckford, 1647
 v. Wade, 1783, 1784, 2176
 Beckwith *v.* Boyce, 115, 122
 v. Howard, 1064
 v. Windsor Mfg. Co., 2141
 Beddingsford's Case, 864, 867
 Bedell's Case, 1557
 Bedell *v.* Constable, 1021, 1022
 v. McClellan, 2160
 v. Shaw, 252, 489
 Bedford *v.* Bedford, 628, 639
 v. Kelley, 1213
 v. McEthern, 1271
 v. McEthern, 1125, 1150, 1310
 v. Terhune, 1073, 1077, 1109, 1112, 1118,
 1119, 1121, 1122, 1124, 1159, 1161,
 1162
 Bedill's Case, 2316
 Bedingfield *v.* Onslow, 2248
 Bedlow *v.* New York Floating Dry Dock Co.,
 1306
 Bedon *v.* Bedon, 383
 Beebe *v.* Coleman, 2251
 v. Griffing, 2279, 2286
 v. State, 2328
 Beech *v.* Miller, 588
 Beecher *v.* Baldy, 1475, 1502, 1503
 v. Buckingham, 1887
 v. Hicks, 678, 698, 1372, 1709
 v. Parmele, 1351
 Beeder *v.* Meeker, 2120
 Beegle *v.* Wentz, 1634, 1650
 Beekman *v.* Bousor, 1603, 1604
 v. Frost, 2119
 v. Hudson, 819
 v. Lansing, 50
 v. People, 1549, 1603
 v. Saratoga & S. R. Co., 197, 2327, 2328
 Beekman Fire Ins. Co. *v.* 1st Meth. Church
 2031
 Beeler *v.* Dunn, 1727
 Beeman's Appeal, 2279
 Beemel *v.* Beemel, 1894
 Beer *v.* Beer, 1026
 Beers *v.* Beers, 553
 v. Broome, 1016
 v. Houghton, 1517, 1518
 v. Lyons, 1573
 v. St. John, 122, 145, 565
 v. Strong, 740
 v. Williams, 1162
 Beeston *v.* Weate, 2229
 Beezeley *v.* Burgett, 2251, 2258
 Began *v.* O'Reilly, 2023
 Begbie *v.* Crook, 1788, 1844
 Behman *v.* Barto, 1001
 Beidler *v.* Fish, 1160
 Beill *v.* Chesson, 2251
 Beirne *v.* Beirne, 675
 Belch *v.* Harvey, 2176
 Belcher, *Ex parte*, 132, 133
 v. Belcher, 1754
 v. Butler, 2139
 v. Costello, 2107
 Belchier *v.* Parsons, 1713, 1714, 1723, 1728
 Belden *v.* Meeker, 2109
 v. Seymour, 1698, 1700
 v. Shade, 2170
 Belding *v.* Cushing, 142
 Belford *v.* Belford, 778
 v. Crane, 670, 679, 792, 1638, 1640
 Belfour *v.* Weston, 1179, 1181, 1182
 Belk *v.* Massey, 2365
 Belknap *v.* Trimble, 1988
 Bell *v.* Adams, 2301

- Bell v. Bell**, 1782, 1783, 1784
v. Deas, 1831
v. Denson, 2298
v. Ellis' Heirs, 1291
v. Farmers' Bank of Ky., 2035
v. Fleming, 2029, 2113
v. Gilmore, 2167
v. Hany, 1280
v. Holford, 1795
v. Hurlley, 2295
v. Josselyn, 1194, 1196
v. Keefe, 2363
v. Kennedy, 1456
v. Lent, 2060
v. Mayor of New York, 783, 800, 801, 802, 803, 945, 2000, 2075, 2088, 2185, 2272, 2282
v. Morse, 2103, 2111
v. Nealy, 733, 887, 892, 894, 895, 921
v. New York, 511, 925
v. Norfolk S. R. Co., 199
v. Norris, 1319
v. Ohio & P. R. Co., 2191, 2192, 2194, 2201
v. Perkins, 671
v. Phyn, 1964
v. Pierce, 2034
v. Red Rock, 2303
v. Scammon, 237, 307, 308, 309, 312, 322, 323, 332, 340, 342, 470, 2315, 2316, 2318, 1319
v. Scannan, 2359
v. Schwarz, 1454
v. Shrock, 2148
v. Simpson, 2107
v. Smith, 2303
v. Tenny, 811
v. Thomas, 2126
v. Twilight, 744, 2301
v. Western Ins. Co., 2115
v. Wilson, 84, 94
v. Woodward, 810, 2097, 2212
- Bell Co. v. Alexander**, 303, 328, 335, 336
- Bellamy v. Bellamy**, 1620, 1794
v. Buckenden, 2089
v. Burrow, 1690
- Bellas v. McCarthy**, 278, 2365
- Bellasis v. Burbirchie**, 979
v. Burbrick, 979
- Beller v. Robinson**, 994, 996
- Bellias v. Ermine**, 271
- Bellinger v. Shafer**, 1726
- Bellis v. Bellis**, 2345
- Belloc v. Davis**, 1058, 2031
v. Rogers, 2145, 2146, 2155
- Bellow v. New York Floating Dry Dock Co.**, 61
- Bellows v. Burlington, C. & M. R. Co.**, 1028
v. Sackett, 1199, 2232
v. Todd, 2342
v. Wells, 52
- Bells v. Gillispie**, 416
- Belmont v. Coman**, 266, 2068, 2069, 2179, 2180
v. O'Brien, 1549, 1798, 1807, 1808, 1809, 2093, 2094
- Belote v. Morrison**, 2045
v. White, 1709
- Belt v. Ferguson**, 794, 913
- Belton v. Avery**, 2040
- Bemer v. Call**, 924
- Bemis v. Driscoll**, 1425
v. Leonard, 1005, 2256
v. Wilder, 1050, 1057, 1058
- Benbow v. Townsend**, 1649
- Benden v. Manning**, 1183
- Bender v. Fleurie**, 411
- Bendred v. Griffith**, 1091
- Benedict v. Bunnell**, 1457
v. Gaylord, 1883, 1934
v. Gilman, 2088, 2171, 2185
v. Howard, 1905
v. Martin, 1194
- Benedict v. Morse**, 1294, 1296, 1350, 1354
v. Torrent, 1989
v. Webb, 1450, 1478
- Benesch v. Clark**, 317, 319, 320, 336, 337, 487, 536
- Benett v. Costar**, 2197
- Benfey v. Congdon**, 1131, 1136, 1278, 1285, 1351
- Bengough v. Eldridge**, 1693
- Benham v. Rowe**, 1755, 2088, 2090, 2163
- Benjamin v. Elmira R. Co.**, 2018, 2019
v. Heeney, 1083
- Benkert v. Jacoby**, 338
- Benneck v. Whipple**, 1297
- Bennell v. Chancellor**, 1032
- Benner v. Evans**, 877
- Bennet v. Bennet**, 745
v. Bullock, 1903, 1904, 1917
v. Child, 1920, 1930, 1933, 1940, 1941, 1942, 1945, 1952, 1971
v. Davis, 654, 656, 684, 699
v. Harms, 721, 750
- Bennett, Ex parte**, 1771
v. Atherton, 1082
v. Austin, 1620, 1643, 1644, 2101
v. Bates, 2109
v. Bennett, 1360, 1367
v. Bittle, 1128, 1168
v. Colley, 1782, 1783
v. Cutler, 1382
v. Davis, 680
v. Garlock, 1577, 1784
v. Holbeck, 1888
v. Hudson, 1637
v. Mattingly, 2149
v. Pierce, 1320
v. Plummer, 2064
v. Robinson, 271, 1274, 1282, 1284, 1347, 1350, 1355
v. Solomon, 2106, 2349
v. Tankerville, 426
v. Union Bank, 1992, 2014
v. Van Syckel, 1089
v. Waller, 2301
v. Williams, 1662
v. Womack, 1065
v. Wyndham, 1817
Doe d., v. Long, 1309
- Benning v. Benning**, 965
v. Nelson, 1794
- Bennock v. Whipple**, 1136, 1266, 1285, 1297, 1304, 2039
- Benoist v. Munday**, 727
- Bensell v. Chancellor**, 986
- Bensley v. Burdon**, 2358
- Benson v. Aitken**, 1460
v. Miners' Bank, 89
v. Morrow, 69
v. Munroe, 1180
v. Scott, 790
v. Suarez, 1199, 2232
- Bent v. Stamford**, 76
v. Weeks, 740
- Bentham v. Smith**, 1831
- Bentley v. Barton**, 976
v. Mackay, 1690
v. Oldfield, 2
v. Phelps, 2046, 2048, 2049
v. Sill, 1128, 1166, 1168
v. Vanderheyden, 2070
v. Whittlemore, 2134
- Benton v. Fay**, 1248
v. Hatch, 2172
v. Kent, 2139
v. Shreeves, 2136, 2150
- Benyon v. Madison**, 314
- Bepp v. Fox**, 1961
- Beppers' Will**, 1837
- Berberick v. Fritz**, 2047
- Berdan v. Sedgwick**, 2060
- Berden v. Van Riper**, 1729
- Berg v. Ingalls**, 1952, 1953
v. McLafferty, 1897

- Bergen *v.* Bennett, 1805, 1806, 1810, 1826, 1832,
1834, 1835, 1842, 1843, 2120
Berger *v.* Duff, 1663, 1667, 1841, 2159
Bergner *v.* Paethrop, 992
Bergoyne *v.* Spurling, 2127
Berkeley *v.* Hardy, 1805
v. Rider, 347, 1600
Berley *v.* Rampacher, 1514
v. Taylor, 1600
Bernal *v.* Hovious, 1234, 1235, 1239
Bernhardt *v.* Lymburner, 2153, 2154
Bernard's Case, 576
Bernard *v.* Bougard, 1653
v. Minshull, 1627, 1628, 1633
Bernecker *v.* Miller, 1908, 1913
Bernstein, *Inte*, 1787
v. Humes, 2083
Berrell *v.* Sabine, 2052
Berridge *v.* Glassey, 969
Berrien *v.* Berrien, 1590
v. Conover, 873
v. McLane, 1662
Berrigan *v.* Fleming, 1920, 1933
Berringer *v.* Cobb, 1288
v. Schaefer, 268
Berrington *v.* Casey, 1000
Berry *v.* Boggess, 1497
v. Bowen, 1040
v. Dobson, 1386, 1394
v. Hall, 693, 694, 700
v. Lindley, 1310, 1323
v. Mutual Ins. Co., 2003, 2036, 2120, 2123,
2124
v. Rigler, 2358
v. Taunton, 1250
v. Waring, 1697
v. Whitney, 2069
v. Williamson, 1609
Berryman *v.* Potter, 2170
Berthelemy *v.* Johnson, 517
Berthold *v.* Fox, 1993, 1999, 2076, 2078
v. Holman, 1999
Bertie *v.* Beaumont, 1288
v. Falkland, 1857, 1858
Bertles *v.* Nunan, 670, 1024, 1920, 1933, 1942,
1945, 1950, 1951, 1952, 1953
Bertram *v.* Cook, 1148, 1218, 1219
Bessell *v.* Landsberg, 1336, 1337
Besser *v.* Hawthron, 811, 2000, 2077, 2078
Besson *v.* Cribble, 751
Best *v.* Allen, 1450, 1473, 1475, 1477
v. Gholson, 1479, 1506
v. Given, 2343
Bethell *v.* McCool, 1903, 1904
Bethlehem *v.* Annis, 1849, 1870, 2030, 2032
v. Perseverance Fire Co., 1505
Bettinger *v.* Baker, 539
Bettison *v.* Budd, 1214, 1220
Betts *v.* Brown, 2296
v. Lee, 62
v. Ratliff, 1234
v. Union Bank, 2349
v. Union Bank of Maryland, 1698
v. Wirt, 2279
v. Wise, 706, 711
Beusen *v.* Mayor of Albany, 2335
Bevan *v.* Hayden, 1483, 1514
v. Pope, 832
Bevans *v.* Briscoe, 1206
Beverly's Case, 1032, 2344
Beverly *v.* Burke, 212, 517, 2295
v. Lincoln Gas Light & Coke Co., 1332
Beverson's Estate, 759
Bevins *v.* Cline, 1938
Bewick *v.* Whitfield, 575
Bexwell *v.* Christie, 1770
Bibb *v.* Balser, 2126
v. Bibb, 447, 468
Bibby *v.* Carter, 2232
Bible Society *v.* Pendleton, 1685
Bicket *v.* Morris, 2228
Bickford *v.* Daniels, 2039
Bickley *v.* Biddle, 890
Bicknell *v.* Bicknell, 2004
v. Byrnes, 2167
Biddel *v.* Brizzolara, 2178
Biddle *v.* Hussman, 1127, 1129, 1167, 1170, 1171,
2250, 2268
v. Reed, 1182
Biddulph *v.* Biddulph, 94, 434
v. Lees, 417
Bierer's Appeal, 960
Bierne *v.* Bierne, 687
Bigden *v.* Vallier, 1878
Bigelow *v.* Bush, 2150
v. Cassidy, 2136
v. Collamore, 1099
v. Finch, 976
v. Forrest, 278
v. Foss, 2302
v. Hubbard, 729, 898, 1092, 1093
v. Jones, 211, 1915
v. Kinney, 1031, 2011
v. Littlefield, 1978
v. Pritchard, 1510
v. Shaw, 68, 71
v. Stringfellow, 2171
v. Topliff, 1030, 1923, 2001, 2037
v. Wilson, 1005, 2063, 2112, 2256
Biggers *v.* Bird, 2046
Biggs *v.* Brown, 1208
v. Farrell, 982
Doe d., *v.* White, 1039, 1040
Bigler *v.* Furman, 1149, 1213
v. National Bank of Newburgh, 125
Bill *v.* Cureton, 1791
Billan *v.* Hercklebrath, 770, 771, 919
Billings, *Re*, 219
Billings *v.* Baker, 585, 587, 651, 660
v. Billings, 310
v. Canney, 1314
v. Clinton, 1646, 1648
v. Hauver, 2014
v. Sprague, 2177
v. Taylor, 89, 494, 561, 742, 811, 812, 853
v. Tucker, 983
Billingsly *v.* Hersey, 982
Bills *v.* Mason, 1496, 1504
Bingham's Case, 432
Bingham *v.* Barley, 1031
v. Clanmorris, 1788
v. Jones, 1842
v. Jordan, 2125
Binnerman *v.* Weaver, 271, 1858
Binney's Case, 44, 224
Binzel *v.* Grogan, 1385
Birch *v.* Wright, 1121, 1300, 1308
Bircher *v.* Parker, 147, 1188, 1315, 1316, 1348
Bird *v.* Bird, 883, 1895
v. Decker, 2062, 2063, 2064
v. Gardner, 805, 817, 830
v. Greville, 1055
v. Higginson, 2250
v. Keller, 2175
v. Kellow, 2075
v. Wilkinson, 2040
Birdsall *v.* Patterson, 2060
v. Tieman, 268
Birke *v.* Abbott, 2166
Birmingham *v.* Empire Ins. Co., 1224
v. Kirwan, 935, 956, 965
Birney *v.* Wilson, 804, 826
Birt *v.* Barlow, 758
Birtwhistel, Doe ex d., *v.* Vardill, 368, 369, 719,
2057, 2058
Bisbee's Lessee *v.* Hall, 974, 976, 1225
Biscoe *v.* Perkins, 288, 299, 300, 1594, 1605,
1712
Bishop *v.* Bedford Charity, 1196, 1202
v. Bishop, 52, 96, 103, 105, 119, 136, 567
v. Blair, 1363, 1370, 1376, 1904
v. Boyle, 708, 714, 744, 745, 789, 885, 891,
922, 923
v. Doty, 1233, 1235, 1239

- Bishop v. Douglass*, 2069
 v. Howard, 1265, 1317, 1324
 v. Hubbard, 1426, 1482, 1501, 1504
 v. Lalouette's Heirs, 1212
 v. Schneider, 2119, 2123, 2125, 2364, 2366
 v. Trustees, 1199
 v. Wall, 1836
Bishop of St. Albans v. Battersby, 1065
Bisland v. Hewett, 864, 2006
Bismark Bldg. & Loan Assoc. v. Bolster, 974, 975, 976
Biss v. Smith, 417
Bissell v. Bissell, 596
 v. Kellogg, 2060
 v. Penrose, 2015
 v. Taylor, 727
Fitner v. Brough, 729, 1093
Bittinger v. Baker, 45, 46, 1234
Bixby v. Whitney, 1865
Bizzell v. Nix, 2004
Black's Appeal, 1964
Black v. Black, 1963
 v. Cregg, 2002
 v. Curran, 1381, 1477, 1515
 v. Dressell, 2013
 v. Galway, 2152
 v. Gerichten, 2171
 v. Gilmore, 1080
 v. Hills, 1031
 v. Kuhlman, 715, 818
 v. Legion, 1038
 v. Ligon, 1037
 v. Lindsay, 1899, 1900
 v. Morse, 2179, 2180
Blackburn's Estate, 888
Blackburn v. Crawford, 596
 v. Gregson, 2004
 v. Knight, 1384
 v. Randolph, 2331
 v. Stables, 1693
 v. Warwick, 2051
Blackerby v. Holton, 2359
Blackford v. Christian, 1717
Blackinton v. Blackinton, 964
Blacklaw v. Lans, 1371
Blackledge v. Nelson, 2153
Blackman v. Holms, 2327
 v. Wheaton, 1514
Blackmer v. Phillips, 1751
Blackmon v. Blackman, 933
 v. Blackmon, 956
Blackmore v. Broadman, 1008, 1075, 1076, 1088
 v. Gregg, 1915
Blackstone Bank v. Davis, 239, 240, 246, 249, 256, 259, 263, 269, 273, 1857, 1860
Blackwell v. Barnett, 1993
 v. Wilkinson, 434
Blagge v. Miles, 202, 311, 1836, 1837
Blaggrave v. Blaggrave, 1797
Blain v. Everett, 1317
 v. Stewart, 2364
Blaine v. Harrison, 718, 733, 734, 735, 736, 741, 792, 793, 907
Blair v. Bass, 2104, 2106
 v. Claxton, 1167
 v. March, 2151
 v. Nugent, 1782
 v. Smith, 2300
 v. Thompson, 858
 v. Ward, 2113
 v. White, 2107
 v. Williams, 1511
Blake, Re, 1562
Blake v. Anscombe, 738, 1605
 v. Baker, 1102
 v. Blake, 76, 1691
 v. Clark, 1014
 v. Coats, 1230, 1231
 v. Collins, 297
 v. Crowninshield, 2256
 v. Everett, 2219
 v. Ferris, 1194, 1195
Blake v. Fish, 2355
 v. Flatley, 1485, 1486
 v. Foster, 2174, 2301
 v. Irwin, 1825
 v. Jones, 42, 1697
 v. Nutter, 824, 1957
 v. Peters, 231
 v. Respass, 133
 v. Sanderson, 1058, 1114, 1117, 1156, 2262, 2265
 v. Williams, 367, 720, 2057, 2105, 2107, 2288
Blakely v. Calder, 1980, 1982
Blakeman v. Blakeman, 2331
Blakemore v. Tabor, 2024
Blakeney v. Ferguson, 781, 831, 892
Blaker v. Anscombe, 542
Blakeslee v. Mobile Ins. Co., 2300
Blakey v. Albert, 2159
Blakley v. Smith, 999
Blamire v. Geldart, 314
Blanchard v. Baker, 2225
 v. Blanchard, 316, 1808
 v. Blood, 1371
 v. Bridges, 2222, 2247
 v. Coolidge, 1242
 v. Kenton, 2047, 2131
 v. Lampert, 596
 v. Moulton, 2296
 v. Raines, 2272
 v. Sheldon, 1594
 v. Tyler, 2355
Blanchard's Factory v. Warner, 234
Bland v. Bland, 347, 1627, 1632, 1684
 v. Lipscombe, 2214
Blande v. Asher, 1463
Blandford v. Blandford, 1880
Blaney v. Pearce, 1998, 2062, 2077
Blankard v. Galdy, 149
Blankenship v. Douglas, 1634
Blantin v. Whitaker, 1219
Blanton v. Taylor, 792
Blashford v. Duncan, 1351
Blasini v. Blasini, 596
Blatch v. Milder, 1614
Blatchford v. Woolley, 1826
Blatchley v. Coles, 1253
Blauvelt v. Ackerman, 1620
Blakney v. Farmers & Mechanics' Bank, 671
Bleecker v. Hennerson, 737
 v. Hennon, 731
 v. Smith, 1057, 1058, 1155, 1156
Blessing v. House, 1911
Blethen v. Dwinall, 2093, 2146, 2175
 v. Towle, 107, 108, 129
Blevins v. Baker, 1902
 v. Rogers, 2004
 v. Smith, 891
Blewett v. Coleman, 1922
Bligh v. Brent, 42, 43, 44, 45
Blight v. Banks, 2153
 v. Schenck, 1786
Blight's Lessee v. Rochester, 216, 1160, 1214, 1222, 1241
Blish v. Harlow, 1274
Bliss v. American Bible Society, 1555
 v. Brainard, 2056
 v. Clark, 1504
 v. Collins, 2269
 v. Connecticut R. Co., 1032
 v. Greeley, 21
 v. Kennedy, 2248
 v. Matteson, 75, 1623
 v. Sheldon, 967
 v. Smith, 1550, 1551, 1566
 v. Whitney, 129, 130, 145, 146, 1187
Bloch v. Isham, 2235, 2236
Bloekley v. Fowler, 2163
Blodgett v. Brent, 834, 891
Blont v. Winter, 939
Blood v. Blood, 703, 798, 815, 821, 851, 2364, 2366

- Blood *v.* Goodrich, 1026, 1042
 Bloodgood *v.* Clark, 506
 v. Mohawk & H. R. Co., 2327, 2328
 Bloodworth *v.* Stevens, 2250, 2252, 2257, 2259
 Bloom *v.* Cate, 2333
 v. McGehee, 2272
 v. Noggie, 2121
 v. Van Rensselaer, 2160, 2164
 v. Welsh, 40, 51
 Bloomer's Appeal, 1662
 Bloomer *v.* Spittle, 2331
 v. Waldron, 1663, 1810, 1832
 Bloomingdale *v.* Barnard, 2138
 v. Bowman, 2111
 Flore *v.* Sutton, 999
 Blossom *v.* Blossom, 785, 1911, 1912
 v. Milwaukie & C. R. Co., 2154, 2159
 v. Van Court, 4094
 Blount *v.* Robeson, 1621, 1781
 v. Winter, 905
 Blout *v.* Blout, 2350, 2359
 Blow *v.* Maynard, 762, 815
 Blower *v.* Murich, 937
 Bludwerth *v.* Lake, 2151
 Blue *v.* Blue, 1395, 1421, 1422, 1424, 1496
 Blum *v.* Carter, 1444
 v. Robertson, 1271, 1278, 1282
 v. Rogers, 1461
 Blumberg *v.* McNear, 2260
 v. Mitchell, 2087
 Blumenberg *v.* Myers, 1316, 1317, 1326, 1327,
 1329, 1330
 Blumenthal *v.* Bloomingdale, 996, 1324, 1325
 Blumfield's Case, 498
 Blundell *v.* Dunn, 2282
 Blunden *v.* Baugh, 210
 Blunt *v.* Aiken, 1199
 v. Gee, 866, 916, 936, 947
 v. Walker, 2014, 2016, 2107, 2111
 Bly, Doe d., *v.* Colman, 1040
 Blyer *v.* Monholland, 2068, 2166
 Blythe *v.* Dagin, 1485
 v. Dennett, 1058, 1345
 Boalman's Savings Bank *v.* Grewe, 2107
 Board of Commissioners *v.* Harman, 1287, 2260,
 2261
 Board of Commissioners Tippecanoe County *v.*
 B. L. & R. Co., 1019
 v. L. M. & B. R. Co., 1019
 Boardman *v.* Bourne, 2335
 v. Catlett, 2169
 v. Cattle, 2073
 v. Florez, 1766
 v. Gore, 2339
 v. House, 1456
 v. Larabee, 2071, 2072
 v. Mosman, 1733
 v. Osborn, 1167
 v. Reed, 2304
 Boatman *v.* Lasley, 2217, 2218
 Boatwright *v.* Faust, 353
 Bob *v.* State, 752
 Bobo *v.* Andrew, 2226
 Robst *v.* Brocks, 1998
 Bockover *v.* Post, 1143
 Boddam, *Ex parte*, 260, 272
 Boddington *v.* Robinson, 483, 531
 Bodine *v.* Gladine, 1872
 Bodwell *v.* Webster, 2038, 2039, 2041
 Boehm *v.* Engle, 149
 Boester *v.* Byrne, 2156
 Bogardus *v.* Parker, 732, 1893
 v. Trinity Church, 211, 225, 1148, 1898,
 1899
 Bogert *v.* Furman, 94, 363
 v. Hertell, 2101
 Bogey *v.* Shute, 2148
 Bogg *v.* Hargrave, 890
 Boggess *v.* Meredith, 1924
 Boggett *v.* Frier, 426
 Boggs *v.* Black, 1271
 v. Boggs, 1464, 1919
 Boggs *v.* Fowler, 2149, 2151
 Bogie *v.* Rutledge, 766, 826, 830
 Bogy *v.* Roberts, 597, 598, 650, 652, 701
 v. Shoab, 2321, 2322
 Bohall *v.* Dilla, 1586, 2306, 2307
 Bohannon *v.* Combs, 794
 Bohannon *v.* Shreshley, 1781
 Bohon *v.* Bohon, 2301
 Boice *v.* Mich. L. Ins. Co., 2149
 Bokee *v.* Hammersley, 2266
 Bolen *v.* Crosby, 2099
 Bollenbacker *v.* Fritts, 1316, 1328
 Boiler *v.* Mayor of New York, 1029
 Bolles *v.* Beach, 2971
 v. Duff, 1036, 2144
 v. State Trust Co., 1580, 1655, 1920, 1931
 Bolling *v.* Bolling, 936
 v. Petersburg, 2205
 Bollinger *v.* Chouteau, 2094
 Bollo *v.* Navarro, 1975
 Bolman *v.* Lohman, 1824
 Bolster *v.* Cushman, 717, 764, 834, 875
 Bolton *v.* Ballard, 791, 805, 845
 v. Bolton, 661
 v. Brewster, 2000
 v. De Peyster, 1837
 v. Duncan, 2273
 v. Grantham, 1039
 v. Hamilton, 1916
 v. Johns, 1517, 1699
 v. Landers, 1144, 1253, 1308
 v. Nallard, 802
 v. Tomlin, 1313
 Denn d., *v.* Bowne, 310
 Boltz *v.* Stolz, 734
 Bomar *v.* Mullins, 1920
 Bomback *v.* Sykes, 1502
 Bond, *In re*, 1684
 Bond *v.* Bond, 986
 v. Bunting, 1587
 v. Coke, 51, 104, 133, 2021
 v. Dolby, 2166
 v. Hilton, 1903, 1921
 v. Hopkins, 1644, 2139
 v. Seymour, 1481
 Bonds *v.* Boardman, 2103
 v. Smith, 1213
 Bone *v.* Cooke, 1608, 1735
 Bonham *v.* Galloway, 2101
 Bonifant *v.* Greenfield, 1788
 Bonnell *v.* Allen, 1184
 v. Smith, 1405
 Bonner *v.* Kennebeck Purchase, 1982
 v. Peterson, 813, 814
 v. Petitioner, 1985
 Bonnett *v.* Saddler, 564, 1185
 Bonney *v.* Foss, 62, 123
 v. Ridgard, 1784
 Bonomi *v.* Backhouse, 200, 2233
 Bonorden *v.* Kriz, 1490
 Bonsall's Case, 1716
 Bonsall *v.* Comly, 1399, 1432
 Bonser *v.* Kinner, 1629
 Bonyhurt *v.* Flummerfelt, 2212
 Boody *v.* Boody, 661
 v. Davis, 1786, 2027, 2028, 2029, 2046
 v. McKenny, 2343
 v. Neece, 2295
 Booker *v.* Bell, 730
 v. Carlile, 1548
 v. Jones, 2017, 2020
 Bool *v.* Mix, 515, 905, 985, 986, 1032, 2343
 Booley, Doe d., *v.* Roberts, 2
 Boon *v.* Murphy, 2008
 v. Pierpont, 2024, 2146
 Boone *v.* Boone, 933, 941
 v. Chiles, 1578, 1622, 1662, 1782, 2036, 2123
 v. Citizens' Savings Bank, 1655
 v. Clark, 2133, 2140
 v. Moore, 2356
 v. Purnell, 757
 v. Stover, 970, 976

- Boone *v.* Tipton, 722
Booraem *v.* Wood, 2067
Booth *v.* Adams, 1903
 v. Baltimore Steam Packet Co., 2086,
 2087, 2088
 v. Barnum, 2027, 2029
 v. Booth, 1715, 1733
 v. Clark, 2365
 v. Conn. Mut. Life Ins. Co., 2166
 v. Cook, 2365
 v. Kehoe, 1047
 v. Lambert, 855, 857
 v. Small, 2298
 v. Stebbins, 916, 935
 Doe d., *v.* Field, 1605
Boothby *v.* Bailly, 30
 v. Vernon, 649, 675, 689, 694, 697
Bopp *v.* Fox, 787, 824
Borah *v.* Archers, 1988
Boraston's Case, 315, 1848
Borden *v.* Downey, 1821, 1823
 v. Kingsbury, 448
Bordman *v.* Osborn, 1171
Boreel *v.* Lawton, 1082, 1168
Borell *v.* Dann, 1697
Borie *v.* Crissman, 498
Borland's Appeal, 2264
Borland *v.* Dean, 1659
 v. Nichols, 949
 v. Nicoll, 935
Borland's Lessee *v.* Marshall, 517, 598, 603, 604,
 612, 614, 706
Borroughs *v.* White, 1513
Borst *v.* Boyd, 2075
 v. Spelman, 681
Boskowitz *v.* Davis, 1633
Bosler *v.* Kuhn, 58, 59
Bosquett *v.* Hall, 1398, 1401
Bostick *v.* Keizer, 1751
Bostock *v.* Blakeny, 1726, 1727
Boston *v.* Binney, 1213, 1297
 v. Richards, 2091
 v. Richardson, 4, 2092
Boston Bank *v.* Chamberlain, 2014, 2343
 v. Reed, 2064, 2066
Boston, C. & M. R. Co. *v.* Gilmore, 98
Boston Franklinita Co. *v.* Condit, 1729, 1812,
 1842, 1924, 1983
Boston Iron Co. *v.* King, 2185
Boston & L. R. Co. *v.* Boston & S. R. Co.,
 2327
 v. Salem & L. R. Co., 3
Boston & Roxbury Mills Co. *v.* Newman, 2316
Boston & W. R. Corp. *v.* Haven, 2089, 2090
 v. Sparhawk, 2092
Boston Water Power Co. *v.* Boston & W. R.
 Co., 2211, 2327
Bostwick *v.* Atkins, 1031
 v. Beach, 839
 v. Blades, 270, 271
 v. Champion, 1240, 1244
 v. Dry Goods Bank, 1746
 v. Estate of Dickson, 1783
 v. Frankfield, 1163
 v. Leach, 51, 52, 53, 143
 v. Williams, 729, 1094
Boswell *v.* Buchanan, 2301
 v. Dillon, 1607
Bosworth *v.* Strickhart, 2358
 v. Sturtevant, 2357
Botham *v.* McIntier, 2015, 2144
Bothell, Doe d., *v.* Martyr, 1626
Botheroyd *v.* Woolley, 1301, 1306
Botsford *v.* Burr, 1613, 1633, 1634, 1635, 1642,
 1646, 1651, 1653, 1696
 v. McLean, 2330
Bott *v.* Perley, 2333
Bottoms *v.* Carley, 588
 v. Corley, 633, 1372
Bottorf *v.* Connor, 2009
Bouchard *v.* Bourassa, 1500
Boudette *v.* Pierce, 1308, 1325, 1335
Boudy *v.* Birdsall, 2347
Bouffam *v.* Green, 2354
Boughton *v.* Langley, 1607
Bouldin *v.* Alexander, 1661, 2260, 2261
Boulo *v.* New Orleans, M. & T. R. Co., 572
Boulton *v.* Lies, 918
Bourcier *v.* Edmondson, 2272
Bourdillon *v.* Dalton, 2266
Bourn *v.* Gibbs, 1684
Bourne *v.* Bourne, 2063
 v. Taylor, 84
Boutell *v.* Cowdin, 1671
Bovy's Case, Sir Ralph, 1626
Bowas *v.* Pioneer Tow Line, 1248
Bowditch *v.* Andrew, 1753
 v. Banuelos, 1662, 1787
Rowe's Case, 1328
Bowen *v.* Beck, 2068, 2072
 v. Bell, 1698
 v. Bowen, 947, 1401, 1402, 1851, 1862
 v. Chase, 1603, 1661, 1671, 1672, 1680,
 1737
 v. Clark, 1161
 v. Collins, 760
 v. Conner, 282, 285
 v. Dean, 317
 v. Edwards, 1996
 v. Preston, 1914
 v. Proprietors of South Building, 1289,
 1890
 v. Roach, 2257
 v. Scowcroft, 324
 v. Team, 2211
 v. Wood, 106
Bower *v.* Cooper, 1697
 v. Hill, 2240
Bowers *v.* Bowers, 35, 754, 1709
 v. Higbee, 984
 v. Johnson, 2111, 2112
 v. Keesecker, 831, 2306
 v. Oyster, 2004
 v. Pomeroy, 974
 v. Porter, 533, 535
Bowes *v.* East London W. Co., 1037, 1040
Bowie *v.* Berry, 780, 782, 841, 1614
 v. Frahe, 2291
 v. O'Neale, 1751
 v. Stonestreet, 647
Bowker *v.* Collins, 1443
 v. Walker, 1212
Bowler *v.* Erhard, 2260
Bowles' Case, 64, 372, 507, 521, 568, 815, 821,
 2186
Bowles *v.* Berrie, 2186
 v. Lyon, 1316, 1331, 1340
 v. Poore, 820
 v. Rogers, 2006
 v. Stewart, 491
Bowling *v.* Cook, 2120
Bowman *v.* Bailey, 1240
 v. City of New Orleans, 2225
 v. Cockrill, 2336
 v. Conn, 51
 v. Foot, 1058, 1155
 v. Keleman, 2251
 v. Lee, 2299
 v. Long, 1548, 2315
 v. Manter, 2134
 v. Middleton, 2324
 v. Norton, 1382
 v. Tallman, 1980
Bowne *v.* Potter, 764, 800, 870
Bowser *v.* Scott, 2250
Bowyer's Appeal, 1382
Bowyer *v.* Anderson, 1244
 v. Martin, 1210
 v. Seymour, 1138, 1154
 Denne d., *v.* Judge, 1970, 1971
Boxheimer *v.* Gunn, 2133
Boyce *v.* Blakewell, 2266
 v. City of St. Louis, 1549
 v. Coster, 1961

- Boyce *v.* Grundy, 1669
v. Kelbaugh, 2302
v. Owens, 2346
v. Shiver, 1216
v. Waller, 485
v. Washburn, 54, 55
 Boyce's Exr. *v.* Tabb, 1515
 Boyd *v.* Allen, 2079, 2080
v. Baker, 2027
v. Beck, 2091, 2093
v. Blankman, 1620
v. Boyd, 1732
v. Brincken, 1622
v. Carlton, 789, 841, 842, 843, 844, 857
v. Conklin, 198
v. Croydon Railway Co., 1555
v. Cudderback, 240, 1382, 1434, 1467, 1479, 1506
v. De La Montagne, 647
v. Ellis, 1758, 2024
v. England, 1654
v. Harris, 2093
v. Harrison, 721, 725, 732
v. Hunter, 814, 816, 886
v. Martin, 804
v. McCombs, 2255
v. McLean, 1538, 1613, 1615, 1642, 1646, 1648
v. Parker, 2027
v. Schlesinger, 1047
v. Sherrick, 120, 126
v. Strahan, 339, 345
 Boyd's Lessee *v.* Talbert, 1154
 Boydell *v.* Drummond, 1087
v. Golightly, 1693
 Boyer *v.* Cockerill, 2321
v. Dively, 595, 596
v. Smith, 1160
v. Sweet, 118, 458
 Boyers *v.* Elliott, 1961
v. Newbank, 739, 847, 851
 Boykin *v.* Edwards, 1515
v. Face's Exr., 1587
v. Rain, 661, 663, 665
v. Shaffer, 1019
 Boyle *v.* Shulman, 1457
 Boyleston *v.* Cordes, 1901
v. Carver, 2102
 Boylston Insurance Co. *v.* Sylvester, 1911
 Boyne *v.* Rogers, 1199
 Boynton *v.* Bodwell, 1274, 1275, 1342, 1344
v. Dyer, 695
v. Hodgdon, 2298
v. Hubbard, 1770
v. Longley, 198
v. McNeal, 1481
v. Reynolds, 2363
v. Sawyer, 766, 783, 801, 826
 Boyst *v.* Ayerst, 1000
 Bozarth *v.* Largent, 588, 669, 1359, 1363
 Bozeman *v.* Browning, 1723
 Bozon *v.* Williams, 2002
 Bracebridge *v.* Cooke, 1025
 Bracken *v.* Cooper, 1990
v. Duchess of Marlborough, 2124, 2139
v. Vale, 2225
 Brackenbridge *v.* Cooke, 1025
 Bracken *v.* Cooper, 1990
v. Jones, 2296, 2298
v. Martin, 2295
 Brackenridge *v.* Holland, 1724, 1775
 Brackett *v.* Norcross, 1914
 Brackett *v.* Goddard, 54, 58, 137
v. Leighton, 707, 714, 776
v. Persons Unknown, 779, 807
v. Sears, 2030
v. Wait, 1623
 Braddee *v.* Wiley, 2259
 Braden *v.* Canon, 414, 415, 423
 Bradenburg *v.* Reitheman, 1125
 Bradfield *v.* Eylton Land Co., 1045
 Bradford *v.* Belfield, 1778
 Bradford *v.* Bradford, 267, 2330
v. Caldwell, 489, 513
v. Kimberly, 1889
v. Limpus, 1758
v. Marvin, 2004
v. Patton, 1052
v. Randall, 501
v. Street, 1814
 Bradfords *v.* Kents, 938, 946, 947, 948
 Bradish *v.* Gibbs, 1828, 1830
v. Schenck, 1233, 1234, 1235, 1239
 Bradlee *v.* Christ's Hospital, 2236
 Bradley *v.* Bailey, 498
v. Bosley, 2009
v. Boynton, 1921
v. Chester Valley R. Co., 2142, 2157, 2160
v. Corel, 1134, 1136, 1285, 1307, 1315, 1337
v. Covel, 1255, 1299
v. De Goicouria, 1168
v. Dixon, 943
v. Dwight, 194
v. Fuller, 689, 1981, 1998, 2062, 2077
v. George, 2178, 2180, 2181, 2183
v. Holdsworth, 42, 43, 45, 817
v. Peixoto, 249, 252, 337, 486, 499, 1860
v. Rodelsperger, 1399
v. Westcott, 339
v. Westcott, 319, 345, 487, 1806, 1816, 1836
v. White, 1240, 1241
 Bradley Fish Co. *v.* Dudley, 2244
 Bradner *v.* Faulkner, 45, 724, 821
 Bradshaw *v.* Callaghan, 732, 1982, 1984, 1989
v. Hurst, 1457, 1521
 Bradstreet *v.* Clarke, 208, 261, 1060, 1855, 2291
v. Rogers, 2325
v. Supervisors of Oneida, 1657, 2014
 Bradswell *v.* Bradswell, 1630
 Bradwell *v.* Catchpole, 1733
 Brady *v.* Banta, 1381, 1454, 1514, 1520
v. Brady, 1409
v. Ins. Co., 1173
v. Johnson, 2019
v. Parker, 1649
v. Peiper, 1160
v. Waldron, 2081, 2187
 Bragg *v.* Beers, 2333
v. Bragg, 779
v. Geddes, 1537
v. Ins. Co., 2114
v. Massie, 2047
v. Paulk, 1589, 1691
v. Tesseden, 2337
 Brahe *v.* Eldridge, 1795
 Brainerd *v.* Colchester, 784
v. Cooper, 2073, 2074, 2136, 2137, 2170
 Brainerd *v.* Arnold, 982
v. Brainerd, 2035, 2046
 Brair *v.* Robertson, 1013
 Braithwaite *v.* Hitchcock, 1328
 Brake *v.* Ramsay, 985
 Brakeley *v.* Sharp, 2208, 2245
 Braker *v.* Devereaux, 1983
 Braldisch *v.* Gibbs, 1820, 1829
 Bram *v.* Bram, 2150
 Braman *v.* Dowse, 2068, 2069
v. Stiles, 253, 273
 Bramble *v.* Billups, 416, 447, 472
 Bramhall *v.* Ferris, 246, 253, 260, 272, 1747
v. Flood, 2029, 2059
v. Hutchinson, 974, 975
 Branch *v.* Doane, 970, 2314
v. Jesup, 2018
v. Tomlinson, 1506
 Branch Bank *v.* Fry, 2065
 Brand *v.* Frumveller, 1008, 1140, 1141, 1158
 Brande *v.* Grace, 1189
 Brandies *v.* Cochrane, 1748
 Brandon *v.* Aston, 260, 272
v. Bannon, 1145
v. Robinson, 246, 249, 252, 257, 260, 272, 273, 500, 1373, 1858, 1860

- Brandt *v.* Clark, 2101
 Branford *v.* Branford, 662, 1369
 Branger *v.* Maciet, 1066, 1081
 Brannan *v.* Oliver, 1765
 Brannin *v.* Womble, 1425
 Brannon *v.* May, 1777
 Branson *v.* Hill, 314, 315, 316
 v. Labrot, 198
 v. Yancey, 731, 744, 837
 Brant *v.* Gelston, 292, 319
 v. Virginia Coal & Iron Co., 319, 338,
 339, 351, 1806, 2302
 Brantom *v.* Griffiths, 46
 Branton *v.* O'Briant, 1327, 1328, 1329, 1340
 Brashear *v.* Williams, 196
 Prassey *v.* Chalmers, 1833, 1842
 Brastow *v.* Rockport Ice Co., 71
 Bratt *v.* Bratt, 975
 v. Bratt's Admr., 976, 1249
 Bratton *v.* Clawson, 136
 v. Massey, 1563
 v. Mitchell, 1366, 1368, 1369, 1370
 Brawer *v.* Staup, 1642, 1646
 Braxon *v.* Bressler, 68, 1014
 Braxton *v.* Coleman, 789, 790, 823
 v. Lee, 794
 Bray *v.* Lamb, 889, 927, 949
 v. Neill's Exrs., 936
 v. West, 1788
 Braybroke *v.* Inskip, 2083, 2084
 Braye & Camoy's Peerage, Matter of, 233
 Braythwayte *v.* Hitchcock, 1258, 1261, 1262,
 1264, 1276, 1320, 1324, 1325
 Brayton *v.* Jones, 2087
 Brazee *v.* Lancaster Bank, 2140
 Brazier *v.* Ansley, 1237
 Brearley *v.* Cox, 142
 Breatly *v.* Breatly, 1810
 Breckenridge *v.* Auld, 2001, 2040
 v. Brooks, 2085, 2087, 2088, 2070
 v. Ormsby, 986, 2011, 2129, 2244, 2345
 Breckenridge's Heirs *v.* Ormsby, 2132
 Brecknock *v.* Pritchard, 1098, 1183
 Bredell *v.* Collier, 315
 Breed *v.* Judd, 2343
 Breeden *v.* McLaurin, 1900
 Breeding *v.* Davis, 588, 669, 670
 Breese *v.* Bangs, 688
 v. McCann, 1139
 Brennan *v.* Wallace, 1461, 1465
 v. Whitaker, 143
 v. Wilson, 1786, 1800
 Brent's Case, 1550, 1551, 1568
 Brent *v.* Best, 518
 Brenton *v.* Cannon, 518
 Bresee *v.* Stiles, 1411
 Bressler *v.* Kent, 2345
 Brest *v.* Offley, 1629
 Brett *v.* Carter, 2019
 v. Cumberland, 2263
 v. Rigden, 1571
 Brevard *v.* Neely, 1598, 1795
 Brevoort *v.* Brevoort, 1980
 Brewer *v.* Baxter, 236
 v. Boston Theater, 1019
 v. Connell, 728, 794, 795, 893, 913, 914,
 1576
 v. Craig, 1290
 v. Dyer, 1119, 2265
 v. Hardy, 2316, 2317, 2319
 v. Harris, 969, 1006
 v. Hill, 225, 475, 481, 969, 974, 1047
 v. Hyndman, 2172
 v. Keeler, 1212
 v. Linnæus, 1456
 v. Marshall, 2214
 v. Maurer, 2166
 v. Staples, 2150, 2179
 v. Thorp, 1315, 1316
 v. Wall, 1408, 1414, 1472, 1473, 1474, 1484,
 1485, 1486, 1487
 Brewster *v.* Baker, 2044
 Brewster *v.* Carmes, 2109
 v. De Fremery, 1196, 1197, 1200
 v. Kitchell, 1869
 v. Lime, 1746, 1765
 v. Madden, 2059
 v. Striker, 299, 1606
 Briar *v.* Robertson, 1323
 Brice's Estate, 596
 Brice *v.* Randall, 2207, 2217
 v. Stokes, 1608, 1732, 1733, 1735
 Brick *v.* Getsinger, 2187
 Brick Co. *v.* Pond, 983
 Brick Presbyterian Church, *Re.* 38, 40
 Brick Presbyterian Church *v.* New York City,
 40
 Bricker *v.* Hughes, 51
 v. Whalley, 1939
 Brickhouse *v.* Sutton, 878
 Bridge's Case, 958
 Bridge *v.* Wellington, 281, 291
 Bridge Proprietors *v.* Hoboken L. & J. Co.,
 1516
 Bridgemans *v.* Wells, 1046
 Bridges *v.* Carhart, 2139
 Bridgeport *v.* Blinn, 2073, 2169
 v. Hubbell, 2332
 v. Maxwell, 297, 889
 Bridger *v.* Pierson, 2361
 Bridges *v.* Hitchcock, 1008
 v. Potts, 1337
 Bridgewater *v.* Bolton, 202, 309, 312
 v. Egerton, 60
 Bridgford *v.* Riddell, 1376
 Bridgham *v.* Smith, 2207
 v. Tileston, 1119, 2265
 Bridgney *v.* Hitchcock, 1008
 Briggs *v.* Austin, 1207
 v. Davis, 1795, 1798, 2169
 v. Earl of Oxford, 572
 v. Fish, 1993
 v. Hall, 1128, 1166
 v. Kaupman, 2153
 v. Morgan, 594
 v. Morse, 1095
 v. Partridge, 1042
 v. Penny, 1627, 1630, 1633, 1683
 v. Shaw, 307, 309, 312
 v. Titus, 641
 Brigham *v.* Eveleth, 1896, 1967
 v. Potter, 2060
 v. Winchester, 1996
 Bright *v.* Eynon, 518
 v. McQuat, 1256, 1278, 1301, 1304, 1316,
 1327, 1328
 v. Pennywit, 2157
 v. Walker, 2292
 Brightman *v.* Brightman, 418
 Brightwell *v.* Mallory, 817
 Brigland *v.* Shafter, 983
 Briles *v.* Pace, 996
 v. Paste, 995
 Brimmer *v.* Proprietors Long Wharf, 2091, 2092
 Brinkerhoff *v.* Lansing, 2133
 Brindernagle *v.* German Ref. Church, 2156
 Bringhoff *v.* Munzemaier, 103
 Bringloe *v.* Goodson, 1820, 1844, 1845
 Brinkerhoff *v.* Phelps, 1092, 2133
 Brinkley *v.* Walcott, 1133
 v. Willis, 1781
 Brinkman *v.* Jones, 2085
 Brinley *v.* Mann, 2013
 v. Whiting, 2092
 Brinton *v.* Dates, 2262
 v. Hooks, 1919
 v. Seevers, 2366
 Brisbane *v.* Dates, 1180
 v. Stoughton, 2159
 Briscoe *v.* McElween, 2273
 v. McGee, 1919, 2005, 2006
 v. Powers, 2176, 2181
 Bristol *v.* Carroll, 2298
 v. Morgan, 2166

- Bristow *v.* Warde, 1811, 1882, 1990
 Brittain *v.* McKay, 45, 48, 49, 51, 52
 Brittin *v.* Handy, 1618, 1619, 1708, 1770
 Brittlebank *v.* Goodwin, 1782
 Britton's Appeal, 2126
 Britton *v.* Twining, 437, 1693
 v. Updyke, 2154, 2179, 2180
 Broach *v.* Barfield, 2046
 Broadbent *v.* Ramsbotham, 2226
 Broaddus *v.* Turner, 416, 417
 Broadhurst *v.* Balgay, 1733
 v. Morris, 324
 Broadman *v.* Osborn, 1127
 Broadrup *v.* Woodman, 1592
 Broadwater *v.* Darne, 1033
 Brobst *v.* Brock, 1993, 1997, 1998
 Brock *v.* Eastman, 1914, 1982
 v. Smith, 103, 108
 Brocklehurst, 2095
 Brockway *v.* Thomas, 996, 1295
 Brodie *v.* Barry, 368, 719, 2057, 2289
 Brogden *v.* Walker, 463
 Brograve *v.* Winder, 316
 Brolaskey *v.* Lota, 1168
 Brolasky *v.* Ferguson, 2270
 v. Fury, 2263
 v. Gally's Exrs., 76
 Bromfield, *Ex parte*, 95
 Bromley *v.* Elliott, 1242, 1243
 v. Jefferies, 1053, 1087
 Brompton *v.* Alkis, 1968
 Broncker *v.* Coke, 1571
 Brondage *v.* Warner, 2236
 Brone's Admsrs. *v.* Bockover, 670
 Bronson *v.* Coffin, 1069, 1092, 1093, 1094
 v. Kinzie, 1507, 1510, 1511, 1512
 v. Newberry, 1518
 v. Rodes, 2254
 v. St. Peter's Church, 39
 Brook *v.* Briggs, 1148
 v. Brook, 753
 Brookbank *v.* Brookbank, 1791
 Brooke's Appeal, 1690, 2121, 2122
 Brooke *v.* Berry, 1735
 v. Brooke, 707, 710, 752
 Brookings *v.* White, 1514, 2031, 2040
 Brookover *v.* Hurst, 1997
 Brooks *v.* Avery, 2050
 v. Brooks, 479, 497, 506, 1034
 v. Chatham, 1499
 v. Cunningham, 1248, 2255, 2273
 v. Curtis, 2235
 v. Dent, 1611
 v. Everett, 692, 703, 761, 762, 788, 797, 798, 815
 v. Fowle, 1646
 v. Galster, 1210
 v. Hyde, 1284, 1394
 v. Jones, 290
 v. Marbury, 1605, 1712, 1794
 v. Moody, 1094, 1095
 v. Pearson, 1748
 v. Shelton, 1633, 1646
 v. White, 1701
 v. Whitmore, 2124
 v. Wilcox, 2255
 Brookville & M. Hydraulic Co. *v.* Butler, 68, 70, 71, 72, 73
 Broom *v.* Broom, 786, 825, 1957
 v. Hore, 2263
 Broome *v.* Davis, 1385
 Broomfield *v.* Smith, 1313
 Brophy *v.* Bellamy, 1740
 Brophy Co. *v.* B. N. D. Co., 1047
 Brossart *v.* Carlett, 2240
 Brost *v.* Simpson, 1862
 Brothers *v.* Cartwright, 76
 v. Harrill, 2047
 v. Hurdle, 47
 v. McCurdy, 249
 Brough *v.* Higgins, 506, 513
 Broughton *v.* Broughton, 1791
- Broughton *v.* Langley, 1703
 v. Randall, 765
 Brouwer *v.* Jones, 268, 1103
 Brow *v.* Clack, 667
 Browder *v.* Browder, 908
 Brower *v.* Bowers, 769
 Brown's Appeal, 1844
 Brown *v.* Adams, 1248, 1911, 2255
 v. Alden, 411, 1050
 v. Anderson, 415
 v. Armistead, 1752
 v. Ashbough, 1456
 v. Austen, 1016
 v. Bailey, 1925
 v. Balen, 2331
 v. Bates, 1886, 2147
 v. Beatty, 2326
 v. Berry, 2221
 v. Best, 100
 v. Bigg, 315
 v. Bowen, 2248
 v. Boyd, 313
 v. Bragg, 968, 969, 1280, 1327
 v. Bronson, 727, 794, 912, 913
 v. Brown, 71, 940, 987, 1398, 1400, 1580, 1590, 1980, 1981, 1989, 2252, 2303, 2341
 v. Budd, 2006
 v. Burlingham, 2279
 v. Caldwell, 956, 965, 1684, 1686
 v. Cantrell, 947
 v. Cayuga & S. R. Co., 1798
 v. Chamberlain, 1795
 v. Clark, 588, 672
 v. Clifford, 2048
 v. Coats, 1233
 v. Cockrell, 2296
 v. Cole, 2128, 2173
 v. Collins, 710
 v. Combs, 1590, 1706, 2091
 v. Coon, 1413, 1443, 1449, 1450, 1455, 1467, 1468, 1469, 1478
 v. Corey, 88
 v. Cram, 1998, 2079
 v. Cramm, 1998
 v. Crump, 79
 v. Dean, 2042, 2121
 v. Delaney, 2147
 v. Dewey, 2031, 2042, 2052, 2053, 2054
 v. Dillahunt, 1517
 v. Doane, 1586, 1616, 1617
 v. Duncan, 823, 826, 842, 844
 v. Dwelley, 1612
 v. Dwelly, 1614
 v. Dysinger, 1149, 1213
 v. East, 2008
 v. Engel, 1280
 v. Farran, 909
 v. Fifield, 1514, 1515
 v. Fitz, 2312
 v. Gale, 1367, 1920, 1945
 v. Gay, 211, 2296
 v. Gilman, 2005
 v. Higginbotham, 1240
 v. Higgs, 1628
 v. Hodgdon, 986
 v. Holyoke, 2039
 v. Homan, 1990
 v. Illius, 2230
 v. Jackson, 2263
 v. Jaddrell, 1034
 v. Johnson, 1716
 v. Kayser, 995, 1134, 1274, 1316, 1318, 1326, 1336, 1337
 v. Keller, 1159, 1214, 1308, 1393, 1394, 1410, 1424
 v. Kirkman, 2123
 v. Kite, 1123
 v. Lapham, 728, 802, 803, 809, 810, 2097, 2134
 v. Leach, 2031, 2032, 2079
 v. Leete, 2298
 v. Leitch, 1050

Brown *v.* Lillie, 110, 113
v. Lindsay, 1025
v. Lunt, 2366
v. Lynch, 1586, 1621, 1645, 1770
v. Lyon, 1704
v. McKinally, 1180
v. McKinney, 517, 2298
v. McMullin, 1985
v. Martin, 1378
v. Matthews, 1046
v. Mauler, 2364
v. Meredith, 733, 735
v. Minturn, 1794
v. Morrill, 1956
v. National Bank, 2142
v. National Bank of Hamilton, 284
v. Nevitt, 2056, 2149
v. Parson, 1087, 1088, 1205, 1316
v. Peck, 269
v. Pecock, 270
v. Penstz, 2337
v. Persons, 1290
v. Phillips, 2301
v. Porter, 234
v. Powell, 1111, 1123
v. Rainold, 1970
v. Ramsden, 1605
v. Ransey, 292
v. Renshaw, 1843
v. Richards, 806
v. Rickets, 695, 1715, 1716
v. Robbins, 1242
v. Sanborn, 51
v. Simon, 2089, 2090, 2153, 2180, 2183
v. Simons, 2090
v. Snell, 688, 2062, 2063, 2147
v. Sprague, 216, 221, 222
v. Stanclift, 54
v. State, 1401
v. Stead, 2150, 2152
v. Stewart, 1998, 2077, 2079
v. Storey, 1028
v. Thurston, 1267, 2067
v. Tigle, 1009
v. Trumper, 1007, 1314
v. Turner, 1973, 1982
v. Tyler, 2016
v. Van Braam, 1516
v. Vandergrift, 84, 100
v. Van Horn, 1300, 1308, 1335, 1338
v. Vanlier, 2006
v. Weaver, 1776
v. Webster, 1711
v. Wellington, 1911
v. Wenham, 196
v. Werner, 2235, 2237
v. Westbrook, 660
v. Wever, 411, 412, 423, 447, 468, 671
v. Whiteway, 1608, 1797
v. Williams, 885, 886
v. Williamson, 254, 273, 1675
v. Willis, 2167
v. Windsor, 2234
v. Wood, 305, 307, 308, 311, 312, 1913
v. Wright, 1577, 1720, 1721, 1722, 2336
Brown's Admr. *v.* Bragg, 1138, 1150
Brown's Exrs. *v.* Higginbotham, 1241, 1244
Brownie *v.* Bockover, 592
v. Brockville, etc., 1194, 1195
v. Cavendish, 1794
v. Kennedy, 101
v. Potter, 764
v. Warner, 1313
v. Witt, 1398, 1400, 1401
Brownie's Lessee *v.* Anderson, 426
Brownell *v.* Brownell, 291, 416, 423, 1975, 1982
v. Welch, 1327, 1329, 1335, 1339
Browning *v.* Harris, 1381, 1476
Brownlee *v.* Allen, 1956
Brownson *v.* Gifford, 1984
v. Hull, 1920, 1931, 1932, 1933, 1940, 1951,
1952

Brownsville *v.* Basse, 1140
Broyles *v.* Nowlin, 1621, 1760
Brubaker *v.* Paul, 2292
Bruce, *Ex parte*, 2002
Bruce *v.* Rooney, 2102
v. Fulton National Bank, 1067, 1082,
2362
v. Luke, 2322, 2323
v. Schuyler, 1517
v. Strickland, 721
v. Wood, 591, 1365
Bruch *v.* Landy, 2334
v. Lantz, 279, 1703
Brudenell *v.* Elwes, 1828
Bruceton's Case, 547
Brugman *v.* Noyes, 1103
Brumfield *v.* Carson, 31
Brumfit *v.* Roberts, 28, 30, 33, 36
Brumley *v.* Fanning, 2081
Brundage *v.* Brundage, 42, 43
Brundred *v.* Walker, 2151
Brune, Doe d., *v.* Martyn, 1596
Bruner *v.* Briggs, 670
v. Meigs, 1808
Brunson *v.* Hunter, 1629
Brunton *v.* Hall, 2220
Brunswick *v.* Litchfield, 597
Brunswick-Balke Collender Co. *v.* R  es, 199
Brunswick Sav. Inst. *v.* Com. Union Ins. Co.,
2116, 2119
Brush *v.* Kinsley, 2007
v. Ware, 1778, 2304, 2359
Bryan *v.* Atwater, 1915, 2298
v. Batcheller, 773, 774, 887, 894, 920, 921
v. Bradley, 208, 297, 1542, 1548, 1549,
1551, 1558, 2315
v. Butts, 2000, 2062
v. Cowart, 2039, 2047
v. Duncan, 1621
v. Lawrence, 120, 137
v. Ramirez, 1890, 2364
v. Weems, 1712, 1781, 1784, 1797
v. Wetherhead, 2216
v. Whistler, 29
Doe d., *v.* Bancks, 1058, 1138
Bryan's Exrs. *v.* Thompson's Exrs., 1887
Bryant *v.* Christian, 338
v. Cowart, 2039
v. Crosby, 51, 2047
v. Erskine, 1849, 2031, 2032
v. Hendricks, 1642, 1643, 1648
v. Hunter, 786, 824
v. Kinlaw, 1288
v. McCane, 707, 916, 935
v. Pennell, 2020
v. Russell, 1600, 1671
v. Tucker, 1280, 1285
v. Woods, 1513
Brydges *v.* Brydges, 1580, 1591, 1693
Bryson *v.* McCreary, 2250
v. Rayner, 1770
Bubier *v.* Porter, 951
v. Roberts, 932, 955, 956
Buccleuch *v.* Wakefield, 90
Buchan *v.* James, 1782
v. Summer, 694, 1671, 1957, 1958, 1960,
1962, 1963
Buchana *v.* Monroe, 2062
Buchanan's Estate, *In re*, 712, 918, 943, 1382,
1406
Buchanan *v.* Buchanan, 963, 965
v. Curtis, 2205, 2206
v. Deshon, 750, 775
v. Duncan, 603, 608, 675, 687
v. Hamilton, 1600
v. International Bank, 2120, 2126
v. King, 1990
v. Monroe, 2112, 2150, 2152
v. Schaffer, 788
v. Sheffer, 687, 780
v. Shiffer, 656
Bucheridge *v.* Ingram, 44, 710

- Buchill *v.* Clary, 2343
 Buck *v.* Binninger, 489
 v. Colbath, 1516
 v. Conlogue, 1462, 1463, 1464
 v. Payne, 1998
 v. Pickwell, 54, 55
 v. Robinson, 794
 v. Seymour, 2018
 v. Spofford, 1894
 v. Swazezy, 1618, 1635, 1646, 1651, 1652,
 1779
 Buckelew *v.* Snedeker, 1904
 Buckely *v.* Daley, 1998
 Buckenridge *v.* Ingram, 42, 776, 816
 Buckeridge *v.* Ingram, 20
 Buckingham *v.* Hanna, 2300
 v. Nelson, 1497
 v. Smith, 101, 2328
 Buckingham, Earl of, *v.* Drury, 923
 Buckingham's Exrs. *v.* Reeve, 975
 Buckinghamshire *v.* Drury, 951, 953, 955
 Buckinghamshire, Earl of, *v.* Hobart, 510
 Buckland *v.* Butterfield, 129
 v. Hall, 1091, 2263
 v. Pappilian, 1008
 Buckle *v.* Mitchell, 1626
 Buckler's Case, 482, 530
 Buckles *v.* Lafferty's Legatees, 1716, 1766, 1770
 Buckley *v.* Buckley, 61, 127, 138, 606, 607, 694,
 1671, 1969, 1964
 v. Daley, 1998
 v. Nightengale, 278
 v. Taggart, 1222
 v. Wheeler, 1431
 Bucklin *v.* Truell, 2226
 Buckley *v.* Coles, 2208, 2215
 Bucknall *v.* Story, 1180
 Buckner *v.* Calcote, 1781
 v. Jewell, 2266
 v. Sessions, 2149
 v. Warren, 1137, 1140, 1150
 Buckout *v.* Swift, 2021, 2022
 Buckridge *v.* Ingram, 779
 Bucks *v.* Drury, 957
 Bucksport *v.* Spofford, 236
 Buckworth *v.* Thirkell, 581, 664, 690, 691, 780,
 815, 820, 826, 827, 885, 1569
 Budd *v.* Hiler, 724, 847
 v. State, 2332
 Ruddle, Doe d., *v.* Lines, 1310
 Budge *v.* Gumnow, 1664
 Buell *v.* Buckingham, 1766, 1772, 1775
 v. Irwin, 2365
 Buerger *v.* Boyd, 1015, 1176
 Buffalo City Cemetery *v.* Buffalo, 40
 Buffalo East Side R. Co. *v.* Buffalo St. R. Co.,
 198
 Buffalo R. Co. *v.* Brainard, 2325, 2327
 Bufferlow *v.* Newsum, 1216, 1217
 Buffin *v.* Hutchinson, 281
 Buffum *v.* Buffum, 786, 1963
 v. Deane, 1115, 2251, 2257, 2259
 v. Greene, 2349
 v. Hutchinson, 283, 284, 285, 532
 Buford *v.* McKee, 2333
 Buhl *v.* Kenyon, 974, 976, 1225
 Buist *v.* Dawes, 383
 Bulfer *v.* Willingrod, 945
 Bulger *v.* Roche, 2299
 v. Woods, 1922
 Bulkley *v.* Chapman, 2111
 v. De Peyster, 1598
 v. Dolbeare, 560
 Bull *v.* Bull, 1630
 v. Conroe, 1388, 1513
 v. Griswold, 45, 51, 135, 996, 1010, 2259
 v. Kentucky National Bank, 1677, 1679
 v. Schubert, 1244
 v. Sykes, 2015
 Bullard *v.* Briggs, 708, 715, 726, 746, 878, 1698
 v. Chandler, 1665
 v. Goffe, 202
 Bullard *v.* Harrison, 2208
 v. Johnson, 2251
 v. Leach, 811, 2097
 v. Powers, 766
 Bullen *v.* Runnells, 2247
 Doe d., *v.* Mills, 1148
 Bullene *v.* Haitt, 1499
 Buller *v.* Burt, 1830
 Bullitt *v.* Musgrave, 1228
 Bullock *v.* Dommitt, 563, 1068, 1098, 1099, 1153,
 1179, 1181
 v. Hayward, 1901
 v. Thorne, 1845
 Bulwer *v.* Bulwer, 48, 539, 1206, 1207, 1253, 1267
 Bumgardner *v.* Circuit Court, 1518
 Bunce *v.* Gallagher, 2291
 v. West, 2074, 2171, 2174
 Bunch *v.* Hurst, 1758
 Bundy *v.* Iron Co., 2069
 Bunker *v.* Locke, 1378, 1419, 1443, 1445, 2188
 Bunn *v.* Channen, 2195
 v. Daly, 637
 v. Lindsay, 2138
 v. Winthrop, 1791
 Bunnell *v.* Evans, 533
 Bunner *v.* Storm, 1649
 Bunny *v.* Wright, 1019
 Doe ex. d., *v.* Rout, 2
 Bunting *v.* Ricks, 1759, 1765
 Bunz *v.* Cornelius, 1485
 Burbank *v.* Crooker, 1246
 v. Day, 867, 869
 v. Dyer, 1020, 1021, 1135, 1304, 1315, 1316,
 1342
 v. Fay, 2291
 v. Warwick, 2111
 v. Whitney, 1541
 Burch *v.* Burch, 1849
 v. Carter, 1777
 v. Newbury, 2324
 Burchard *v.* Frazer, 2031
 Burchfield *v.* N. Cent. R. Co., 2262
 Burchman *v.* Wilson, 1176
 Burckle *v.* Eckhart, 1240, 1243, 1244
 Furd *v.* Densdale, 635, 636, 637
 Burden *v.* Sheridan, 1642
 v. Thayer, 1027, 1028, 1120, 1121, 1171,
 1847, 2064, 2151
 Burdeno *v.* Amperse, 646, 895
 v. Banterse, 1938
 Burdet *v.* Hopegood, 618
 Burdett *v.* Clay, 2104, 2105, 2106
 v. Doe d. Spilsbury, 1831
 v. Withers, 1228
 Doe d., *v.* Wrighte, 1744
 Burdge *v.* Rolin, 1431
 Burdick *v.* Briggs, 771, 919, 920
 v. Jackson, 2001
 v. Washburn, 1229, 1234
 Burditt *v.* Colburn, 2035
 Burette *v.* Briggs, 2008
 Burey *v.* Reese, 2318
 Burford *v.* Rosenfield, 2158
 Burgaine *v.* Spurling, 2128
 Burge *v.* Smith, 901, 911, 912
 Burger *v.* Potter, 2007, 2009
 Burges *v.* Curwin, 373
 v. Mawbey, 491, 509
 Burgess *v.* Eve, 2030
 v. Rice, 1214
 v. Wheate, 157, 277, 299, 477, 1534, 1545,
 1551, 1558, 1575, 1597, 1602, 1704,
 1736, 2009
 v. Wheaton, 1800
 v. Wilson, 1349
 Burgett *v.* Taliaferro, 1882, 1898
 Burghardt *v.* Turner, 492, 1910
 Burgher *v.* Humphrey, 983
 Burgoyne *v.* Spurling, 2127, 2128
 Burhans *v.* Burhans, 1982, 1984
 v. Hutchens, 2096, 2110
 v. Van Zandt, 1738, 1883

- Burk *v.* Chrisman, 2155
Burk, *Ex parte*, *v.* Hamstead Free School,
1037
Burke *v.* Adams, 220
 v. Allen, 2126
 v. Bank of Tennessee, 2064
 v. Barron, 731, 831, 835
 v. Colbert, 650, 657
 v. Hale, 1212
 v. Lynch, 2004
 v. Miller, 2128
 v. Smith, 1581
 v. State, 1243
 v. Valentine, 585, 588, 653, 670, 687
Burkett *v.* Burkett, 1452
Burkham *v.* Beaver,
Burks *v.* Burks, 1619, 1633, 1760
 v. Mitchell, 2297
Burland *v.* Kipp, 2099
Burleigh *v.* Clough, 320, 336, 487, 1815, 1820
 v. Cluff, 487
 v. Coffin, 1024, 1363, 1364, 1367, 1368
Burleu *v.* Shaanon, 662
Burleson *v.* Burleson, 1899
Burling *v.* King, 1697
Burnap *v.* Cook, 1409, 1473, 1474, 1475, 1484,
 1493, 1496, 1497, 1504, 1523
Burne, Doe d., *v.* Pridaux, 1040
Burnes *v.* Bryant, 973
 v. McCubbin, 1137, 1143, 1146, 1150
Burnet *v.* Burnet, 720, 817, 818
 v. Davis, 677, 1372
 v. Denniston, 415, 2097, 2136, 2139, 2161
 v. Pratt, 2125
Burnett *v.* Dennison, 2074
 v. Denniston, 2073
 v. Lynch, 1073
 v. Marshall, 1910
 v. Pratt, 1886, 2102, 2125
 v. Rich, 1217
 v. Thompson, 974, 988, 1046
Burnham *v.* Kempton, 2248
Burns *v.* Bryant, 1274, 1278, 1280, 1291, 1344
 v. Burns, 597
 v. Cooper, 1230, 1231, 2251
 v. Gallagher, 2241
 v. Harris, 1399
 v. Jones, 1454
 v. Lewis, 1952, 1953
 v. Lynde, 727, 1044, 2339
 v. O'Rourke, 1033
 v. Phelps, 1168
 v. Thayer, 829
 v. Thompson, 1947
Burnside *v.* Merrick, 1963, 1964
 v. Merritt, 786, 825
 v. Terry, 1517, 1999, 2036, 2037
 v. Twitchell, 131, 133, 2186
 v. Wayman, 2038
 v. Weightman, 46
Burnson *v.* King, 1632
Burr *v.* Beers, 2070, 2071
 v. Graves, 976
 v. Hutchinson, 2331
 v. Mills, 2240
 v. Phoenix Glass Co., 2342
 v. Sim, 75, 522, 533
 v. Smith, 1541
 v. Spencer, 982
 v. Stenton, 1080, 1082, 1125, 1169
 v. Veeder, 2089
Burrage *v.* Briggs, 2282
Burrell *v.* Bull, 1621, 1643
 v. Burrell, 2298
 Doe d., *v.* Perkins, 1309
Burridge *v.* Brady, 937
Burrill *v.* Shell, 1599, 1663
Burriss *v.* Page, 697, 698, 820, 821
Burritt *v.* Saratoga M. F. Ins. Co., 2114
 v. Silliman, 1598
Burrough *v.* Foster, 411, 414
 v. Philcox, 1685
Burroughs *v.* Nutting, 650, 657
 v. Richman, 1033
Burrow *v.* Henson, 2168
Burrows *v.* Gradin, 1306
 v. Lock, 1697, 1758
Bursen *v.* Goodspeed, 1411
Burson's Appeal, 1366
Burson *v.* Fowler, 1449, 1454
 v. Huntington, 2033, 2035
Burstou *v.* Jackson, 2301
Burt *v.* Herron, 347, 1593
Burt *v.* Hulburt, 661, 1377
 v. Merchants' Ins. Co., 2327
 v. Ricker, 2085
 v. Wilson, 1616, 2004
Burton *v.* Barclay, 1163
 v. Baxter, 2100, 2102, 2104, 2106
 v. Burton, 750
 v. Hintrager, 2084
 v. Holley, 1247
 v. Lies, 943, 2156
 v. Marshall, 646
 v. Martz, 2366
 v. Muffitt, 2235
 v. Murphy, 1899, 1900
 v. Rohrbeck, 1079
 v. Smith, 2083
 v. Wheeler, 2136, 2178
Burt's Estate, *Re*, 1818
Burwell *v.* Anderson, 317, 319
 v. Fauber, 1778
 v. Hobson, 2241, 2248
Burwell's Exrs. *v.* Lumsden, 934
Bury *v.* Hartman, 1759
Buryham *v.* Grey Hospital, 1088
Busby *v.* Busby, 202, 302, 311, 331
 v. Holthaus, 2231
 v. Salter, 322, 324
Busch *v.* Cooper, 2362
Bush's Appeal, 1561, 1576, 1579, 1597, 1674,
 1736, 1747
Bush *v.* Bradley, 600, 601, 603, 604, 612, 614, 619
 v. Bush, 1704, 1773
 v. Cole, 1092
 v. Cooper, 2059
 v. Hicks, 2331
 v. Lathrop, 2109
 v. Lester, 1512
 v. Scott, 1497
 v. Sherman, 2160
 v. Steinman, 1194
 v. Sullivan, 2212
Bushby *v.* Dixon, 362
Buskirk *v.* Stridland, 2233
Buss *v.* Dyer, 2242
Busse's Estate, Matter of, 1521
Bussman *v.* Ganster, 1001, 1002, 1098, 1178, 1182
Rustard's Case, 798, 819, 1991
Buswell *v.* Marshall, 2272
 v. Peterson, 2144
Butcher *v.* Butcher, 1315, 1356
 v. Rogers, 2322
Butler's Case, 821
Butler *v.* Birkey, 2177
 v. Butler, 799, 975
 v. Carter, 1782
 v. Cheatham, 710, 759, 761, 815
 v. Godley, 1580
 v. Haskell, 1745, 1757, 1758
 v. Heustis, 403, 408, 1831, 1839
 v. Kidder, 1176
 v. Ladue, 2140
 v. Little, 311, 330, 331, 332, 536
 v. Mulinhill, 1032, 1034
 v. Nelson, 1431
 v. Page, 97, 112, 130, 131, 133, 136, 142,
 146, 1027, 2162
 v. Portarlington, 1691
 v. Rivers, 1225
 v. Roys, 1911, 1984
 v. Seward, 808, 809, 2130
 v. Porter, 1691

Butt *v.* Ellett, 1051, 2018, 2020
v. Thomas, 417
 Butte Canal & D. Co. *v.* Vaughn, 2238, 2239
 Butterfield *v.* Beall, 590, 1231, 1304, 1367
v. Field, 665
v. Stanton, 959
v. Wicks, 1411
 Butterick *v.* Holden, 1005
 Butterworth *v.* Crawford, 2241
 Buttlar *v.* Rosenblath, 1932, 1944, 1950, 1952
 Buttrick *v.* Wentworth, 2164
 Butts *v.* Broughton, 1485, 2075, 2169, 2170,
v. Trice, 960, 963
v. Wood, 75
 Buxton *v.* Dearborn, 1419, 1483, 1514, 1515
v. Inhabitants of Uxbridge, 402, 428, 449
v. Rust, 1000
 Buzick *v.* Buzick, 716, 726, 727, 746, 878, 879
 Byam *v.* Bickford, 1897
 Byassee *v.* Reese, 54, 55
 Byckman, *v.* Gills, 90
 Iyer *v.* Etnye, 882
 Byers *v.* Byers, 1028, 1403, 1405
v. Danley, 1635
v. Wackman, 1648, 1700
 Byington *v.* Backwalter, 2169
 Byng *v.* Byng, 60, 324
 Bynum *v.* Postwick, 184
 Byrane *v.* Rogers, 1060, 1154
 Byrd *v.* McDaniel, 2175
 Byrne *v.* Beeson, 1144
v. Byrne, 662
v. Van Hoesen, 1022
 Byrnes *v.* Stillwell, 345

C.

Caballero *v.* Henty, 1765
 Cabeen *v.* Mulligan, 1386, 1442, 1443, 1459, 1460,
 1461
 Cade *v.* Brownlee, 974, 976
 Cadell *v.* Palmer, 323, 971
 Cadmus *v.* Combes, 504
 Cadogan *v.* Kennet, 1626
Doe d., v. Ewart, 300, 315, 322, 1553, 1557,
 1597, 1605, 1606
 Cadwalader *v.* Bailey, 2215, 2217
 Cadwallader *v.* App, 1145
v. Harris, 1515
 Cady *v.* Allen, 1101
v. Owen, 2302
v. Shepherd, 1018
 Caffney *v.* Hicks, 2041
 Cage *v.* Acton, 660, 770
v. Russell, 1157
 Cagger *v.* Lansing, 1139
 Cahill *v.* Wilson, 1462
 Cain *v.* Cain, 916
v. McGuire, 54, 55
 Caines *v.* Grant, 1618
 Cains *v.* Jones, 2359
 Cairncross *v.* Lorimer, 2302
 Cairns *v.* Chabert, 504, 505, 740
v. Colburn, 1537
 Cairo & F. R. Co. *v.* Turner, 2324
 Cairo & St. L. R. Co. *v.* Wiggins Ferry Co.,
 1317
 Calame *v.* Calame, 771, 772, 919, 920
 Calbraith *v.* Green, 763
 Calcraft *v.* Roebuck, 202
 Caldecot *v.* Smythies, 1205, 1208
 Calder *v.* Bull, 885
 Calderwood *v.* Tevis, 1441
 Caldwell *v.* Baylis, 573
 Caldwell *v.* Copeland, 88
v. Fulton, 88, 89, 2189
v. Furgeson, 306, 331, 334, 337
v. Harris, 1213
v. Smith, 1212, 1219
v. Taggart, 2147

Caledonian R. Co. *v.* Sprot, 66, 90, 92
 Calhoun *v.* Atchison, 2255
v. Calhoun, 1491, 1497, 1562
v. Cook, 210, 533
v. Curtis, 1905, 1911
v. Hays, 1977
v. McLendon, 1400
v. Williams, 1398, 1400
 California Dry Dock Co. *v.* Armstrong, 1153,
 1228
 California Tel. Co. *v.* Alta. Tel. Co., 197
 Calkins *v.* Calkins, 799, 2000
v. Isbell, 2095
v. Munsel, 2171
 Call *v.* Barker, 1981, 1982, 1983
 Callahan *v.* Hawkes, 1120
v. Robinson, 917
v. Shaw, 2066
 Callender *v.* Marsh, 2232
 Callis *v.* Day, 2011
v. Kemp, 416, 447
v. Tolson, 1781
 Calloway *v.* People's Bank, 2159, 2160
 Calton *v.* Hilley, 990
 Calus *v.* Harper, 818
 Calver *v.* Harper, 885
 Calvert *v.* Aldrich, 64, 65, 1891, 2234
v. Bradley, 1117
v. Eden, 1548, 1583
v. Simpson, 996
v. Williams, 1517
Doe d., v. Frowd, 1309
 Calvin's Case, 673
 Calvo *v.* Davies, 2150, 2071, 2072
 Cambria Iron Co.'s Appeal, 2273
 Cambridge Valley Bank *v.* Dilam, 2359
 Camden Mut. Ins. Co. *v.* Jones, 966
 Camel *v.* Portland Sugar Co., 1194
 Cameron *v.* Irwin, 2086, 2127, 2128, 2129, 2155,
 2161, 2185
v. Lewis, 1643
v. Mason, 2005
 Cameto *v.* Dupuy, 1426
 Camley *v.* Stanfield, 1222
 Camp *v.* Camp, 1148, 1348
v. Chamberlain, 50
v. Cleary, 254
v. Homesley, 1903
v. Scott, 1139, 2257, 2274
v. Smith, 2101
 Campau *v.* Barnard, 1990
v. Campau, 1908
v. Laffery, 999
v. Shaw, 1023
 Campbell *v.* Adair, 1380, 1457, 1459, 1460, 1461,
 1466, 1483, 1514, 1515
v. Ayers, 1386, 1441, 1442
v. Baldwin, 2008
v. Beaumont, 345, 352
v. Bemis, 2151
v. Brown, 890
v. Campbell, 694, 786, 801, 817, 825, 1464,
 1878, 1884, 1905
v. Carson, 306, 331, 333, 338
v. Crampton, 753, 754
v. Dearborn, 2041, 2044, 2045, 2047, 2048,
 2054
v. Elliott, 1502
v. Evans, 2324
v. Foster, 273, 1747, 1798
v. Gullatt, 596
v. Hampton, 1214
v. Hunt, 976
v. Johnson, 2357
v. Johnston, 2155
v. Jones, 1440
v. Knight, 783, 803
v. Kuhn, 2345
v. Leach, 1039, 1838, 2014
v. Lewis, 1074
v. Lowe, 1979
v. Macomb, 2185

- Campbell *v.* McManus, 1387
 v. Mesier, 65, 508, 757, 2236, 2237
 v. Miller, 1664, 1714, 1718, 1720, 1724
 v. Morris, 782
 v. Murphy, 802, 813, 841, 844, 866
 v. Patterson, 2068
 v. Proctor, 1252, 1266, 1291, 1305
 v. Roach, 2009
 v. Roddy, 112, 133
 v. Sandys, 525, 528
 v. Shipley, 1139
 v. Smith, 2072, 2226
 v. Texas & N. O. R. Co., 2019
 v. Tompkins, 2011
 v. Upshaw, 1699
 v. Vedder, 811, 2098, 2110
 v. Walker, 1611, 1767
 v. Wallace, 1901, 1928
 v. Wenlock, 1056
 v. Wilkinson, 2291
 v. Wilson, 2242
 v. Winson, 2219
 Doe d., *v.* Scott, 1339
Campfield *v.* Johnson, 1751
Campion *v.* Cotton, 059
Canal Commissioners, *v.* People, 101
Canal Co. *v.* Railroad Co., 1860, 2188
Canby's Lessee *v.* Porter, 517, 635, 636, 637,
 1367
Cancey *v.* Strove, 1024
Candler *v.* Tillet, 1733
Candy *v.* Stradley, 1983
Caneby *v.* Haskins, 415
Canfield *v.* Fairbanks, 2345
 v. Ford, 23, 83, 88, 228, 1980
 v. Shear, 2017
Canfraque *v.* Burnell, 2056
Cannaughton *v.* Sands, 1400
Cannel *v.* Buckel, 647
Canning *v.* Canning, 344
 v. Pinkham, 2354
Cannon *v.* Apperson, 265
 v. Cannon, 2353
 v. Copeland, 123
 v. Folsom, 1247
 v. Hare, 740
 v. Wilber, 1151
 v. Trotuman, 1545, 1578, 1595, 1777
Cantagrel *v.* Van Lupin, 2298
Cantrell *v.* Fowler, 1196
Cape Fear Nav. Co. *v.* Wilcox, 1869
Capen *v.* Peckham, 106, 111, 112, 113, 116, 1186
 v. Richardson, 1538
Capner *v.* Flemington Mining Co., 1153, 2187
Cappell's Estate, 975
Capper *v.* Sibley, 1020
Car *v.* Ellison, 376
Carberry *v.* Willis, 2207, 2242, 2245
Card *v.* Jaffray, 2049
 v. Patterson, 908
Cardigan *v.* Armitage, 93
Cardington *v.* Armitage, 90
Cardross's Settlement, *Re*, 1827
Cardwell, *Re*, 1720
Care *v.* Keller, 930
Carell *v.* Cuddington, 433, 446
Carey *v.* Buntain, 731, 734, 741
 v. Rawson, 2002, 2040, 2049
Cargile *v.* Wood, 751, 752, 789
Carin *v.* Carin, 967
Carithers *v.* Stuart, 2172
Carle *v.* Monkhouse, 1207
Carleston *v.* Rugg, 5
Carleton *v.* Byington, 2120
 v. Cate, 2248
Carley *v.* Lewis, 2261, 2262, 2263, 2264
Carlies *v.* Howland, 2005, 2006
Carlin *v.* Chappell, 91, 2233
 v. Paul, 2218
 v. Ritter, 111, 112, 145
Carlisle's Appeal, 1021
Carlisle *v.* Cooper, 2242
Carll *v.* Butman, 783, 802, 803, 2074, 2182
Carlton *v.* Buckner, 2007
 v. Carleon, 3
 v. Dorset, 794
 v. Jackson, 805, 806, 808, 2134
Carlyle *v.* Cannon, 310
 v. Patterson, 1923
Carlyon *v.* Lovering, 2227, 2238
Carmack *v.* Masterston, 998
Carmichael *v.* Buck, 1746
 v. Carmichael, 931
 v. State, 595, 596, 752
Carnall *v.* Duval, 2033, 2034
 v. Wilson, 718, 733, 735, 736, 737, 739,
 838, 881, 909
Carnes *v.* Poll, 519, 746
Caro *v.* Metropolitan Elevated R. Co., 2, 3
Carondelet *v.* Lannon, 1028, 1158
 v. St. Louis, 2192
 v. Wolfert, 1151
Caroon *v.* Cooper, 801, 817
Carpenter *v.* Bowen, 1998
 v. Canal Co., 1783
 v. Carpenter, 1664, 1713, 1714, 1723, 1725,
 1728, 1998, 2055
 v. Collins, 1334
 v. Davis, 652, 701
 v. Denoon, 516, 517
 v. Dexter, 2364
 v. Garret, 593, 598, 599, 615
 v. Griffin, 934
 v. Herrington, 1514
 v. Jones, 1267, 1297
 v. Koons, 2154, 2179, 2180
 v. Logan, 2108
 v. McBride, 1740, 1764, 1777
 v. Moores, 2125
 v. Providence Washington Ins. Co., 2089,
 2113, 2114, 2116, 2117
 v. Robinson, 1757
 v. Thompson, 1148, 1218, 1348
 v. United States, 1276, 1291, 1292, 2261
 v. Walker, 122, 123
 v. Weeks, 764, 766
 v. Wescott, 1871
 v. Williamson, 2151
Carpentier *v.* Brenham, 2135, 2150
 v. Williamson, 2146, 2321, 2322
Carper *v.* Mumger, 2101
Carr, Petitioner, 1981
Carr *v.* Allison, 1088
 v. Brady, 722, 723
 v. Caldwell, 1491, 1497, 1498
 v. Carr, 779, 2045
 v. Clough, 2343
 v. Dodge, 1909
 v. Ellison, 1009, 1088, 1089
 v. Estill, 324, 325
 v. Givens, 585, 606, 612, 1911
 v. Hobbs, 2004
 v. Hodge, 2089
 v. Holbrook, 2040
 v. Hoxie, 2354
 v. Ireland, 76
 v. Rising, 1459, 1465, 2044, 2052, 2054
 v. Wallace, 2191
Carradine *v.* Carradine, 1694
 v. O'Connor, 2159
Carrick *v.* Errington, 1638
Carrier *v.* Perley, 1136
 v. Sears, 986, 1032
Carrig *v.* Dee, 2223
Carrington *v.* Herrin, 1457
 v. Herrion, 1398
 v. Roots, 50, 51
Carroll *v.* Ballance, 1163, 1164, 1998, 2079
 v. Carroll's Lessee, 940, 1516
 v. Gallion, 2206, 2297
 v. Hancock, 1568
 v. Lee, 1561
 v. Newton, 80
 v. Renick, 646, 1609

- Carroll *v.* Van Rennselaer, 2004
 Carruthers *v.* Humphrey, 1999
 Carshore *v.* Murray, 960
 Carskadon *v.* Torreyson, 1685
 Carson *v.* Blakey, 1755
 v. Burnet, 2205
 v. Carson, 1631
 v. Coleman, 2325
 v. Crigler, 2250
 v. Foley, 1626
 v. Godley, 1054, 1066, 1202
 v. Marshall, 1644
 v. Murray, 905, 906, 910
 Doe d., v. Baker, 1255, 1278
 Carstairs *v.* Taylor, 1054
 Carter *v.* Balfour, 706
 v. Barnardiston, 970, 973, 987
 v. Beals, 1920
 v. Bennett, 1781, 2103, 2110
 v. Burr, 21, 2268
 v. Cantrell, 651, 1366
 v. Carter, 1506, 2046
 v. Castleberry, 1624
 v. Chadron, 2363
 v. Crawley, 19
 v. Dale, 588, 656, 677, 678, 679, 680, 1372
 v. Denman, 729
 v. Eveleigh, 1375
 v. Goodin, 802, 928
 v. Goodman, 1468
 v. Goodwin, 782, 901, 902
 v. Gregory, 212
 v. Hammett, 1114, 1117, 2262, 2264
 v. McQuade, 1049
 v. McMichael, 461
 v. Montgomery, 1649
 v. Murcot, 2198
 v. Palmer, 1708
 v. Parker, 841
 v. Peak, 1003
 v. Penn, 1890
 v. Reddish, 321
 v. Rockett, 2114, 2118, 2119
 v. Rolland, 1727
 v. Taylor, 811, 1993, 2097, 2137
 v. Town of La Grange, 1214
 v. Tyler, 462
 v. Walker, 782
 v. Walter, 2274
 v. Warne, 1115
 v. Warner, 1114
 v. Williams, 598, 599, 607, 608, 615
 Cartwright *v.* Miller, 1891, 1892
 v. Pulney, 1973
 v. Wise, 1640
 Caruthers *v.* Caruthers, 952, 955, 956
 v. Humphrey, 2129, 2131
 v. Wilson, 865
 Carver *v.* Jackson ex d. Astor, 1048, 2300
 v. Pecks, 2082, 2083
 v. Richards, 1040
 v. Smith, 1919, 1932, 1944, 1952
 Carwardine *v.* Carwardine, 1569
 Carwin, District Township of, *v.* Moorhead, 995
 Cary *v.* Cary, 1629
 v. Daniels, 1092, 2211
 v. Folsom, 2154
 v. Willis, 1879
 Casad *v.* Hughes, 1083
 Casamayor *v.* Strode, 2081
 Casboard *v.* Ward, 1658
 Casborne *v.* English, 2172
 v. Inglis, 689
 v. Scarfe, 509, 592, 599, 611, 1996, 2063, 2084, 2168
 Case *v.* Arnett, 106
 v. Case, 751, 1801
 v. Coddling, 1633, 1634, 1646, 1651
 v. Erwin, 1777
 v. Gerrish, 1623
 v. James, 2124
 v. Heart, 1238
 Case *v.* McCabe, 2002
 Case of Private Road, 2211
 Casey *v.* Buttolph, 1580, 2319
 v. Buttolph, 237
 v. Casey, 1707, 1769
 v. Gregory, 1169, 1170, 1222
 v. Inloes, 1768, 1773, 2291
 v. Rawson, 2357
 Caskey *v.* Brewer, 415
 Casler *v.* Shipman, 2246
 Cason *v.* Hubbard, 908
 Casper *v.* Walker, 265
 Casporus *v.* Jones, 870
 Cass *v.* Martin, 511, 783, 802, 2182
 v. Thompson, 797, 821, 940
 Cass County Bank *v.* Webber, 1385, 1392
 Cassanave *v.* Brooke, 519
 Cassell *v.* Coake, 536
 v. Cooke, 306, 309, 321, 331, 332, 333
 v. Ross, 1407, 1409, 1413, 1451, 1454, 1498, 1499, 1717, 1756, 1778
 Casselman *v.* Packard, 1384, 1386, 1387, 1417, 1431, 1433, 1435, 1436, 1442
 Cassidy *v.* LeFevre, 1248
 Cassily *v.* Rhodes, 46, 49
 Castle *v.* Palmer, 1481, 1503
 Castleman *v.* Beit, 2064
 Castleton *v.* Langdon, 1850
 Castner *v.* Walrod, 588
 Caston *v.* Caston, 872, 947
 Castro *v.* Illes, 720
 v. Tennent, 291
 Caswell *v.* Crane, 1013
 v. Districh, 1229, 1231, 1233, 1234, 1235, 1239
 Cate *v.* Thayer, 2357
 Cater *v.* Eveleigh, 1375
 Catesby's Case, 1311
 Cathcart's Appeal, 2099
 Cathcart *v.* Bowman, 1093
 v. Robinson, 1697
 v. Turner, 2272
 Cathedral Church, Matter of, 29
 Catherwood *v.* Caslor, 595
 v. Catherwood, 1652
 Catholic Mutual Benevolent Asso. *v.* Firnane, 2280
 Cathorpe, *Ex parte*, 1721
 Catlin *v.* Hayden, 1306
 v. Kidder, 1897, 1913
 v. Milner, 1365
 v. Munger, 1511
 v. Ware, 789, 791, 822, 840, 841, 845, 900, 902, 909
 v. Washburn, 1309, 2363
 Caton *v.* Caton, 908
 Catskill Bank *v.* Gray, 1241, 1242
 Catterall *v.* Sweetman, 597
 Catterlin *v.* Armstrong, 2067, 2171
 Cattley *v.* Arnold, 1299, 1300, 1301, 1306, 1320, 1325
 Cauffman *v.* Cauffman, 942, 949
 Cauffman *v.* Presbyterian Congregation of Cedar Springs, 490
 v. Sayre, 2144
 Caujole *v.* Ferrie, 595, 596, 757, 759
 Caulfield *v.* Maguire, 509
 Caulk *v.* Florida, 2319
 v. Fox, 237
 Caulkins *v.* Fry, 1033
 Cavan *v.* Doe d. Pulteney, 942, 1039
 Cavanaugh *v.* Clinch, 1130, 1132
 v. Peterson, 2119
 v. Smith, 1427
 Cave *v.* Mackenzie, 1644
 Cavender *v.* Cavender, 1661
 v. Smith, 717, 885
 Caw *v.* Robertson, 1850
 Cearnas *v.* Irving, 1707
 Ceconi *v.* Rodden, 1095
 Cecil *v.* Salisbury, 985
 Center *v.* Fillinghurst, 2154

- Center *v.* P. & M. Bank, 2103, 2106
Central Bank *v.* Copeland, 641, 2060
Central Branch R. Co. *v.* Fritz, 63, 139
Central Bridge Co. *v.* Lowell, 2327
Central Gold Min. Co. *v.* Platt, 2327
Central Mills Co. *v.* Hart, 2270
Central Nat. Bank of Baltimore *v.* Connecticut
Mut. L. Ins. Co., 1761
Central Park Extension, Matter of, 714, 796,
873
Central R. Co. *v.* Greely, 2327
v. Hetfield, 2325
v. Macon, 1019
Central Trust Co. *v.* Wabash, St. L. & P. R.
Co., 2066
Centrill *v.* Risk, 915
Cesar *v.* Karutz, 1110
Chadborn, Doe d., *v.* Green, 1303, 1314, 1333
Chadwick *v.* Felt, 1612
v. Island Beach Co., 2069
v. Moore, 1511
v. Parker, 1060, 1154, 1157
v. Perkins, 1591
v. Woodward, 1054
Chaffee *v.* Dodge, 286
v. Franklin, 813
Chafron *v.* Cassidy, 2305
Chahoon *v.* Hollenback, 1773
Chaine *v.* Wilson, 1456
Chaires *v.* Brady, 2046
Chalker *v.* Chalker, 1861, 1867, 1868, 1869
Challefoux *v.* Ducharme, 1897, 1917, 1919
Challoner *v.* Davies, 1164
Chalmer *v.* Bradley, 1778, 1782, 1783
Chalmers *v.* Wright, 2075
Chalmonally *v.* Clinton, 2303
Chamberlain *v.* Chamberlain, 225, 596, 712, 757
v. Crane, 297, 1548, 2319, 2321
v. Gardner, 2144
v. Godfrey, 1016
v. Lyell, 1450, 1467
v. Marshall, 2304
v. Neale, 2254
v. Sprague, 2363
v. Stearns, 1683
v. Taylor, 77, 1689
v. Thompson, 288, 300, 688, 1594, 1596,
1606, 1796, 1997, 1998, 2062, 2077
Chamberlin *v.* Donohue, 1269, 1293, 1295, 1296,
1297, 1309, 1322, 1326
Chambers *v.* Fox, 1471
v. Goldwin, 2051
v. Handley, 589
v. Maudlin, 1712
v. Minchin, 1732, 1733
v. Pleak, 1915
v. Penland, 1449
v. Perry, 1731
v. Vignaud, 1297
Chambliss *v.* Jordan, 1512, 1513, 1517
Chambovet *v.* Cagney, 646
Champion *v.* Bostwick, 1240, 1241, 1242, 1243,
1244
v. Spencer, 1977
Champlin *v.* Foster, 2140
v. Laytin, 2061, 2130
v. Williams, 2150
Champney *v.* Coope, 520, 1580, 2097, 2098, 2127,
2134
Chance *v.* Hinman, 1102
Chancellor *v.* Poole, 2265
Chancy *v.* Strong, 1363, 1368, 1369
v. Chaney, 814
Chandler *v.* Cheney, 1930, 1931, 1938, 1942, 1952
v. Dyer, 2073, 2139, 2140, 2170
v. Hollingsworth, 658, 794
v. Howland, 1240, 1242, 1243
v. Jamaica Pond Aqueduct, 2245
v. Pocock, 76
v. Price, 322
v. Ricker, 1898, 1913
v. Rider, 1814
Chandler *v.* Temple, 2035
v. Thurston, 48, 538, 1231, 1235, 1263,
1268, 1297
v. White, 2301
& Hart *v.* Rossiter, 712
Chanery *v.* Stevens, 297
Chaney's Admrs. *v.* Chaney's Admrs., 813
Chanoine *v.* Fowler, 920
Chapel *v.* Bull, 730, 1095, 2353
Chapin *v.* Broder, 2167
v. Chicopee University Soc., 2101
v. First Universalist Society, 299, 1607
v. First Universalist Soc. of Chicopee,
286, 1659, 1812, 1813
v. Foss, 2271
v. Hill, 934, 935, 941, 956
v. Schafer, 1031
v. School District, 1540, 1555, 1850, 1972
v. Wright, 2175
Chaplin *v.* Chaplin, 445, 611, 689, 702, 781, 1566
v. Givens, 1660
v. Sawyer, 1411
v. Simmon's Heirs, 736
v. Tillinghast, 181
Chapman *v.* Allen, 1947
v. Armistead, 731
v. Beardsley, 2005
v. Blissett, 1606, 1797
v. Bluck, 1000
v. Brown, 1604
v. Chapman, 1952, 1953, 2002
v. County Commissioners of Douglass,
1633
v. Glassell, 1551, 1561
v. Gray, 28, 225, 969, 974, 975, 976, 1047,
1225
v. Harney, 1060, 1154, 1155, 2256
v. Holmes, 1093
v. Kendall, 1092
v. Kirby, 1060, 1151
v. Long, 45
v. Martin, 2274
v. McGrew, 1044
v. Miller, 591
v. O'Brien, 2302
v. Porter, 2085, 2087, 2184
v. Prickett, 2
v. Robertson, 367, 368, 720, 2057, 2058,
2288, 2289
v. Schroeder, 776, 806, 878, 931
v. Smith, 2088
v. Tanner, 2004
v. Townner, 1258, 1308, 1314
v. Turner, 2168
v. Union Mutual Life Ins. Co., 110, 134,
137
v. West, 2152, 2154
v. Wright, 1061, 1154
Chappell *v.* Allen, 2107, 2147
v. Brewster, 401
v. Gregory, 1200
v. New York, N. H. & H. R. Co., 2240,
2241, 2242
Charles *v.* Andrews, 955
v. Charles, 645
v. Dubose, 1620, 1768
Charles River Bridge Co. *v.* Warren Bridge
Co., 2291
Charless *v.* Lamberson, 1380, 1386, 1441, 1442,
1443, 1444, 1445, 1446, 1451, 1483, 1502,
1518
v. Rankin, 2231, 2232, 2233
Charlewood *v.* Bedford, 1042
Charlton *v.* Miller, 773
Charter *v.* Otis, 916
v. Stevens, 2161
Chase's Case, 776, 778, 779, 790, 814, 816, 840,
844, 845, 848, 874, 875, 885, 902, 903,
2045
Chase *v.* Abbott, 1409, 1454, 1523, 1934, 2078,
2079
v. Alley, 927, 951

- Chase *v.* Creed, 2034
v. Chase, 660, 1631
v. Cheney, 34
v. Hazelton, 550, 552, 556, 558, 561
v. Lockerman, 1997, 2085, 2103
v. McDonald, 2140
v. McLellan, 2174
v. Peck, 2001, 2003, 2005, 2009
v. Silverstone, 2230
v. Sutton Manuf. Co., 2244
v. Wingate, 78, 79, 106
v. Woodbury, 2076, 2153, 2176, 2178, 2181, 2183
 Chasemore *v.* Richards, 2230
 Chastain *v.* Smith, 1643
 Chatfield *v.* Wilson, 2248
 Chatard *v.* O'Donovan, 1287, 1288
 Chatham *v.* Bradford, 2122
 Chatterton *v.* Fox, 1092
 Chattle *v.* Pound, 1214
 Chavener *v.* Wood, 2172
 Chaworth *v.* Phillips, 1123, 1124
 Cheatham *v.* Jones, 1421
 Chedel *v.* Millard, 1028
 Chedworth *v.* Edwards, 1783
 Cheek *v.* Waldron, 885, 940, 1363, 2160
 Cheese, Doe d., *v.* Creed, 1309
 Cheeseborough, Matter of, 5
v. Green, 64, 65, 507, 2234
v. Millard, 2137, 2164, 2176, 2177, 2178
 Cheetham *v.* Hampson, 1068, 1198, 1201, 1202
 Cheever *v.* Parsons, 1251
v. Pearson, 234, 1019, 1257, 1260, 1263, 1280, 1281, 1282, 1296, 2212
v. Perley, 2095
v. Rutland, 2078
 Chegan *v.* Young, 2264
 Chellis *v.* Stearns, 2077
 Chelton *v.* Green, 2065
 Chenango Bridge Co. *v.* Paige, 69
 Chenery *v.* Stevens, 1563, 1565, 2118, 2316, 2319, 2334
 Cheney *v.* Arnold, 751, 752, 757
v. Bonnell, 1140
v. Pierce, 1362, 1370
v. White, 2309
 Cherrington *v.* Abney Mill, 2222, 2247
 Cherry *v.* Bowen, 2050, 2168
v. Monroe, 2124, 2150
v. Stein, 2223, 2229
 Chesapeake & O. R. Co. *v.* Paine, 43
 Cheseldine *v.* Brewer, 751
 Cheshire *v.* Payne, 654
 Cheshire Nat. Bk. *v.* Jewett, 49, 51
 Chesley *v.* Thompson, 1905, 1969
v. Welch, 538, 1205, 1285
 Chesline *v.* Lewis, 1330
 Chesline Lines Committee *v.* Lewis, 1341
 Chess *v.* Chess, 1016
 Chess-Charlye Co. *v.* Purtell, 293
 Chesson *v.* Chesson, 509
 Chester *v.* Chester, 326
v. Dickerson, 1960, 1961, 1962, 1964
v. Wheelwright, 2031
v. Willan, 1070
 Chesterfield *v.* Jansen, 1586, 1645
 Chesterman *v.* Gardner, 1165
 Chestnut *v.* Shane's Lessee, 904, 2332, 2333
 Chestnut Hill Turnpipe Co. *v.* Piper, 2243
 Chetham *v.* Williams, 2189
 Chetwood *v.* Winston, 415, 416
 Chew's Appeal, 267
 Chew *v.* Bank of Baltimore, 986
v. Barnett, 2018
v. Barrett, 2019
v. Chew, 415, 449, 469, 708, 760, 762, 785, 788
v. Commissioners of Southwark, 599, 603, 604, 611, 612, 689, 699, 700
v. Farmers' Bank, 431, 938
v. Hyman, 2170
v. Morton, 2291
 Chew *v.* Weems, 415
 Chew's Admrs. *v.* Beall, 1373, 1562
 Chicago *v.* Garrity, 2268
v. Larned, 2325
v. O'Brennan, 1201
v. Robbins, 1516
 Chicago & Eastern Ill. R. Co. *v.* Hay, 1781
 Chicago & N. W. R. Co. *v.* Borough of Ft. Howard, 98
 Chicago R. Land Co. *v.* Peck, 2136
 Chicago & Pacific R. Co. *v.* Stein, 1014
 Chicago K. N. R. Co. *v.* Ozark Township, 233
 Chicago, R. I. & P. R. Co. *v.* Howard, 1041
v. Kennedy, 1777
 Chicago, T. & M. C. Ry. Co. *v.* Titterington, 1469, 1474
 Chicago, etc., Co. *v.* U. S. Coal & Iron Co., 983
 Chick *v.* Rollins, 2093, 2094
v. Willetts, 1999, 2053, 2076, 2079
 Chickerley's Case, 1050
 Chickerling *v.* Faile, 1883, 2151
v. Fullerton, 2152
 Chidester *v.* Consolidated Ditch Company, 498
 Chighizole *v.* Le Baron, 1020
 Child *v.* Baylie, 433, 437
v. Chappell, 2211, 2240
v. Gibson, 1715
v. Sampson, 987
v. Sand, 1902
v. Singleton, 1447
 Childers *v.* Bumgarher, 605, 607, 612, 630
v. Childers, 1691
v. Smith, 2250, 2251
 Childress *v.* Cutter, 1922
 Childs *v.* Childs, 689, 2062
v. Clark, 1108, 1109, 2262, 2264
v. Dolan, 2067
v. Drake, 758
v. Jordan, 1615
v. Smith, 737, 739, 740, 743
v. Westcott, 1024
 Chiles *v.* Bartleson, 534
v. Coleman, 2359
v. Conley, 1916, 2338, 2352
 Chilton *v.* Henderson, 441, 448
v. Lyons, 2005
v. Niblett, 1282
v. Wilson, 2299
 Chinnary *v.* Blackman, 2066
 Chinnubee *v.* Nicks, 831
 Chinsley *v.* Langley, 260, 267, 268
 Chipman *v.* Emeric, 1057, 1139, 1143, 1154
v. Tucker, 2033, 2035
 Chirac *v.* Reinecker, 213, 359
 Chisholm *v.* Chisholm, 1411
v. Georgia, 195
 Chissom *v.* Hawkins, 2272
 Chittenden *v.* Berney, 2075
 Cholmondeley *v.* Cholmondeley, 1630
v. Clinton, 473, 1545, 1577, 1736, 1744, 1784, 1785, 2091, 2184
 Chopin *v.* Runte, 1482
 Choppell *v.* Gregory, 1054
 Chorpennig's Appeal, 1724, 1766
 Choteau *v.* Thompson, 976, 1225
 Chouteau *v.* Eckhart, 2192
v. Jones, 2366
 Chowning *v.* Cox, 2037
 Chretien *v.* Doney, 1320
 Christ Church Hospital *v.* Fuchsels, 2254
 Christ's Hospital *v.* Budgin, 1887
 Christian *v.* Crocker, 1239
v. Dripps, 63, 138
v. Ellis, 1958
v. Newberry, 810
 Christian Union *v.* Yount, 367
 Christie's Appeals, 974, 1141
 Christie, Succession of, 1397, 1407, 1410
 Christie *v.* Gage, 489
v. Herrick, 2147

- Christine *v.* Witherill, 1989
 Christmas *v.* Mitchell, 1777
 Christopher *v.* Austin, 1129, 1173, 1174
 v. Sparke, 2174
 v. Williams, 1479
 Christy *v.* Alfred, 2209
 v. Dyer, 1386, 1441, 1442, 1443, 1444,
 1445, 1491, 1492, 1497
 v. McBride, 1713, 1714, 1723, 1728
 v. Pridgeon, 1516
 Chritien *v.* Doney, 1006
 Chudleigh's Case, 410, 1534, 1535, 1539, 1545,
 1551, 1554, 1556, 1557, 1558, 1564, 1565,
 1566, 1568, 1570, 1571
 Church *v.* Brown, 257, 1096, 1097
 v. Burghardt, 212, 2296, 2297
 v. Chapin, 1623
 v. Ghurch, 814, 831, 1622
 v. Edwards, 454
 v. Gilman, 1016
 v. Griffith, 122, 1226
 v. Imperial Gas Light & Coke Co., 1332
 v. Mundy, 307
 v. Ruland, 1701
 v. Schoonmaker, 1305
 v. Seeley, 2262
 v. Sterling, 1620, 1622, 1643
 v. Wells, 31, 37, 38, 40, 83
 Church of Avquakanon *v.* Ackerman's Exrs.,
 938, 948
 Churchill *v.* Dubben, 307
 v. Hudson, 635, 639
 v. Hulbert, 1356
 v. Hunt, 1101, 2025, 2026
 v. Marks, 260, 272, 1677
 Churchman *v.* City of Indianapolis, 1781
 v. Martin, 2325
 Chure *v.* Seeley, 2268
 Chute *v.* Washburn, 1864
 Chynoweth *v.* Tannery, 2213
 Cibak *v.* Klekr, 2241
 Cibel *v.* Hills, 1174
 Cilley *v.* Huse, 1957
 Cilly *v.* Hawkins, 1245, 2246
 v. Huse, 786
 Cincinnati College *v.* Yeatman, 78, 976
 Cissna *v.* Haynes, 2153
 Citizens' Bank *v.* Knapp, 123
 Citner *v.* McRea, 799
 City *v.* City, 795
 City Bank of Baltimore *v.* Smith, 1870, 1872
 City of Brooklyn, 1248
 City of Chicago *v.* Laffin, 68
 v. McGinn, 68
 v. O'Brennan, 1199
 City of Cleveland *v.* State Bank, 1832
 City of Dubuque *v.* Miller, 1319
 City of Logansport *v.* Justice, 1247
 v. Seybold, 2325
 City of London *v.* Greyme, 556, 562, 564
 v. Mitford, 1008, 1009
 v. Nash, 1083
 City of Philadelphia *v.* Girard's Heirs, 1604,
 1675, 1676, 1680, 1682
 City of St. Louis *v.* Kamie, 1193
 v. Laclede Gas Light Co., 1923
 City of Salem *v.* Eastern R. Co., 4
 City of San Antonio *v.* French, 1133
 City Council *v.* Moorhead, 1182
 City Council of Montgomery *v.* Montgomery &
 W. Plank Road Co., 982
 City Nat. Bank *v.* Hamilton, 1635
 Claflin *v.* Boston & A. R. Co., 243, 2240, 2242
 v. Carpenter, 54, 55, 2213
 Clagett *v.* Hall, 2349
 Claiborne *v.* Handerson, 781, 820, 1543
 Claires *v.* Brady, 2047
 Clancey *v.* Onondago Pine Salt Mnfg. Co., 1020
 v. Stephens, 1448
 Clancy *v.* Byrne, 1083, 1198, 1199
 Clanvickard *v.* Sidney, 1366, 1369, 1370
 Clap *v.* Draper, 56, 2357
 Clapp *v.* Bromaghan, 1897, 1917, 1979, 1982, 2295
 v. Coble, 1169, 1170
 v. Inhabitants of Stoughton, 1359, 1360,
 1363, 1364
 v. Maxwell, 2167
 v. Noble, 1131, 1316, 1327, 1329
 v. Paine, 1310, 1315, 1334, 1351
 v. Stoughton, 1024, 1368, 1369, 1849
 Clare *v.* Appleby, 2108
 v. Hunt, 923
 v. National, etc., 1194, 1195
 Clark *v.* Akres, 2355
 v. Allen, 2340
 v. Babcock, 1066
 v. Baker, 228, 416, 420, 423, 424, 2091,
 2300, 2358
 v. Baltimore, 671
 v. Bancroft, 2164
 v. Barnes, 1004
 v. Battorf, 724, 789, 846
 v. Beach, 688, 1997, 2062, 2077
 v. Bell, 2009
 v. Brown, 2125
 v. Burgh, 1360
 v. Caldwell, 1033
 v. Christ's Church, 1138
 v. Clark, 517, 585, 596, 653, 662, 664, 670,
 680, 683, 769, 773, 810, 920, 1024, 1065,
 1376, 1646, 1920, 1942, 1951, 2222,
 2270
 v. Clark's Estate, 2260, 2261
 v. Condit, 2050, 2160
 v. Crego, 1899, 1917
 v. Crownshaw, 125
 v. Curtis, 2066
 v. Douglass, 1623
 v. Dwelling-house, 632
 v. Eaton (Clark *v.* Trust Co.), 1757, 1758
 v. Eaton (Comr. of Friedman's Trust
 Co.), 1658
 v. Everly, 1309
 v. Farrington, 2014, 2016
 v. Field, 752
 v. Foot, 568
 v. Fraley, 2273
 v. Graham, 368, 720, 2058, 2157, 2288, 2289,
 2339, 2352
 v. Griffin, 916, 934, 935, 955
 v. Harvey, 1208, 1319, 1320, 1676
 v. Henry, 2037, 2039, 2042, 2050, 2168
 v. Herring, 977, 1111, 1249
 v. Holden, 552, 557, 559, 560, 566, 1139
 v. Hornthal, 1730, 1842
 v. Howland, 1134, 1317
 v. Hume, 2266
 v. Hunt, 2008, 2009
 v. Jones, 1050, 1058, 1138, 1140
 v. Kelliher, 1356
 v. Koetig, 1474, 1485
 v. Laughlin, 810
 v. Lawrence, 2230
 v. Livering, 1997
 v. Lott, 661, 662, 1359
 v. Lyon, 2038
 v. Mackin, 2136, 2172
 v. McClure, 209, 210, 2297
 v. Makenna, 1375
 v. Martin, 268
 v. Munroe, 766, 783, 804, 829, 830
 v. Muzzey, 847, 848
 v. New England Mut. F. Ins. Co., 2113
 v. Nolan, 1408, 1472, 1486
 v. Ownes, 477
 v. Parker, 1979
 v. Prentice, 2149
 v. Redman, 903
 v. Reyburn, 2062, 2187
 v. Rhoades, 1003, 1330
 v. Richardson, 729, 863
 v. Riddle, 1754, 1755
 v. Robins, 2090
 v. Rochester, 2325

- Clark *v.* Scott, 291
v. Shannon, 1378, 1387, 1419, 1446, 1454, 1475
v. Sibley, 2184
v. Sidway, 1956
v. Slaughter, 661
v. Smith, 1039, 1256, 2088, 2090
v. Swift, 729, 1092
v. Taintor, 1662
v. Tennison, 271, 1165
v. Thompson, 1920
v. Tinker, 2194
v. Titcomb, 2342
v. Trawick, 1517
v. Troy, 2363
v. Wheelock, 1273, 1274, 1293, 1294
v. White, 2328
v. Williams, 197
v. Wilson, 2089, 2118
v. Wright, 1087
 Doe d., *v.* Smaridge, 1136, 1303, 1307, 1314, 1333, 1335
 Clarke's Appeal, 638, 1369
 Clarke's Estate, 500
 Clarke *v.* City of Rochester, 2335
v. Clarke, 572, 1936
v. Clarke's Admr., 1219, 1221
v. Cordis, 1910
v. Cummings, 557, 1141
v. Fuller, 999
v. Howland, 1136, 1315
v. McCreary, 715, 2332
v. McClure, 211
v. Merrill, 1052
v. Mikell, 309
v. Rannie, 1205
v. Reyburn, 2084
v. Royal Panopticon, 2159
v. Samson, 1989
v. Southwick, 2237
v. Swaile, 1775
v. Trawick, 1512
v. Wagner, 2298
v. Windham, 270
 Clarkson *v.* Doddridge, 2105
 Clary *v.* Fryer, 1810, 1811
v. Owen, 112, 2096
 Clason *v.* Corley, 2066, 2156, 2162
v. Norris, 2177
 Classen *v.* Carroll, 1316
v. Classen, 595
 Claussen *v.* Lafrenz, 1539
 Clavering *v.* Clavering, 495, 561, 1791
v. Ellison, 1867
 Clawson *v.* Hutchinson, 671
 Clay *v.* Freeman, 786
v. Richardson, 1475
v. Sanders, 737
v. Wren, 2079
 Clay, Heirs of, *v.* Clay, 216
 Clayton's Case, 2256
 Clayton *v.* Blakey, 981, 1013, 1258, 1264, 1322
v. Cagle, 1781
v. Clayton, 302, 330
v. Freet, 2331
v. Wardell, 751, 758, 759
 Clearwater *v.* Rose, 531, 532, 2105, 2106
 Cleary *v.* McDowell, 1365
 Clegg *v.* Rowland, 1038
 Clemence *v.* Steere, 506, 541, 542, 543, 556, 557, 561, 563, 564, 565, 566, 575, 577, 578, 1153
 Clemens *v.* Broomfield, 1017, 1042
v. Clemens, 1548, 1603
 Clement *v.* Bennett, 2038
v. Greenhouse, 2352
v. Hadlock, 1240, 1244
 Clements *v.* Bostwick, 304
v. Broomfield, 998
v. Glass, 417
v. Lacey, 1411, 1525
v. Lacy, 1407, 1457
 Clements *v.* Welles, 1185, 1778
 Clemm *v.* Wilcox, 1218
 Clemmins *v.* Gotshall, 2303
 Clepper *v.* Livergood, 679, 680, 695, 701
 Clere's Case, Sir Edw., 1538, 1566, 1805, 1844
 Clere *v.* Brooks, 366
 Clerk *v.* Clerk, 1033
 Cleve *v.* Veer, 2154
 Cleveland *v.* Boerum, 2152
v. Cohors, 2111
v. Crawford, 489
v. Flogg, 2296
v. Hallett, 280, 284, 287, 289, 290, 1555, 1563, 1592, 1594, 1597, 1710, 1796, 1813
v. Martin, 2133
 Cleves *v.* Willoughby, 1054, 1066, 1175, 1180, 1200
 Clews *v.* Bathurst, 661
 Cliff *v.* Gibbons, 307
 Clifford *v.* Hare, 2248
v. Watts, 1168, 1175
 Clift *v.* Clift, 312
v. White, 811, 1580, 2098
 Clifton *v.* Clifton, 1364
v. Lombe, 1629
 Climie *v.* Wood, 106, 122, 127, 133
 Clinan *v.* Cooke, 999
 Cline *v.* Inlow, 2151
v. Upton, 1466
 Clinefelter *v.* Ayers, 1810, 1842
 Clinton *v.* Cox, 2175
v. Fly, 266
v. Myers, 69, 2225, 2227, 2228
v. Westbrook, 1997, 1998
 Clinton National Bank *v.* Manwarring, 2083
 Clinton Wire Cloth Co. *v.* Gardner, 1131, 1316, 1317
 Clock *v.* Gilbert, 2299
 Clore *v.* Lambert, 133, 135
 Close *v.* Hunt, 745
 Closs *v.* Boppe, 1636
 Cloud *v.* Calhoun, 1599, 1786, 1788
 Clough *v.* Bond, 1718, 1719, 1733
v. Elliott, 777, 802
v. Hosford, 1283, 1292
 Clow *v.* Derby Coal Co., 2152
 Clowdsley *v.* Pelham, 1630
 Clowes *v.* Dickenson, 907, 2076, 2154, 2180
 Cloyes *v.* Sweetser, 2357
 Clubb *v.* Wise, 1479, 1506
 Clun's Case, 497, 1172
 Clun, Doe d., *v.* Clarke, 1309
 Clure *v.* Commissioner, 693
 Cluss's Case, 1051
 Clute *v.* Bool, 1798
 Clayat *v.* Batteson, 518
 Clymer *v.* Dawkins, 1914
 Clyner *v.* Dawkins, 1913
 Coakley *v.* Mahar, 1023, 1893
v. Perry, 1349
 Coal Co. *v.* Fry, 1659
 Coal Creek Mining Co. *v.* Ross, 2301
 Coale *v.* Barney, 1981
v. Hannibal & St. Jo. R. Co., 1153
 Coalter *v.* Hunter, 2213
 Coan *v.* Mole, 1322, 1334
 Coane *v.* Parmentier, 340
 Coape *v.* Arnold, 1694
 Coars *v.* Holderness, 1638
 Coates' Appeal, 347, 1632
 Coates *v.* Cheever, 89, 494, 495, 561, 712, 742, 803, 810, 811, 812, 841, 853
v. Woodworth, 1648
 Coats *v.* New York City, 40
 Cobb *v.* Biddle, 60
v. Davenport, 2198
v. Dyer, 2069, 2136
v. Kibb, 2260
v. Knight, 1792
v. Lavelle, 1014
v. New England Ins. Co., 1051

- Cobb *v.* Stokes, 1310, 1333
v. Thornton, 2167
v. Webb, 1462
- Cobbey *v.* Knapp, 1474
- Cobble *v.* Tomlinson, 824
- Cobel *v.* Cobel, 2252, 2259
- Coble *v.* Nonemaker, 1777
- Coburn *v.* Holles, 210
v. Palmer, 1149, 1213, 1266
- Cochran *v.* Cochran, 506
v. Darcy, 1512, 1513
v. Goodell, 1885, 2041, 2125
v. Guild, 1094
v. Kerney, 1919, 1935, 1945
v. Ocean Dry Dock Co., 1014, 1015
v. Utt, 2024
v. Van Surley, 2323, 2324, 2327, 2329, 2330, 2332
- Cochrane *v.* Libby, 757
v. Willis, 1697
- Cock *v.* Goodfellow, 1715
- Cocke *v.* Bailely, 804, 832
v. Hannum, 1464
- Cocker's Exrs. *v.* Phillips, 762
- Cockerell *v.* Dickens, 368, 719, 2057, 2289
- Cockerill *v.* Armstrong, 762, 763, 800
- Cocket *v.* Sheldon, 373
- Cockran *v.* O'Hern, 654, 655, 681, 683, 684, 685, 687, 699, 1371, 1372, 1674
- Cockrell *v.* Curtis, 1454
- Cockrill *v.* Armstrong, 823, 928, 1592, 1593, 1630
v. Downey, 58
v. Morrey, 339
- Cockson *v.* Cook, 1074
- Coddington *v.* Dunham, 1079
- Coder *v.* Huling, 1956, 1963
- Codling *v.* Johnson, 2205, 2218
- Codman *v.* Hall, 1026, 1925
v. Jenkins, 2271
v. Johnson, 505, 1102
v. Winslow, 1913
- Codwise *v.* Taylor, 2009
- Cody *v.* Quarterman, 996, 1212, 1283, 1293, 1294, 1299, 1306, 1319, 1334
- Coe *v.* Bradley, 2304
v. Clay, 1065
v. Columbus, P. & Ind. R. Co., 98, 2038
v. Delaware & L. R. Co., 2018
v. Hobby, 996, 1162
v. McBrown, 98, 2019
v. Persons, 2322
v. Smith, 1381
v. Walcottville Manf. Co., 2292
v. Winters, 2121
v. Wolcottville, 591
- Coffee *v.* Ruffin, 1717
- Coffey *v.* Hunt, 2065
- Coffin *v.* Argo, 1989
v. Bramlitt, 1724
v. Coffin, 573
v. Heath, 1891
v. Loring, 2016
v. Lunt, 1270, 1271, 1274, 1285, 1304
- Coffman *v.* Coffman, 780
v. Huck, 1276, 2261
- Cogan *v.* Cogan, 1569
- Coggesgall, etc., Trustees of New Rochelle, *v.* Pelton, 1659
- Coggs *v.* Bernard, 1191
- Cognil *v.* Freelove, 2263
- Cogley *v.* Browne, 1157
v. Cushman, 2011
- Cogreve *v.* Dehon, 1947
- Cogswell *v.* Cogswell, 506, 508, 510, 511, 943
v. Lippert, 804
v. Stout, 2134
v. Tibbetts, 887, 895
- Cohen *v.* Broughton, 2274
v. Dry Dock, East Broadway & B. R. Co., 1195
v. Dupont, 1166
v. Kyler, 120, 135, 136, 1727
- Cohens *v.* Virginia, 1516
- Cohier *v.* Trinity Church, 36
- Cohn *v.* Virginia Ins. Co., 632
- Coit *v.* Comstock, 1686, 1687
- Coker *v.* Pearsall, 1027, 2064
v. Smith, 2151
v. Whitlock, 2080
- Colburn *v.* Hollis, 2297
v. Mason, 1912
v. Morrill, 1128, 1173, 1174
v. Morton, 1769
v. Richards, 2227
- Colby *v.* Osgood, 1096
- Colchester *v.* Roberts, 2220
- Coldwell *v.* Woods, 2040
- Cole *v.* Cole, 757, 945, 986, 1407, 1410
v. Eastham, 2198
v. Gill, 1286, 1290, 1445, 1497, 1504
v. Laconia Savings Bank, 1443, 1444, 1445
v. Lake Co., 1297, 1849
v. Langley, 596, 757
v. McKey, 1197
v. Marple, 1514
v. O'Neil, 654
v. Patterson, 2268
v. Pennoyer, 1031, 2344
v. Rawlinson, 309
v. Robinson, 1033
v. Savage, 2071, 2112
v. Scott, 2006
v. Sewell, 1569
v. Smith, 976
v. Sprowle, 2186, 2206
v. Stewart, 133, 2186
v. Terry, 1246
v. Van Riper, 587, 588, 633, 669, 896, 1362, 1377, 1514
v. Wade, 1663, 1731, 1778, 1816, 1817, 1818, 1833, 1841, 1842
v. Wolcottville Mfg. Co., 1365
- Colegrave *v.* Dias Santos, 96, 127, 145
- Coleman's Appeal, 2244, 2247
- Coleman's Estate, 204
- Coleman *v.* Anderson, 2335
v. Ballandi, 1509, 1513
v. Beach, 1808, 1809
v. Billings, 2298
v. Chadwick, 92, 2233, 2237
v. Cocke, 1613, 1616
v. Coleman, 1883, 1972, 1973
v. De Wolf, 722, 723
v. Doe, 18
v. Duke of St. Albans, 2067, 2162
v. Grubb, 1973
v. Haight, 1084
v. Hutchenson, 1906
v. Laue, 1907
v. Rensselaer, 2082
v. Satterfield, 588, 1364
v. Stearns Mfg. Co., 106, 133
v. Walker, 1784
v. Whitney, 2140
v. Witherspoon, 2067
v. Wooley, 1375, 1562
- Coles *v.* Allen, 1622, 1760
v. Appleby, 2154, 2179, 2180
v. Coles, 689, 783, 800, 1671, 1961, 1962, 1980, 1981
v. Forrest, 2152
v. Raguet, 2060
v. Sims, 1778, 1872
v. Soulsby, 1700
v. Trecothick, 1621, 1697, 1707, 1758, 1772
v. Wooding, 1973, 1976
- Colgan *v.* McKeown, 750
v. Pellens, 221
- Colgate *v.* Colgate, 919, 955, 965
v. Owing's Case, 903
- Colgrove *v.* Gallman, 2671
- Colham *v.* Bradford, 2119
- Collam *v.* Hocker, 2240

- Collamer *v.* Hutchins, 1980
 v. Kelley, 1122, 1164
 v. Langdon, 2085, 2103
 Collard *v.* Hare, 1784
 College Street, *in re*, 1102
 Collett *v.* Collett, 270
 Colley *v.* Merrill, 706
 Collier's Case, 340, 343
 Collier's Will, 1837
 Collier *v.* Blake, 1662
 v. Brown, 1697, 1758
 v. Collier's Exrs., 7
 v. Corbett, 1901
 v. McBeam, 1606
 v. Pierce, 2223
 v. Slaughter, 270, 271
 v. Walters, 1579, 1693
 Collingswood *v.* Pace, 2287
 v. Pays, 236
 Collins' Appeal, 1509
 Collins *v.* Barrow, 1168, 1200
 v. Blatern, 2059
 v. Canty, 1344
 v. Carlisle's Heirs, 536, 820, 821, 1593,
 1630, 1815
 v. Chaman's Heir, 75
 v. Champ's Heirs, 77, 95
 v. Dickinson, 1980
 v. Forrey, 764
 v. Harding, 984, 2250
 v. Hasbrouck, 1104, 1109, 1112, 1113,
 1143, 1155
 v. Hoxie, 2281
 v. Johnson, 1283, 1286
 v. Larenburg, 1373, 1562
 v. Many, 1280
 v. Marcy, 268
 v. Prentice, 2085, 2220
 v. Rowe, 2068
 v. Smith, 1621, 1707, 1769
 v. Tillou's Admr., 2045
 v. Torrey, 783, 800, 803, 2062
 v. Torry, 2094
 v. Warren, 837, 1957, 1964, 1965
 v. Willdin, 1124
 v. Wood, 939
 Doe d., v. Weller, 1025, 1264, 1323
 Collins Mfg. Co. *v.* Marcy, 259, 266, 269, 1972
 v. Murray, 268
 Collinson *v.* Lister, 1715
 Collis *v.* Kemp, 413
 Colman *v.* Clements, 1913
 v. Duke of St. Albans, 1027
 Colony *v.* Dublin, 671
 Colquhoun *v.* Atkinson, 2140, 2355
 Colsten *v.* Chaudet, 1814
 Colt *v.* Towle, 268
 Colton *v.* Gorham, 2263
 v. Smith, 2091
 Columbia National Bank *v.* Embree, 1949
 Columbian Ins. Co. *v.* Lawrence, 1668, 2113,
 2114, 2117
 Colville *v.* Miles, 1207
 Colvin *v.* Worford, 974
 Colwell *v.* Caper, 976
 v. Carper, 1424
 v. Woods, 2039
 Colyear *v.* Mulgrave, 2314
 Coman *v.* Lakey, 434, 1614
 Comb's Case, 1043
 Combs *v.* Branch, 2250, 2252, 2258
 v. Jordan, 2253
 v. Young, 767, 801, 809
 v. Young's Widow, 705, 744
 Comby *v.* McMichael, 1597, 1796
 Comer *v.* Chamberlain, 589, 592, 593, 623, 678
 v. Sheehan, 2258
 v. Shehan, 1028
 Coming, *Ex parte*, 2002
 Comins *v.* Comins, 211
 Comly *v.* Strader, 721, 1376
 Commercial Bank of Buffalo *v.* Warren, 2130
 Commercial Bank *v.* Corbett, 1426
 Commercial Bank of Lake Erie *v.* Western
 Reserve Bank, 2154
 Commercial Bank of Manchester *v.* Nolan,
 1554
 Commercial Bulletin Co., *in re*, 2263, 2266
 Commercial Ins. Co. *v.* Spankneble, 239, 2116
 Commercial Real Estate Assoc. *v.* Parker, 2171
 Commissioners *v.* Harman, 1287
 v. Smith, 890
 v. Walker, 1573, 1585, 1610, 1670, 1671,
 1680, 1681
 v. Withers, 2325
 Commissioners of Pilots *v.* Clark, 982
 Commissioners of the Sinking Fund *v.* Walker,
 1555, 1656, 1657, 1658, 1712, 1714,
 1718, 1719, 1722
 Commissioners Tippecanoe County *v.* L. M. &
 B. R. Co., 1019
 Common *v.* Coupe, 2291
 Commonwealth *v.* Alger, 5, 194, 195, 198, 199,
 200, 2323, 2325, 2328
 v. Blodgett, 4
 v. Byrne, 2324
 v. Carter, 4
 v. Chapman, 149
 v. Charleston, 195
 v. Cogan, 22
 v. Cook, 1403
 v. Cooley, 921
 v. Dennis, 921
 v. Eagle F. Ins. Co., 1734
 v. Essex Co., 2327
 v. Franklin Insurance Co., 1114, 1173
 v. Godley, 22
 v. Intoxicating liquors, 4
 v. Kennedy, 1919
 v. Kensey, 1357
 v. Knowlton, 118, 149, 458
 v. Lane, 753, 754, 755
 v. Lay, 1403
 v. Leach, 149
 v. Lodge, 707
 v. McAllister, 1719
 v. McCaughey, 22
 v. Marshall, 921
 v. Martin's Exrs., 76
 v. Mateer, 1788
 v. Moltz, 1781
 v. Munson, 595, 752
 v. Phoenix Bank, 754
 v. Reading Savings Bank, 2041
 v. Richardson, 1029
 v. Sheriff, 1003
 v. Stauffer, 271, 1858
 v. Stremback, 50
 v. Stump, 506, 752, 757, 759
 v. Tewkesbury, 4, 198
 v. Thompson, 522
 v. Tiffany, 982, 1036
 v. Vincent, 71, 982, 1036
 v. Walker, 1456
 v. Weatherhead, 982
 v. Wise, 22, 1036
 v. York, 118, 458
 Comparet *v.* Randall, 1020
 Compton's Petition, 2206
 Compton *v.* Allen, 1099
 v. Oxenden, 1580, 2098
 Comstock *v.* Comstock, 1452, 1524
 v. Drohan, 2071, 2166
 v. Hitt, 2068, 2070
 v. Scales, 2020
 v. Van Dusen, 2220
 Comulet Co. *v.* Russell, 2364
 Conant *v.* Brackett, 1211
 v. Little, 739, 740, 851, 852, 854
 v. Smith, 1983, 1988
 Conboy *v.* Kansas City & S. W. R. Co., 1469,
 1473, 1474
 Concord Bank *v.* Bellis, 2345
 Concord R. Co. *v.* Greeley, 2328

- Conde *v.* Shepherd, 2152
Condict, Executors of, *v.* King, 415, 418
Condit *v.* Neighbor, 2251, 2257
Condon *v.* Barr, 1318, 1326
Cone *v.* Dunham, 1581
 v. Hasmliton, 2083
 v. Niagara F. Ins. Co., 2117
 v. Woodward, 1154
Conger *v.* Duryee, 1143, 1156
 v. Ring, 1769
 v. Weaver, 1092
Congleton *v.* Pattison, 1071, 1078, 1079
Congregational Church *v.* Morris, 218, 219, 774
Congregational Society *v.* Fleming, 108, 112, 116
 v. Morris, 750
 v. Stack, 1850
Conkey *v.* Everett, 1666
 v. Hart, 1511, 1517
Conklin *v.* Conklin, 322, 323, 1892
 v. Egerton, 1752, 1835
 v. Foster, 565, 976, 1415, 1424, 1502, 1519
 v. Hinds, 2125
 v. Parsons, 104
 v. White, 1342
Conkling *v.* King, 1058
Connally *v.* Hardwick, 1409
Connaughton *v.* Sands, 1398, 1483, 1514, 1515
Connecticut Gen. Life Ins. Co. *v.* Eldredge, 1765
Connecticut Mut. L. Ins. Co. *v.* Crawford, 2170
Connell *v.* Connell, 909
 v. Lamb, 2253
 v. Mayer, 2972
Connolly *v.* Belt, 2159
 Connolly, 753
Conner *v.* Banks, 2106
 v. Gerrard, 1792
 v. Hawkes, 1431
 v. Nichols, 1479, 1506
 v. Shepherd, 552, 776, 807, 833
 v. Whitmore, 2091, 2103
Connell *v.* Todd, 2358
Connolly *v.* Branster, 928
 v. Smith, 712
Connor, *In re*, 1465
Connor *v.* Bradley, 1059, 1060, 1061, 1154
 v. Clark, 135
 v. Coffin, 45, 78, 103, 106, 135
 v. Lewis, 1614
 v. McMurray, 1382, 1450, 1455, 1467, 1479
 v. Shepherd, 707
 v. Squiers, 135
 v. Stephen, 777
 v. Whitmore, 2084
Conover *v.* Conover, 2260
 v. Hobart, 2069, 2071
 v. Hoffman, 1806
 v. Mutual Ins. Co., 239, 2115, 2116
 v. Porter, 896
 v. Warren, 2008
Conrad *v.* Atlantic Ins. Co., 688, 1992, 1993
 v. Harrison, 2153, 2155, 2164
 v. Long, 269
 v. Saginaw Mining Co., 122, 123, 129, 130
 v. Smith, 2262, 2263
 v. Starr, 1893
Conroe *v.* Birdsall, 2343
Conroy *v.* Sullivan, 1449, 1504
Constable *v.* Bull, 1627
Constant *v.* Abell, 1315, 1316
Constantine *v.* Wake, 1109, 1122, 2262
Continental Nat. Bank *v.* Weems, 1762, 1763
Converse *v.* Blumrich, 2009
 v. Citizens' Ins. Co., 1957
 v. Ferre, 1892
Conway, *Ex parte*, 1794, 1795
Conway *v.* Alexander, 2037, 2043, 2044, 2052, 2053, 2054, 2055
 v. Cutting, 1690
Conway *v.* Hale, 1658
 v. Kinsworthy, 1665, 1690
 v. Starkweather, 1130, 1134, 1136, 1318, 1353
 v. Taylor's Exr., 1516
Conwell *v.* Clifford, 2025, 2059
 v. Evill, 2045
 v. Kuykendall, 2772
 v. McCowan, 2150
Conyers *v.* Kenan, 2296
Cooch *v.* Gerry, 1998
 v. Goodman, 1925
Coogan *v.* Burling Mills, 2022, 2024
 v. Parker, 1083, 1084, 1177, 1179, 2269
Cook *v.* Allen, 1974, 1977, 1983
 v. Babcock, 2296, 2297
 v. Bartholomew, 2031, 2032, 2141
 v. Bisbee, 521
 v. Brightley, 1071, 1901
 v. Brown, 237, 2319
 v. Champlain Transportation Company, 123, 553, 554, 1153, 1228
 v. Cholmondeley, 563
 v. Clinton, 1899
 v. Colyer, 2047
 v. Cook, 541, 542, 545, 546, 547, 557, 727, 743, 1212, 1296
 v. Cooper, 2085, 2100
 v. Corthell, 2018
 v. Creswell, 1337
 v. Dillon, 1779
 v. Ellington, 1582, 1591, 1593, 1630
 v. Farnam, 890
 v. Finkler, 2175
 v. Fisk, 853
 v. Fountain, 1611, 1612
 v. Hammond, 194
 v. Holmes, 329, 342
 v. Hull, 72, 2227
 v. Johnson, 2258
 v. Klink, 1523
 v. McChristian, 1378, 1379, 1380, 1448, 1465, 1502, 1510
 v. Newman, 1504
 v. Norton, 1353
 v. Parham, 2102
 v. Parker, 1032
 v. Patrick, 1639
 v. Stearns, 2212, 2213
 v. Tullis, 1586, 1617, 1661
 v. Walker, 317, 319, 785
 v. Wardens of St. Paul's Church, 1853, 1855
 v. Webb, 1026, 1903
 v. Whiting, 58
 v. Winford, 967
 v. Wood, 1723
County *v.* Railroad Co.
Cook's Exrs. *v.* Cook's Admrs., 855, 858
Cooke, *Ex parte*, 1761
Cooke *v.* Bremond, 1947
 v. Clayworth, 1032, 1034
 v. Crawford, 1817
 v. Culbertson, 2045
 v. Husbands, 1373, 1562
 v. Lamotte, 1790, 1801
 v. Loxley, 1214
 v. Neilson, 1254, 1327, 1328, 1343
 v. Soltan, 1743
 v. Turner, 267
Cookson *v.* Cookson, 1964
 v. Richardson, 1620, 1760
Cooler *v.* Wooding, 1928
Cooley *v.* Dewey, 2281
 v. Hobart, 2026
Coolidge *v.* Learned, 1913, 2197, 2290, 2291, 2292
 v. Melvin, 2134
Coolingwood *v.* Pace, 2287
Coombe, *Ex parte*, 2003
Coombs *v.* Anderson, 465
 v. Beaumont, 125
 v. Jackson, 1023

Coombs *v.* Jordan, 22, 47, 49, 51, 61, 144, 183,
485, 1225, 2140
v. Read, 1376
v. Young, 927
Coombe *v.* Clements, 938
Coomler *v.* Hefner, 1304, 1316, 1327, 1328, 1331,
1334, 1546
Coon *v.* Bean, 1858
v. Brickitt, 1154, 1861, 1868
Cooney *v.* Cooney, 1503
v. Hayes, 1111
v. Woodburn, 1372
Coope *v.* Eyer, 1241, 1242
Cooper *v.* Adams, 62, 63, 479, 514, 1266, 1273,
1277, 1294, 1296, 1297
v. Barber, 2245
v. Bigley, 2024, 2153
v. Cedar Rapids, 1983
v. Cole, 1050, 1236, 2067
v. Cooper, 440, 1024, 1358, 1404, 1405,
1580, 1689, 1919, 1934, 1942, 1951
v. Coursey, 411, 412
v. Davis, 688, 2062, 2080, 2187
v. Fields, 1251
v. First Presbyterian Church, 40
v. Foss, 2068
v. Galbraith, 1758
v. Jackson, 2079
v. Johnson, 122, 123, 147
v. Kynock, 344, 1693, 1796
v. Lloyd, 774, 894
v. Martin, 2151, 2172
v. McClun, 1598, 1738
v. McDonald, 656, 679, 680, 684, 1372
v. McGrew, 1234
v. Newland, 2099, 2101, 2111
v. Presbyterian Church, 32
v. Rankin, 1042
v. Smith, 1213, 1216, 1217, 2226
v. Slower, 1256, 1268, 1272
v. Tabor, 890
v. Whitney, 788, 832, 1560, 2168
v. Williams, 2328
v. Wolf, 2018, 2019
v. Wyatt, 260, 272, 1113, 1677
v. Young, 1247
Coosa River Steamboat Co. *v.* Barclay, 1517,
1518
Cootee *v.* Richardson, 1111
Coots *v.* Lambert, 849
Coover's Appeal, 1064
Cope *v.* Cope, 2188
v. Marshall, 57
v. Wheeler, 2056, 2164, 2071
Copeland *v.* Barron, 352, 534, 1815
v. Copeland, 42, 816, 817, 2126
v. Sauls, 216, 217, 673, 1349
v. Stephens, 1115
v. Stevens, 1114
v. Yoakum, 2039
Copely *v.* Riddle, 2305
Coppis *v.* Middleton, 2137
Copp *v.* Hersey, 802, 955
v. Norwich, 1533
Coppage *v.* Alexander's Heirs, 1851, 1858
Copper Mining Co. *v.* Beach, 1008
Coppin *v.* Coppin, 368, 719, 2057, 2289
v. Gunner, 625
v. Pennyhough, 1778
Coray *v.* Eyre, 2036
Corbet's Case, 1559, 1564, 2194
Corbet *v.* Waterman, 5072
Corbett *v.* Corbett, 249, 252, 499
Corbin *v.* Cannon, 1914
v. Dale, 2240
v. Healy, 287, 401, 402, 408, 410, 446, 449,
450
v. Jackson, 1976
v. Minchin, 1473, 1480
Corbitt *v.* Clenny, 1777
Cord *v.* Hirsch, 2152
Cordes *v.* Miller, 1172, 1173

Core *v.* Faupel, 2296, 2297, 2298
Coreill *v.* Ham, 935
Corey *v.* Bishop, 80
v. People, 834, 836
Corinth *v.* Emery, 1945
Corlass, *In re*, 618
Corlies *v.* Corlies, 1721
Corliss *v.* McLagin, 103, 133, 138, 2067
Corman *v.* Herritt, 2335
Cormerais *v.* Genella, 2159, 2167
v. Wesselhoeft, 1640
Cormick *v.* Taylor, 860
Corn Exchange Ins. Co. *v.* Babcock, 646, 2012
Cornelius *v.* Ivins, 265, 266, 1849, 1851, 1972
v. Smith, 1580, 1590
Cornell *v.* Dean, 1231
v. Hall, 2043, 2052, 2053
v. Hichens, 2014, 2016
v. Lamb, 104, 2253, 2273
v. Molton, 1005
v. Prescott, 2112, 2150, 2166
v. Vanartsdalen, 1202
Cornellison *v.* Cornellison, 1334
Cornfoot *v.* Fowke, 1039, 1110
Corning *v.* Gould, 1174, 2243, 2247
v. Murray, 2100
v. Troy Iron & Nail Works, 1145, 1222
v. Troy Nail Co., 2248
Cornish *v.* Frees, 1427
v. Mew, 518
v. Stubbs, 1312
Cornwall *v.* Hoyt, 647
Doe d., v. Matthews, 1310
Corp *v.* Chandler, 287
Corpman *v.* Baccastow, 2038
Corporation of Hastings *v.* Ivall, 1351
Corriel *v.* Ham, 917, 955
Corrigan *v.* City of Chicago, 1171
v. Trenton, 2257
v. Trenton Del. Tolls Co., 1019
v. Woods, 1276
Corry *v.* Lamb, 949
Corse *v.* Leggett, 1617
Cortleyou *v.* Hathaway, 2066
v. Van Brundt, 2201
Corven's Case, 121
Corwin *v.* Corwin, 2318
v. Cowan, 133
v. Davison, 1914
Corwithe *v.* Griffing, 1985
Corxall's Lessee *v.* Sherrerd, 452
Cory *v.* Eyre, 2124
Cost *v.* Rose, 1084
Costabadie *v.* Costabadie, 1740
Costar *v.* Clarke, 788, 827, 1578
v. Lorillard, 761, 763, 788, 832, 1682, 1876,
1877
Coster *v.* Murray, 1781
Costigan *v.* Gould, 2355
Cotes *v.* The City of Davenport, 1261
v. Woodson, 1032
Cottee *v.* Richardson, 1164
Cotten *v.* Willoughby, 2020
Cottenham, Succession of, 1481
Cotter *v.* Bettner, 1241
v. Layer, 1840
Cotterell *v.* Long, 2036, 2037, 2046, 2052
Cottinger *v.* Fletcher, 1637
Cottingham, Succession of, 1481
Cottingham *v.* Fletcher, 1691
Cottman *v.* Grace, 1658
Cotton, *Ex parte*, 125, 133
Cotton *v.* McKee, 2039
v. Pocassett Mfg. Co., 2219
v. Wood, 1382
Cottrell's Appeal, 1777
Cottrell *v.* Adams, 2102, 2105
Couch *v.* Anderson, 292
v. Burke, 1280
v. Stratton, 881, 918, 944, 951, 952
Coudert *v.* Cohen, 1013
Coulson *v.* Whiting, 1054

- Coulter v. Holland, 853, 856
v. Robertson, 1553, 1710, 1711, 1727
 Coultz v. Walker, 1579
 Council v. Page, 1047
 Countess of Shrewsbury's Case, 1228, 1297
 County of Henry v. Bradshaw, 2355
 County of Shrewsbury v. Earl of Shrewsbury, 510
 Countz v. Markling, 910
 Coursey v. Davis, 324
 Coursey Oil Co. v. Oilbreck & A R Co., 1019
 Courthope v. Mapplesden, 577
 Courtlass v. Vaulore, 780
 Courtney v. Carr, 1909, 2076
v. Taylor, 1063
 Courtois v. Carpenter, 2056
 Cousins v. Allen, 2169
 Coutant v. Servoss, 1832, 2133
 Coutts v. Acworth, 1793
 Cove v. Cather, 744, 840
 Covendale v. Aldrich, 1825
 Covender v. Culdeel, 1962
 Coventry v. Coventry, 963
 Covert v. Hertzog, 888
 Covey v. Pittsburgh, F. W. & C. R. Co., 98, 142
 Covilland v. Tanner, 1900
 Cowan v. Iowa St. Ins. Co., 2115
v. Wheeler, 1610, 1616
 Cowart v. Cowart, 108
 Cowden's Estate, 2179, 2180
 Cowdry v. Cowdrey, 1411
v. Day, 2051
 Cowell v. Colorado Springs Co., 259, 268
v. Lammers, 2308
v. Lumley, 1053, 1084, 1086, 1126, 1175, 1177
 Cowen v. Alsop, 1623
 Goweta Falls Mfg. Co. v. Rogers, 1247
 Cowgell v. Warrington, 1484, 1487
 Cowie v. Goodwin, 1177, 1200, 2269
 Cowing v. Howard, 1715
 Cowl v. Varnum, 2007
 Cowles v. Kendall, 2213
v. Kidder, 2227
 Cowley v. Lumley, 2269
v. Shelby, 2135
 Cowley's Heirs v. Chiles, 1213
 Cowling v. Higginson, 2220
 Cowman v. Hall, 761, 763, 788, 827, 831
v. Harrison, 1684
 Cowper v. Cowper, 1692, 2287
v. Fletcher, 1021
 Cowton v. Wickersham, 2262
 Cox v. Bent, 1264, 1275, 1299, 1313, 1324, 1325
v. Cox, 771
v. Fonblanque, 501
v. Garst, 802
v. Grant, 1638
v. Jagger, 718, 736, 739, 744, 838
v. Joiner, 2334
v. McBurney, 1956, 1963
v. Shropshire, 1481
v. Stafford, 1398
v. United States, 2057
v. Vickers, 2149
v. Walker, 1595
v. Wells, 901
v. Wheeler, 2137, 2150, 2178, 2179
v. Wilder, 702, 915, 1481
Doe d., v. Day, 1040
 Coxall v. Sherrerd, 298
 Cox v. Blanden, 1756
v. Higbee, 841
v. Higher, 844
 Coy v. Coy, 1777
v. Downie, 1100
 Coyle v. Wilkins, 2175
 Cozens v. Long, 883
v. Stevenson, 1079
 Cozine v. Graham, 1592
 Cozzens v. Jaslin, 2279
 Crabb v. Pratt, 781
 Craddock v. Riddlesbarger, 49, 50, 51, 52
 Craft v. Webster, 2105
v. Wilcox, 1919, 1950, 1952
 Crafts v. Aspinwall, 2154, 2179, 2180
v. Crafts, 826, 1921, 1988, 2029, 2172
 Craig v. Craig, 1754, 1755
v. First Presbyterian Church, 33, 35, 36, 39
v. Leslie, 218, 434, 673, 1560
v. Merime, 2255
v. Parkis, 2099
v. Pinson, 2320
v. Radford, 673
v. Somers, 1048
v. Tappan, 2306
v. Taylor, 1876
v. Watt, 485
v. Wells, 259, 266, 269
 Craig's Heirs v. Walthall, 947, 964
 Crain v. Cavana, 773, 898, 899, 920, 954, 956, 960
v. Fox, 2245
v. McGoon, 2127, 2128
v. Wright, 1824
 Cram v. Burnham, 597, 752, 757, 759
 Cramer v. Hoose, 1634, 1651
 Crane v. Bonnell, 2039, 2045, 2052, 2053
v. Brigham, 117, 146
v. Buchanan, 2045
v. Caldwell, 2006
v. Deming, 2027, 2029, 2030
v. Linneus, 1428, 1429
v. March, 2107, 2108
v. Marshall, 212
v. Meginnis, 772, 2331
v. O'Conner, 971, 975, 978, 1017
v. O'Reilly, 1290
v. Palmer, 777, 804, 814, 832, 2005
v. Reader, 2354
v. Reeder, 220, 2014, 2347
v. Turner, 2110, 2120
v. Waggoner, 1434, 1894
 Cranson v. Cranson, 727, 794, 795, 912
 Cranstone v. Crane, 2161
 Cranz v. White, 1427, 1428
 Crary v. Goodman, 984, 1917, 2298
 Crashaw v. Maule, 825
v. Sumner, 2237
 Craske v. Christian Union Pub. Co., 996, 1264, 1319, 1322
 Crassen v. Swovelaud, 2038
 Craufurd v. Hunter, 1668
 Craven v. Brady, 271, 274, 501
v. Craven, 917, 947
v. Winter, 722
 Craver v. Wilson, 2060
 Crawford's Appeal, 1739, 2313
 Crawford v. Chapman, 1071
v. Crawford, 1783
v. Edwards, 2072
v. Ellis, 2068
v. Forshaw, 1816
v. Hazelrigg, 2133
v. Jones, 2256
v. Kirksey, 1623, 1624, 1625
v. Lockwood, 1506
v. Longstreet, 1331, 1322
v. Morris, 1314
v. Scovell, 2345
v. Taylor, 2094, 2174, 2175
v. Thompson, 270
v. Wheeler, 1083
v. Wick, 994
 Crawley's Case, 1552, 1553
 Cray v. Willis, 1968
 Craythorne v. Swinburne, 2137
 Creager v. Creager, 1383, 1443, 1607
 Creelius v. Hurst, 727, 826, 913
 Creech v. Crockett, 1027, 1297
 Creekmur v. Creekmur, 2266, 2297, 2298
 Creel v. Kirkham, 1231, 1233

- Cregan *v.* Cullen, 1185
 Cregonin R. Co. *v.* Railway & Nav. Co., 1019
 Creiger, Matter of, 675, 686, 692, 703, 762, 777,
 793
 Creiger *v.* Braun, 1327
 Creigh *v.* Henson, 1782
 Creighton *v.* McKee, 1088
 v. Pringle, 1553
 v. Sanders, 1327, 1329, 1339, 1340
 Crenshaw *v.* Thackston, 2150, 2072
 Cresinger *v.* Welch, 986
 Cressman's Appeal, 1665, 1690, 1790
 Cresson *v.* Stout, 104, 105, 108, 110, 126
 Crest *v.* Jack, 1891, 1892
 Creveling *v.* Fritts, 1578
 v. West End Iron Co., 1151
 Crewe *v.* Dicken, 1778, 1818
 Crews *v.* Pendleton, 46, 47
 v. Threadgill, 2047, 2054
 Cribb *v.* Rogers, 282
 Crickmere *v.* Patterson, 1847, 1848, 1856
 Cridland's Estate, 500, 1673
 Criley *v.* Chamberlain, 414
 Crim *v.* Nelms, 1212
 Crine *v.* Tifts, 49
 Crippen *v.* Baums, 2331
 v. Morrison, 146, 2063
 v. Morse, 1923
 Cripps *v.* Jee, 2049
 v. Wolcott, 316
 Crisfield *v.* Storr, 1927
 Crisp *v.* Martin, 29
 v. Miller, 2018
 Doe d., *v.* Barber, 1352
 Critchfield *v.* Ramaley, 1315, 1318, 1333, 1335,
 1337
 Crittenden *v.* Johnson, 764, 803, 827, 831, 887,
 927
 v. Woodruff, 734, 764, 838, 888, 889, 927
 Crittenton *v.* Alger, 2226
 Croade *v.* Ingraham, 734, 838, 984, 2262
 Croan *v.* Joyce, 1935, 1940, 1950
 Crocheron *v.* Jaques, 1599
 Crocker *v.* Carson, 1884, 1897
 v. Crocker, 1642, 1645, 1745, 1746, 1763,
 1765
 v. Fox, 847, 861, 873, 885
 v. Higgins, 1600
 v. Jewell, 2101
 v. Tiffany, 1924
 Crockett *v.* Crockett, 534, 544, 555, 566, 740,
 776, 887
 Crockford *v.* Alexander, 577
 Croft *v.* Bunster, 2033, 2100, 2107, 2108
 v. Lumley, 1056, 1057, 1105
 v. Slee, 436
 v. Wilbar, 1364
 Doe d., *v.* Tiddbury, 1215, 1306
 Croghan, Estate of, 1520, 1521
 Cromie *v.* Hoover, 141, 145, 1224
 v. Louisville, etc., Soc., 1659
 v. Trustees Wabash & Erie Canal Co.,
 73
 Crommelin *v.* Thies, 994, 1104, 1111, 1112,
 1118, 1123, 1133, 1168, 1254, 1255,
 1283, 1295, 1297, 1315, 1316, 1317, 1318
 Crompe *v.* Barrow, 1838
 Crompton *v.* Oxenden, 1164
 Cromwell's Case, 2340, 2349
 Cromwell *v.* Bank of Pittsburgh, 2161
 v. Brooklyn, 2110
 v. Brooklyn F. Ins. Co., 2118
 v. Delany, 450
 v. Tate, 2363
 v. Winchester, 284, 285
 Cronin *v.* Haseltine, 2101
 Cronklute *v.* Cronklute, 2240
 Crook *v.* Crooking, 1691
 v. Glenn, 2175
 v. Ingoldsby, 1786
 v. Watts, 2287
 Crooke *v.* County of Kings, 1798, 1808, 1809
 Crooke *v.* De Vandes, 322
 v. Frazier, 2083
 v. O'Higgins, 2149, 2150, 2151
 Crooker *v.* Jewell, 2103, 2147
 Crookes *v.* Whitworth, 1878, 1884, 1974
 Croom *v.* Herring, 76
 v. Talbot, 2250
 Crop *v.* Morton, 491
 v. Newton, 1700
 v. Norton, 1587, 1690
 Cropsey *v.* Ogden, 753, 754
 Crosby *v.* Allyn, 1911
 v. Berger, 2056
 v. Dodds, 310
 v. Farmers' Bank of Andrew Co., 1946
 v. Hanover, 197
 v. Harlow, 1295
 v. Leavitt, 2085, 2128
 v. Loop, 2250, 2251, 2256, 2258, 2268
 v. Wadsworth, 53, 54
 Crosskey *v.* Chapman, 1777
 Cross, *Re*, 1037, 1450, 1497, 1488
 Cross's Appeal, 1645
 Cross *v.* De Valle, 215, 216
 v. Carson, 1849, 1861, 1873
 v. Carter, 1866
 v. Everts, 1450, 1462, 1474, 1485
 v. Hudson, 1844
 v. Marston, 135, 139
 v. Robinson, 1915, 1993, 2128
 v. Tome, 2250, 2253
 v. Upson, 1110, 1281
 Crossley *v.* Lightowler, 2208, 2228, 2245
 Crossling *v.* Crossling, 1840
 Crossman *v.* Field, 2, 305, 308, 335
 Crosswell *v.* Crane, 1013
 Crotty *v.* Collins, 47
 Crouch *v.* Briles, 2270
 v. Fowle, 1054
 v. Puryear, 494, 495, 552, 553, 867, 742,
 811, 812
 v. Shepherd, 2241
 v. Tregouning, 2265
 v. Wabash, 1156
 Crouse *v.* Derbyshire, 1234
 v. Holman, 986
 Crow *v.* Brown, 1427, 1428, 1429
 v. Knightingler, 1165
 v. Mark, 1905, 1906
 v. Vance, 2007, 2104, 2106
 Crowder *v.* Shackelford, 1021
 Crowe *v.* Wilson, 974
 Crowell *v.* Hospital of St. Barnabas, 2072
 v. Woodbury, 1988
 Crowey, *In re*, 1379
 Crowher *v.* Rowlandson, 1032
 Crowhurst *v.* Amersham Burial Board, 57, 199
 Crowie *v.* Hoover, 1188
 Crowther *v.* Crowther, 1785
 Croxall *v.* Sherrerd, 401, 402, 447, 453, 454,
 459, 470, 473, 1558, 1559, 1736
 Crozier's Appeal, 941
 Cruger *v.* Douglas, 1798
 v. Halliday, 1599, 1660, 1661, 1778, 1787
 v. Haywood, 310
 v. McLaury, 1139, 1862, 2258
 v. McLawry, 2268
 Cruikshank *v.* Duffin, 2159
 Crum *v.* Moore, 1713
 Crumb *v.* Davis, 832
 v. Sawyer, 910
 Crumbaugh *v.* Kugler, 1623
 Crumley *v.* Deake, 687, 690
 Crummen *v.* Bennett, 1481
 Crump *v.* Norwood, 815
 v. Redd, 1633
 Crutchfield *v.* Coke, 2165
 Cruwys *v.* Colman, 1629
 Cubberly *v.* Yager, 2166
 Cubbins *v.* Ayers, 130
 Cubitt *v.* Porter, 1904, 2235, 2236
 Cudleigh's Case, 1525, 1528

Cudlip *v.* Randall, 1261
Cuddworth *v.* Scott, 2020
Cueman *v.* Broadnax, 298, 1558
Cuffee *v.* Milk, 415, 423, 466
Culbertson's Appeal, 1605, 1753
Culbertson *v.* Duly, 308
 v. Luckey, 1626
Cullen *v.* Sprigg, 1863, 1864
Culley *v.* Doe d. Taylerson, 607
Culling *v.* Tuffnail, 124, 127
Cullom *v.* Erwin, 2106
Cullough *v.* Norwood, 920
Cullum *v.* Branch Bank at Mobile, 2136
Cullwick *v.* Swindell, 133
Culow *v.* Rhodes, 1898
Culver *v.* Harper, 800
 v. Rhodes, 1899, 1915, 1916, 1917, 2296
Cumber *v.* Gilman, 2086
Cumberland *v.* Codrington, 1672, 2181
 v. Washington County Court, 671
Cumberland C. & I. Co. *v.* Sherman, 1768
Cumming *v.* Cumming, 2155, 2180
 v. Williamson, 1832
Cummings *v.* Barrett, 68, 71, 73
 v. Freer, 2331
 v. Long, 1504, 1505
 v. McCullough, 1624
 v. Mills, 1241
 v. Powell, 2344
 v. Shaw, 317, 318
 v. Show, 536
 v. Wyman, 2295
Cunnea *v.* Williams, 2273
Cunningham *v.* Ashley, 2107
 v. Bell, 1646
 v. Bloodgood, 1509
 v. Cambridge Savings Bank, 1288
 v. Cunningham, 184, 657, 757, 759, 772
 v. Freeborn, 1794
 v. Gray, 1376
 v. Hawkins, 2095
 v. Horton, 1253, 1266, 1274, 1279, 1353
 v. Knight, 766, 908
 v. McKindley, 1781
 v. Moody, 611
 v. Pattee, 1008, 1026, 1087, 1088
 v. Shannon, 916, 934, 956, 965
Cunynghame *v.* Thurlow, 1844
Cure *v.* Crawford, 1314
Curell *v.* Miss. M. & F. Ins. Co. 2115
Curl *v.* Lowell, 1274, 1295, 1296, 1356
Curlin *v.* Hendricks, 1697
Currant *v.* Jags, 1647
Curren *v.* Finn, 774
Currie *v.* White, 1665, 1690
Carrier *v.* Barker, 1013, 1274, 1335, 1338, 1341
 v. Earl, 1144, 1269, 1271, 1274, 1284,
 1285, 1293, 1295, 1297
 v. Gale, 2085, 2091, 2128, 2292,
 v. Jordan, 1274, 1281
 v. Perley, 1254, 1257, 1270, 1273, 1274,
 1279, 1300, 1305, 1307, 1337, 1342
 v. Sutherland, 1382, 1481
Currie *v.* Finn, 221
Curry *v.* Bott, 635, 659, 1362
 v. Commonwealth Ins. Co., 2113, 2115,
 2117
 v. Curry, 898, 899, 958
 v. Lyles, 2348, 2349
Curtin *v.* Patton, 2344
Curtis *v.* Board of Education, 1864
 v. Brownell, 2345
 v. Buckley, 2002
 v. Deering, 1094
 v. Des Jardins, 1464
 v. Fox, 681
 v. Francis, 2244
 v. Galpin, 2212
 v. Galvin, 1252, 1266, 1293, 1294, 1296,
 1354
 v. Gardner, 283, 285, 290, 1710
 v. Gooding, 2151

Curtis *v.* Goodnow, 2142
 v. Grand Trunk R. Co., 1195
 v. Grost, 62
 v. Hall, 1033
 v. Hewin, 2279
 v. Hitchcock, 2152
 v. Hobart, 835, 851, 852, 861, 920, 1376
 v. Hoyt, 63, 1252, 2206
 v. Hunton, 2289
 v. Hutton, 368, 369, 2057, 2058, 2289
 v. Keesler, 1913
 v. King, 1897
 v. Leavitt, 671
 v. Le Grande Hydraulic Water Co.,
 2243
 v. Longstreth, 414, 415, 447, 472
 v. Lyman, 2119
 v. Mason, 1733
 v. Miller, 1159, 1161, 1164
 v. O'Brien, 1050, 1506
 v. Pierce, 1102
 v. Price, 300, 344, 1606, 1797
 v. Riddle, 139, 142
 v. Rippon, 347, 1632
 v. Root, 1491, 1497, 2015
 v. Swearingen, 1921
 v. Wheeler, 1306
Cusack *v.* White, 2346
Cushing *v.* Adams, 1252
 v. Ayer, 2180
 v. Blake, 611, 654, 655, 660, 677, 678, 679,
 680, 682, 683, 1548, 1574, 1576, 1584,
 1609, 1692, 1694
 v. Hurd, 2083
Cushman *v.* Bailey, 1241
 v. Luther, 2031
 v. Smith, 5, 2327
Cusic *v.* Douglass, 1507, 1508, 1509, 1510
Cuson *v.* Blazer, 69
Cuthbert *v.* Chauvet, 1797
 v. Kuhn, 1117, 1170, 2253, 2268, 2269
 v. Lawton, 2226
Cutler *v.* Currier, 1894
 v. Dickinson, 2043
 v. Lincoln, 2014
 v. Pope, 51, 54, 55
 v. Tuttle, 1634, 1636, 1653
 v. Winsor, 1240
 v. Wright, 920
Cutter *v.* Davenport, 367, 720, 2057, 2058, 2288
 v. Doughty, 1637
Cutting *v.* Cutting, 1807, 1808, 1809, 1810, 1820,
 1825
Cutts *v.* York Mfg. Co., 2015, 2016, 2071
Cuyler *v.* Bradt, 1691
 v. Ensworth, 2177
Cyr *v.* Madore, 2243

D.

Dabney *v.* Bailey, 938, 948
 v. Manning, 1605
Dacre *v.* Gorges, 845
Dade *v.* Irwin, 1669
Dadmun *v.* Lamson, 2092, 2101, 2102
Daggett *v.* Rankin, 2001, 2038, 2087, 2125
 Doe d., *v.* Snowden, 1308
Dahm *v.* Barlow, 1212
Daidge *v.* Bowers, 1301, 1325
Dailey *v.* Grimes, 2257, 2273
 v. Moor, 2339
Daily *v.* Abbott, 2087
Dairs *v.* The State Bank, 2332
Dakin *v.* Allen, 1290
 v. Cope, 1138
Dakins *v.* Berisford, 1372
Dald *v.* Geiger, 1024
Dale *v.* Hamilton, 787, 1644
 v. McEvers, 2089, 2090, 2138
 v. Robinson, 2013
 v. Thurlow, 2364

- Dall *v.* Confidence Silver Mining Co., 89
 D'Almaine *v.* Moseley, 307
 Dalrymple *v.* Dalrymple, 594, 595, 751, 753
 Dalton *v.* Angus, 66, 2233
 v. Dalton, 546, 547
 v. Landahn, 2270
 Daly *v.* Burchell, 2150
 Dalzell *v.* Lynch, 1225
 Damainville *v.* Man, 1108, 1116, 2269
 Damb *v.* Hoffman, 2263, 2264
 Dame *v.* Dame, 63, 116, 123, 1254, 1278, 1295, 1296
 Damon *v.* Damon, 597
 v. Granby, 2360
 Damrell *v.* Hartt, 1815
 Dana *v.* Binney, 2133
 v. Coombs, 2011
 v. Farrington, 1755
 v. Jackson, 1977, 1986
 v. Petersham, 974
 v. Valentine, 2239, 2245
 Dand *v.* Kingscote, 90, 93
 Dane *v.* Kirkwall, 987, 1034
 Danforth *v.* Beattue, 1425, 1481
 v. Lowry, 1576
 v. Sargeant, 1310
 v. Smith, 800, 865
 v. Talbot, 315
 Daniel *v.* Coker, 2087
 v. Day, 1723
 v. Grace, 2254
 v. Leitch, 784, 940
 v. Thompson, 419, 469
 v. Wood, 30, 31, 32, 35, 36, 37, 39, 40, 83
 Daniels *v.* Alvord, 2035
 v. Bailey, 54
 v. Bowe, 132
 v. Brown, 1234
 v. Daniels, 1901
 v. Davison, 999, 1296
 v. Eisenbord, 2031, 2032
 v. Flower Brook Mfg. Co., 2127
 v. Newton, 1173
 v. Pond, 78, 79, 103, 106, 566, 567, 1153, 1184, 1277, 1297
 v. Richardson, 1024, 1074, 1077
 Danks *v.* Quackenbush, 1510, 1511, 1518
 Dann *v.* Spurrer, 1007, 1008
 Dansey *v.* Griffith, 322
 Dansville, Town of, *v.* Pace, 671
 Dauvers *v.* Dorrity, 1979
 D'Aquin *v.* Armant, 2262
 Darby *v.* Callaghan, 976, 2313
 v. Darby, 1961, 1980
 v. Dixon, 1419
 v. Mayer, 2057, 2058, 2289
 Darby's Lessee *v.* Mayer, 367, 368, 720
 Darcy *v.* Askwith, 565
 v. Askworth, 563
 D'Arcy *v.* Blake, 798, 819, 1576
 Darden *v.* Cowper, 1908
 Dark *v.* Johnson, 84, 2211, 2212, 2213
 Darke *v.* Martyn, 1720
 Darke, Doe d., *v.* Bowditch, 1150
 Darling *v.* Chapman, 2131
 v. Kelly, 1230
 v. Pulteney, 1806, 1831, 1840
 v. Rogers, 1682
 Darlington's Appropriation, 641, 1978
 Darlington *v.* Bond, 1140, 1146
 v. Ulph, 1152
 Darrill *v.* Stephens, 1317
 Darrow *v.* Kelly, 2126
 Darst *v.* Roth, 1805
 Dart *v.* Barbour, 2331
 v. Dart, 405, 414, 2301, 2323
 v. Hercules, 123
 Dartmouth College *v.* Clough, 1107, 1124, 2257
 v. Woodward, 235, 2324
 Darvall *v.* Roper, 83
 Dash *v.* Vonkleek, 671
 Dashiell *v.* Attorney-General, 1637
 Dashiell *v.* Collier, 841, 844
 Dater *v.* Bank of United States, 2342
 Daub *v.* Englebach, 2068
 Daubenspeck *v.* Platt, 2054
 Dauchy *v.* Bennett, 2137, 2170
 Daud *v.* Kingscote, 2238
 Daughaday *v.* Paine, 2006
 Daugherty *v.* Daugherty, 945
 v. Deardorf, 2151
 v. Matthews, 1143
 Davall *v.* New River Co., 42
 Davenish, Doe d., *v.* Moffatt, 1310
 Davenkill *v.* Fletcher, 937
 Davenport *v.* Buckman, 1199
 v. Coltman, 309, 1638
 v. Farrar, 2306
 v. Ferrar, 767, 781, 831
 v. Haynie, 2256
 v. Lawson, 2220
 v. Reg, 1138
 v. Tyrrell, 2299, 2301
 v. Young, 2332
 Davey *v.* Durant, 2160
 David *v.* Beelman, 2268
 v. Ryan, 1105
 Davidson *v.* Allen, 2005
 v. Chalmers, 499
 v. Cooper, 2239
 v. Cowan, 2119, 2126
 v. Cox, 1999
 v. Ernest, 1289
 v. Ellmaker, 1214
 v. Foley, 1637
 v. Graves, 915
 v. Isham, 198
 v. Jones, 2349
 v. Lawrence, 2175
 v. Little, 1697
 v. New Orleans, 2324
 v. Sillman, 2302
 v. Thompson, 1894
 v. Westchester Gas Light Co., 132
 v. Whittlesey, 733, 734, 741, 828
 Davie *v.* Briggs, 523
 Davies, *Ex parte*, 321
 Davies *v.* Cannop, 1205
 v. Connop, 1207
 v. Mayor of New York, 1029
 v. Moreton, 1157, 1158
 v. Otty, 1590
 v. Ridge, 1669
 v. Speed, 1568
 v. Warner, 370
 Davies, Doe d., *v.* Davies, 486, 1594, 1597
 v. Gatacre, 461
 v. Thomas, 1334, 1778
 Daviess *v.* Meyers, 490, 511
 Davila *v.* Davila, 954
 Davis *v.* Alden, 1152, 1227
 v. Anderson, 1999, 2078
 v. Andrews, 1451
 v. Angel, 270
 v. Ball, 1698
 v. Barrett, 2098
 v. Bartholomew, 785, 900, 909
 v. Bawcum, 305
 v. Bean, 1094, 2089, 2090
 v. Bechstein, 2108, 2109
 v. Benton, 2305
 v. Bowmar, 2266
 v. Brandon, 501
 v. Brocklebank, 1251, 1269, 1271
 v. Brown, 724
 v. Buffum, 115, 128, 135, 145, 1204
 v. Burrell, 1357
 v. Central Vt. R. Co., 199
 v. Christian, 786, 825, 1749
 v. Cincinnati, 976
 v. Clark, 1919, 1931, 1932, 1944, 1952
 v. Coburn, 1781
 v. Collier, 2272
 v. Connop, 538

- Davis *v.* Cook, 2135
v. Cristian, 1957, 1961, 1965
v. Darron, 764
v. Darrow, 712, 800, 870
v. Davis, 596, 707, 794, 795, 896, 914, 946, 1402, 1918, 2302
v. Demming, 2168
v. Dendy, 2090
v. Dudley, 2011
v. Easley, 62, 545
v. Elkins, 202
v. Eyton, 539, 1113, 1206
v. Garret, 1579
v. Getchell, 2228, 2229
v. Gilliam, 555, 1370
v. Givens, 1882
v. Gray, 1089
v. Hayden, 402, 403, 411, 438, 449
v. Henson, 1403, 1503
v. Hulett, 2166
v. Hunt, 889
v. Jones, 145
v. Kelly, 1456, 1460, 1465, 1466
v. King, 1990
v. Lassiter, 2087
v. Lennen, 1986
v. Logan, 763, 824
v. Loundes, 265
v. McDonald, 801, 896, 908, 909
v. McFarlane, 51
v. Mailey, 348
v. Mason, 208, 598, 600, 601, 602, 603, 604, 605, 611, 613, 679, 680, 689, 695
v. Maynard, 2133
v. Miller, 334
v. Morris, 1107, 1122, 1124
v. Moss, 115, 145, 146, 1155, 1158
v. Murray, 889, 1773
v. Murphy, 1027, 1273
v. Newton, 1376
v. New York Concert Co., 2140
v. Ney, 1594
v. O'Ferrall, 721, 831, 1376
v. Peabody, 1492
v. Perley, 2303
v. Pierce, 810, 1580, 2097
v. Richardson, 351
v. Rock Creek, L. F. & M. Co., 1620
v. Rowe, 20
v. Scott, 2307
v. Sear, 2208
v. Simpson, 1707, 1777
v. Skinner, 1894, 1922
v. Smith, 1126, 1175
v. Speed, 2319
v. Stark, 1158
v. Stinson, 355, 366
v. Stonestreet, 2037, 2043, 2044, 2050, 2053, 2054
v. Taylor, 1009
v. Thompson, 993, 1264, 1267, 1268, 1269, 1270, 1274, 1293, 1294, 1295, 1296
v. Tingle, 714
v. Walker, 868
v. Warner, 372
v. Watts, 2261
v. Wetherell, 728, 729, 731, 879, 1493, 1494, 1646, 2074, 2173
v. Whittlesey, 735
v. Williams, 1797
v. Winn, 2089, 2136, 2138
v. Winslow, 2225
v. Wood, 1405
- Davis, Doe d., *v.* Evans, 1309
 Davison's Appeal, 712
 Davison *v.* Davison, 949
v. Johonnot, 2329
 Davol *v.* Howland, 772, 920
 Davoue *v.* Fanning, 1708, 1768, 1770, 1771, 1772, 1773, 1775, 2163
 Davy *v.* Pepys, 278
 Daw *v.* Newborough, 1583
- Dawley *v.* Ayers, 1395, 1462
 Dawson, *in re*, 109
v. Bank of Whitehaven, 885
v. Bell, 943
v. Clark, 1638
v. Daniel, 78
v. Dawson, 515
v. Drake, 2085
v. Godfrey, 216, 236
v. Hall, 2354
v. Hayden, 1449, 1467, 1777
v. Holt, 1408, 1472, 1486
v. Mills, 1901
v. Oliver Massey, 270
v. Shaver, 706
v. Small, 1687
v. Thurston, 2365
- Day *v.* Adams, 2354
v. Allender, 2206
v. Cochran, 600, 603, 604, 607, 608, 612, 620, 621, 634, 635, 636, 637
v. Dameron, 307
v. Davis, 1897
v. Day, 2331
v. Howard, 1900
v. Micou, 278, 2142
v. N. Y. C. R. Co., 2240
v. Patterson, 2151, 2153
v. Solomon, 767, 804
v. Swackhamer, 2264
v. Watson, 1128, 1174
v. West, 920
- Dayrell *v.* Hoare, 1039
 Dayton *v.* Dayton, 2148
v. Doozer, 1138
v. Newman, 2353
v. Rice, 2079
v. Vandoozer, 1150
- Deadrick *v.* Armour, 1815
v. Cantrell, 1608, 1631, 1633, 1635
- De Agreda *v.* Mantel, 2167
 Deaminville *v.* Mann, 1072
- Dean *v.* Allalley, 130
v. Central Pass Co., 2333
v. Comstock, 1289
v. Dean, 1589, 1612, 1646
v. Feeley, 1349
v. McCarthy, 199
v. Mitchell, 788, 827
v. Nelson, 2176
v. Nunnally, 338, 339
v. O'Meara, 1988
v. Parker, 1950
v. Phillips, 818
v. Richmond, 663, 664, 773, 920
v. Roesler, 1002, 1245
v. Walker, 2068, 2069, 2071, 2072
- Dean's Heirs *v.* Mitchell's Heirs, 760, 751
 Dean of Rochester *v.* Pierce, 1332
 Dean of Windsor's Case, 1074, 1075
- Deane *v.* Aveling, 594
v. Caldwell, 1069, 1173
v. Hutchinson, 123, 129
- Dearborn *v.* Dearborn, 2032, 2079
v. Eastman, 2343
v. Taylor, 926, 2103
- Dearborne *v.* Taylor, 2178
 D'Arcy *v.* Blake, 781
- Dearden *v.* Evans, 61
 Deare *v.* Carr, 2158
- Dearing *v.* Thomas, 1395, 1398, 1460, 1503
v. Watkins, 2126
- Dearman *v.* Dearman, 1481
 Dearmas *v.* Mayor, etc., of New Orleans, 18, 195
- Dearmond *v.* Dearmond, 727, 794, 912
 Deas *v.* Horrey, 383
 Deaver *v.* Rice, 976, 1230, 1231, 1238
- De Ball *v.* Thompson, 1043
 De Barante *v.* Gott, 218, 645, 959
 De Baun *v.* Bean, 71
 De Bell *v.* Thomson, 999

- Deboe v. Lowen*, 415, 469, 538
Debolle v. Pennsylvania Insurance Co., 2362
Debow v. Colfax, 48, 539, 1205, 1206, 1207, 1267
De Castro v. Barry, 1980
De Caters v. Le Ray De Chaumont, 1770
Dech's Appeal, 1891, 1893
Decker v. Adams, 1131, 1271
 v. Boice, 1047, 2109
 v. Livingston, 1359, 1360, 1363, 1364,
 1367, 1368, 1369, 1901
 v. McManus, 1274
Declonet v. Borel, 2240
De Cordova v. Hood, 2006, 2008
De Coster v. Villa, 661
Decouch v. Savitier, 646, 753, 1781
Decoursey v. Guarantee Co., 2274
Bedman v. Lawson, 2091
Dee v. Dowall, 2300
Deere v. Chapman, 1393, 1414, 1415, 1424, 1483
Deerfield v. Arms, 2294
Deerhurst v. St. Alnams, 1693
Deering v. Adams, 335, 1594, 1597, 1605, 1796
 v. Beard, 1456, 1465
 v. Boyle, 1513, 2012
Deffely v. Pico, 1502, 1519
Deford v. Mercer, 2331
De Forest v. Bacon, 1794
 v. Byrne, 1076, 1185
De France v. De France, 2053, 2054
 v. Johnson, 751, 770
Deg v. Deg, 1623, 1691
De Gendre v. Kent, 43
De Geofroy v. Riggs, 218
De Godey v. De Godey, 712
Degraffenreid v. Scruggs, 106, 132, 135, 136
De Grey v. Richardson, 362, 606, 607, 608, 692,
 693, 703
De Hart v. Dean, 656, 678, 1372
 v. United States, 2212, 2213
De Haven v. Landell, 2146, 2156
De Herques v. Marti, 2302
De Hymel v. Scottish-American Mortgage Co.,
 1476, 1467, 1490
Deibert's Appeal, 299, 1606
Deibler v. Barwick, 2004
Deisher v. Stein, 996
Dejarnette v. Allen, 477, 479, 491, 552, 626, 635,
 1364, 1370
Delahay v. Clement, 1097, 2077
 v. McConnell, 2037
Delahoussaye v. Judice, 2226
De La Howe v. Harper, 1512, 1513
Delaire v. Keeman, 2001, 2043
De Lancey v. Ganong, 1142, 1144, 1145, 1146,
 1148, 1151
 v. Stearns, 2109
Delaney, Estate of, 1378, 1445
 v. Fox, 1214
 v. McCormack, 1807, 1808, 1809
 v. Rochereau, 1195
 v. Root, 51, 55, 56, 1231, 1233
Delano v. Blake, 1031
 v. Montague, 1013, 1348, 1353
 v. Wilde, 2083
Delaplaine v. Lewis, 2150
Delashman v. Berry, 994
Delassus v. Poston, 2005
 v. United States, 3
De Laureal v. Kempner, 2107
De Laurencel v. De Boom, 1589, 1592
Delaven v. Pratt, 1496
Delaware & N. C. Co. v. Bonnell, 810
Delaware & R. Canal Co. v. Lee, 198
Delay v. Vinal, 948
De Leon v. Higuera, 2001, 2024, 2036, 2051
Dell v. Gardner, 2270
Dellott v. Whitmere, 514
Dellinger's Appeal, 1594
Dellinger v. Tweed, 1504
Delmas v. Merchants' Mutual Ins. Co., 1515
Delmerge v. Mullins, 1219
Delmonico v. Guillaume, 787, 1961, 1963
Deloney v. Hutchinson, 1885, 1961
De Long v. Mulcher, 2297
De Mandeville v. Crompton, 794
Demarest v. Hardham, 198
 v. Koch, 1955
 v. Willard, 1074, 1075, 1077, 2064, 2251,
 2252
 v. Wynkoop, 2085, 2095, 2104, 2175, 2176
Demby v. Parsene, 1186
Demers v. Bullett, 2363
Demi v. Bossler, 1208, 1209
De Mill v. Lockwood, 450
Deming v. Bullitt, 501
 v. Colt, 1963
 v. Deming, 661
 v. Williams, 647
De Mott v. Benson, 2028, 2030
v. Hagerman, 1229, 1233, 1234, 1235, 1906
 v. McMullen, 2012
Dempsey v. Kipp, 1306
 v. Tylee, 646
Dempster, v. West, 2147
Den v. Adams, 1319
 v. Bernard, 969, 1004
 v. Blair, 1136, 1140, 1335
 v. Crawford, 534, 1548
 v. Dimon, 2063, 2132
 v. Drake, 1134, 1136, 1254, 1271, 1280, 1290,
 1299, 1319, 1337
 v. Dodd, 835
 v. Emans, 403
 v. Fearnside, 1040
 v. Fogg, 405, 411, 413
 v. Fox, 401, 402, 447
 v. Gardner, 1920
 v. Green, 1292
 v. Hanks, 1549, 2314, 2318
 v. Hugg, 403, 405, 415
 v. Johnson, 980
 v. Kinney, 544
 v. Laquear, 403
 v. Lloyd, 1146, 1271
 v. Mackey, 1271, 1299, 1319
 v. McPeake, 408
 v. Moore, 415
 v. Mulford, 2291, 2299
 v. Payne, 2
 v. Post, 1057, 1107, 1111, 1123
 v. Quinby, 1364, 1367
 v. Robinson, 445, 463
 v. Schenck, 401
 v. Sinnickson, 2295
 v. Snowhill, 1334, 1336
 v. Stockton, 2077, 2084
 v. Troutman, 1703
 v. Wade, 1271, 1350, 1354
 v. Westbrook, 1291
 v. Winans, 1285
Den d. Doremus v. Zabriskie, 470
Den d. Hankinson v. Blair, 1307, 1309
Den d. Humphries v. Humphries, 1303
Den d. Irwin v. Cox, 1308
Den d. Jacobs v. Gilliam, 464
Den d. McEwen v. Drake, 1307
Den d. Pollock v. Kittrell, 1257
Den d. Snowhill v. Snowhill, 1307
Den ex d. Bockouwer v. Post, 1104
Den ex d. Crane v. Fogg, 415, 423
Den ex d. Davidson v. Frew, 927
Den ex d. Decker v. Adams, 1132, 1135, 1310,
 1333, 1346, 1351
Den ex d. De Peyster v. Howland, 1929
Den ex d. Ewan v. Cox, 412, 415, 423, 427
Den ex d. Freeman v. Heath, 1160
Den ex d. Grandy v. Bailey, 1169, 1170
Den ex d. Hardenbergh v. Hardenbergh, 1024,
 1876, 1881, 1919, 1920, 1930, 1931,
 1933, 1938, 1939, 1940, 1942, 1950
Den ex d. Harker v. Gustin, 1217
Den ex d. Finchman v. Clark, 415, 444
Den ex d. Hopper v. Demarest, 598, 603, 604,
 614

- Den ex d. Howell *v.* Ashmore, 1220
 v. Howell, 1293
 Den ex d. Hughes *v.* Shaw, 914
 Den ex d. James *v.* Dubois, 401, 448, 450, 470
 Den ex d. Love *v.* Edmondston, 1282, 1287, 1309
 Den ex d. Lyerly *v.* Wheeler, 1751
 Den ex d. Miller *v.* Miller, 852, 859
 Den ex d. Needham *v.* Bronson, 1941, 1942
 Den ex d. Player *v.* Nicholls, 973, 980
 Den ex d. Roberts *v.* Forsythe, 286, 531
 Den ex d. Somers *v.* Peirson, 412, 415
 Den ex d. Spachius *v.* Spachius, 450, 470
 Den ex d. Stamps *v.* Irwine, 1231
 Den ex d. Stedman *v.* McIntosh, 1256
 Den ex d. Stewart *v.* Johnson, 915
 Den ex d. Williams *v.* Bennet, 873
 Den ex d. Williamson *v.* Snowhill, 1319
 Den ex d. Wilson *v.* Small, 411, 415, 426, 428
 Den ex d. Wyckoff, 1929, 1930, 1933, 1944
 Den, Lessee, *v.* Webster, 1294
 Denegre *v.* Haun, 1495, 1512, 1524
 Denent *v.* Williams, 1978
 Dengenbart *v.* Cracraft, 908
 Denham *v.* Cornell, 94
 v. Holeman, 2299
 De Nicholls *v.* Saunders, 2065
 Denike *v.* New York & Rosendale Lime Co., 1019
 Denison *v.* Denison, 595
 v. Ford, 1166
 Denman *v.* Prince, 2237
 Denn *v.* Cartwright, 1314
 v. Gaines, 533
 v. Gaskin, 302, 320, 331
 v. Gillot, 441, 442
 v. Shenton, 322
 Denn d. Bolton *v.* Bowne, 310
 Denn d. Jackling *v.* Cartwright, 1334
 Denn ex d. Moor *v.* Meller, 344
 Denne *v.* Judge, 1967
 Dennett *v.* Croker, 212
 v. Dennett, 237, 401, 545, 666, 682, 1034, 2319
 v. Hopkinson, 45
 v. Penobscot Fair Ground Co., 1276, 1292, 2261
 Denning *v.* Smith, 2335
 v. Van Deusen, 536
 Dennis *v.* Dennis, 752, 760
 v. McCagg, 1545
 v. Twitchell, 1119
 v. Warder, 1290
 v. Wilson, 283, 285, 2218, 2361
 Dennison *v.* Ely, 2042
 v. Goehring, 1069, 1738
 v. Grove, 1045
 v. Reade, 1138, 1150
 Dennistoun *v.* Walton, 1213
 Denny *v.* Cabot, 1240, 1241, 1242, 1243, 1244
 v. McCabe, 517, 651, 668, 669, 670, 701
 v. Palmer, 1756
 v. White, 1396, 1506
 Denson *v.* Mitchell, 317, 319, 486, 536, 803, 1314
 Dent *v.* Emmeger, 2192
 v. Slough, 1376
 Denton *v.* Cole, 2107
 v. Donner, 1621
 v. Jackson, 41
 v. Ledell, 2242
 v. Livingston, 43, 817
 v. McKenzie, 1639, 1650
 v. Nanny, 511, 748, 757, 783, 800, 818, 2169, 2170, 2173
 v. Strickland, 1237
 Dentzel *v.* Waldie, 901, 911
 Denzel *v.* Waldie, 2323
 Denys *v.* Suckburg, 1906
 Depas *v.* Mayo, 720
 Depew *v.* Dewey, 2175
 De Pere Co. *v.* Reynen, 1317, 2270
 De Peyster *v.* Clendinning, 1555
 De Peyster *v.* Ferrers, 1885
 v. Michael, 48, 245, 249, 250, 251, 252, 256, 259, 261, 266, 1858, 1859, 1861
 De Puy *v.* Strong, 1901, 1909
 Deraismes *v.* Deraismes, 504
 Derbes *v.* Romero, 2365
 Derby *v.* Taylor, 1112
 v. Weyrich, 1480
 Derby Bank *v.* Landon, 2144
 Dering *v.* Farrington, 1989
 Derm *v.* Gillot, 291
 Dermott *v.* Jones, 1099
 Derry *v.* Derry, 1622, 1652, 1760
 Derush *v.* Brown, 761, 763, 788, 832
 De Rutte *v.* Muldrow, 259, 1039
 De Rutzen, Doe d., *v.* Lewis, 1148
 De Ruyter *v.* St. Peter's Church, 2342
 Dervin *v.* Jennings, 2048
 De Saussure *v.* Lyons, 1842
 Descarlett *v.* Dennett, 1871, 1872
 Deshler *v.* Bury, 923, 924
 Desilver, Matter of, 686
 Deskowitz *v.* Davis, 1646
 Desloge *v.* Peace, 2212, 2213
 v. Pearce, 995, 1280, 1283, 2212
 v. Pierce, 2212
 Despard *v.* Churchill, 21, 974
 v. Walbridge, 1133, 1149, 2050
 Despatch Line *v.* Bellamy Mfg. Co., 105, 113, 115, 131, 135, 1047
 Detroit Savings Bank *v.* Bellamy, 1334, 1335, 1340
 De Uprey *v.* De Uprey, 1983
 Devacht, Lessee of, *v.* Newsam, 1220
 De Vandal *v.* Malone, 2110
 Devaughn *v.* Devaughn, 836, 850
 Devaynes *v.* Robinson, 1832
 Devecmon *v.* Devecmon, 974, 975
 Devenpeck *v.* Lambert, 2206
 De Verne, *In re*, 682
 Deville *v.* Wildoe, 1500
 Devin *v.* Himer, 2340
 De Visme, *In re*, 1647
 Devoy *v.* Devoy, 1648
 Dewey *v.* Brownell, 2086
 v. Dewey, 1964
 v. Dupuy, 2264
 v. Goodenough, 1514
 v. Lambier, 1900
 v. Lambies, 1966
 v. Moyer, 1623
 v. Payne, 1322
 v. Van Deusen, 1996, 2085, 2104, 2105
 v. Williams, 1861
 De Wilton *v.* Saxon, 1228
 De Windt *v.* De Windt, 405, 417
 Dewitt *v.* Cooper, 505
 v. Moulton, 2122, 2366
 De Witt *v.* Eldred, 401, 426, 443, 454, 459, 818
 v. San Francisco, 1884, 1888, 1968
 De Wolf *v.* Johnson, 2056, 2071
 Dexter *v.* Arnold, 1899, 2095, 2104
 v. Gradner, 1687
 v. Harris, 1993
 v. Manley, 1079, 1080, 1081, 1166
 v. Stewart, 1611
 Dey *v.* Dey, 1622
 v. Dunham, 2039, 2042
 De Yampert *v.* Brown, 2134
 D'Eyncourt *v.* Gregory, 103, 104, 105, 106, 107, 120, 128, 137
 De Young *v.* Ruchanan, 1131, 1315, 1316
 Diamond *v.* Lore, 976
 Diamond Manuf. Co. *v.* Atlantic Delaine Co., 2225
 Dias *v.* Glover, 1930
 Dibble *v.* Clapp, 789
 v. Hutton, 647
 Dice *v.* Sheffer, 309
 Dick *v.* Daughton, 912
 v. Mawry, 2104, 2105, 2106, 2107

- Dick *v.* Pitchford, 249, 253, 263, 257, 1577, 1578,
1748
Dickason *v.* Dawson, 2085
v. Williams, 2006
Dicken *v.* Johnson, 2341
v. Morgan, 135
Dickenson *v.* Chase, 2007
v. Harris, 983
v. Jackson, 800
Dickerman *v.* Burgess, 2334
v. Lust, 2171
Dickerson's Appeal, 1579
Dickerson, *In re*, 266
Dickerson *v.* Brown, 596
v. Chesapeake R. Co., 1928
v. Cook, 2273
v. Talbot, 2300
Dickey *v.* Lyon, 2241
v. McCullough, 1863
v. Thompson, 2153, 2155, 2181
Dickins *v.* Hamer, 812
Dickinson, Appellant, 1666
Dickinson *v.* Canal Co., 2230
v. Codwise, 1618, 1619, 1940
v. Davis, 778, 1640, 1647
v. Goodspeed, 1253
v. McLane, 1480
v. Mayor, 570
v. Robbins, 1242
v. Williams, 1890, 1896
Dickson, *In re*, 267
Dickson *v.* Chorn, 1386, 1442, 1491, 1522
v. Desire, 2362
v. Dickerson, 1488
v. Dickson's Heirs, 753
v. Parker, 2035
v. Saville, 782
Dicus *v.* Hall, 1440
Dietrick *v.* Noel, 2296
Diffendorf *v.* Reformed Cal. Church, 34
Digby *v.* Atkinson, 1098, 1316, 1317
Digby, *Ex parte*, *v.* Jones, 1242
Diggs's Case, 1839, 1843
Diggs's Lessee *v.* Jarman, 1810
Dighton *v.* Tomlinson, 319
Dikeman *v.* Norrie, 1634
Dillay *v.* Greenough, 1636
Diller *v.* Brubaker, 1728, 1735
v. Roberts, 1133, 1317
Dillingham *v.* Fisher, 2306, 2307
v. Hoffman, 2221, 2241
v. Jenkins, 975
v. Snow, 234
Dillon *v.* Brown, 1026, 1029, 1030, 1296, 2102
v. Birare, 2133
v. Byrare, 2133
v. Byrne, 1491, 1496, 1497
v. Dillon, 525
v. Frayne, 1559
v. Freine, 410
v. Parker, 946
v. Plaskett, 2083
v. Wilson, 2260, 2261
Dilrow *v.* Bone, 1791
Dilworth *v.* Mayfield, 1960, 1965
v. Sinderling, 1768
Dimmick *v.* Dimmick, 1949
Dinon *v.* Delmonico, 1241
Dimond *v.* Billingslea, 766
Dimsdale *v.* Robertson, 1051
Dinehart *v.* Thompson, 1229
v. Wilson, 1229, 1234, 1909
Dingley *v.* Buffum, 145, 1204, 1266
v. Dingley, 1568
Dingman *v.* Kelly, 1001
Dinnan *v.* Nichols, 2151
Dings *v.* Parshall, 2136, 2150
Dinsdale *v.* Ives, 1296
Dinwiddie *v.* Bell, 1906
Dippers at Tunbridge Wells, 1364
Dircks *v.* Brant, 1205, 1209, 1210
Disborough *v.* Outcalt, 1748
Disbrow *v.* Folger, 1984
District Attorney *v.* Lynn & Boston R. Co., 5
District Township of Carwin *v.* Moorhead, 905
Ditchett *v.* Spuyten Duyvil & P. M. R. Co.,
1202
Diver *v.* Diver, 1024, 1940, 1951, 1952
Divine *v.* Mitchum, 1671, 1963
Dix *v.* Atkins, 1314
v. Burford, 1733
Dixfield *v.* Newton, 2100, 2103
Dixie, Doe d., *v.* Davies, 1265, 1275
Dixon *v.* Baty, 1215
v. Dixon, 2007
v. Dixon's Exrs., 1407, 1410
v. Haley, 2270
v. McCue, 956
v. Niccolls, 1230, 1231, 2255, 2257, 2258
v. Nicolls, 2250, 2251
v. Saville, 940
Doak *v.* Donelson's Lessee, 1150, 1266, 1294
v. Wiswell, 127
Doane *v.* Bodger, 1891, 1892, 2208
v. Doane, 509, 1411, 1421
Dob *v.* Halsey, 1240, 1242, 1243
Dobbin *v.* Hewett, 2056
v. Rex, 1988
Dobbins *v.* Duquid, 1245
v. Lusch, 1280, 1285, 1295
Dobschuetz *v.* Holliday, 123, 1225, 1226
Dobson's Estate, 76
Dobson *v.* Butler, 771, 920
v. Dobson, 732
v. Lord, 2089
v. Murphy, 878
Docker *v.* Somes, 76, 1715, 1761
Dockery *v.* Noble, 2103
Dockham *v.* Parker, 1231, 1234, 1239, 1267, 2255
Doda *v.* Burchell, 2211
Dodd *v.* Acklom, 1161
v. Burchall, 2216
v. Watson, 545, 558, 1898
Dodds *v.* Snyder, 2153
v. Wilson, 1034
Dodge *v.* Berry, 71, 72
v. Cole, 1622, 1760
v. Dodge, 936
v. Evans, 2004, 2005
v. Kinzey, 1944
v. Kinzy, 1919
v. Manning, 1760
v. Moore, 318
v. Potter, 2122
v. Stacy, 2206
v. Woolsey, 76
v. Wright, 1154
Dodgley *v.* Tolberry, 1023
Dodkins *v.* Kuykendall, 1384
Dodson *v.* Balli, 328, 329, 336, 500, 1602, 1655,
1674, 1694, 1695, 1736, 1737, 1798, 1799
v. Davis, 831
v. Hall, 1003
v. Hay, 611, 695
Doe *v.* Allen, 308, 331, 533
v. Austin, 1148
v. Baines, 308
v. Barton, 2092
v. Bateman, 1107, 1109
v. Batten, 1345
v. Bernard, 2357
v. Bevan, 257, 1057, 1113
v. Birch, 1058, 1059, 1138
v. Bird, 1914
v. Bliss, 1058
v. Britain, 1820, 1844
v. Brown, 661, 662, 1362, 1370, 2299
v. Burt, 64, 66
v. Campbell, 2299
v. Carter, 274
v. Chamberlaine, 1259, 1290
v. Chapman, 202
v. Charlton, 425
v. Chase, 993

Doe *v.* Claridge, 1607
v. Clark, 2341
v. Clarke, 260, 272, 340, 343
v. Corrie, 271
v. Craiger, 416, 447, 472
v. David, 1113
v. Davies, 1261
v. Donovan, 1338, 1339
v. Dowall, 2300
v. Driscoll, 271
v. Dugan's Exrs., 515
v. Dyball, 23
v. Ellis, 322
v. Fenn, 1901
v. Finch, 456
v. Flanagan, 523
v. Flynn, 1141
v. Freeman, 271
v. Fyldes, 333, 340
v. Galliers, 1113
v. Georgia R. & B. Co., 2324
v. Gilbert, 307
v. Godwin, 1139, 1146
v. Green, 1311
v. Grover, 993
v. Harris, 1788
v. Harter, 312, 343
v. Hawks, 113
v. Hicks, 1596, 1797
v. Hodgson, 1022
v. Holmes, 340, 344
v. Homfray, 1560
v. Howland, 337
v. Hughes, 1344
v. Hull, 1346, 1347, 1348
v. Hutton, 690, 1848
v. Ironmonger, 300, 1605
v. Jones, 456, 1215, 1868, 1869
v. Keen, 359, 363
v. Killen, 617, 618
v. Kinney, 312
v. Knightley, 1311
v. Lainckbury, 2, 307
v. Lamb, 2257
v. Langlands, 2, 307
v. Laning, 473
v. Lanius, 2251, 2258
v. Lawder, 1282
v. Laxton, 525
v. Lazenby, 216
v. Maisey, 1279
v. Marriott, 1149
v. McKilvain, 2304
v. McLoskey, 2029, 2063, 2064, 2104
v. Miller, 1290
v. Milward, 1344
v. Morgan, 2, 322
v. Morris Canal Co., 2325
v. Needs, 1595
v. Nicholls, 288, 299
v. Oliver, 2323
v. Palmer, 1344, 1345
v. Parrott, 1920, 1940
v. Pearson, 259, 261, 262, 263
v. Pegge, 1148
v. Perkins, 1353
v. Porter, 1306
v. Presser, 1913
v. Pritchard, 1349
v. Prosser, 1915
v. Raffan, 1317, 1335
v. Reade, 1713
v. Reynolds, 1144, 1148, 1212
v. Richards, 340, 342, 344, 1280
v. Rideout, 1306
v. Ries, 1000
v. Rivers, 387, 600, 692, 693, 702, 703
v. Rooke, 1837
v. Routledge, 299
v. Rutledge, 1553
v. Salkeld, 1558
v. Scott, 1337

Doe *v.* Scudamore, 694
v. Scuddamore, 693
v. Seaton, 1074, 1149
v. Shewin, 1102, 1152
v. Simpson, 970, 973, 980, 1597, 1711
v. Smaridge, 1321
v. Smith, 1788, 1831
v. Snelling, 340, 343
v. Spry, 1184
v. Staples, 1713
v. Thomas, 1296
v. Timins, 780, 1597
v. Tolfield, 307
v. Turner, 1296, 1348
v. Vincent, 1837
v. Wadell, 2283
v. Walters, 2302
v. Watts, 1254
v. Williams, 307, 309, 312
v. Wilson, 546
v. Wood, 1257, 1261, 1262, 1301, 1306
v. Wright, 331, 1743
v. Wrightman, 1311
v. Wroot, 1713
v. Wichele, 363, 387
Doe d. Abdy *v.* Stevens, 1139, 1146
Doe d. Allen *v.* Calvert, 1040
Doe d. Anglesea *v.* Churchwardens of Rugley, 1869
Doe d. Aslin *v.* Summersett, 1027
Doe d. Bastow *v.* Cox, 1265, 1318, 1326
Doe d. Bennett *v.* Long, 1309
Doe d. Biggs *v.* White, 1039, 1040
Doe d. Birtwhistle *v.* Vardill, 2288, 2289
Doe d. Blacknell *v.* Plowman, 1744
Doe d. Blomfield *v.* Eyre, 1828, 1829, 1830
Doe d. Bly *v.* Colman, 1040
Doe d. Booley *v.* Roberts, 2
Doe d. Booth *v.* Field, 1605
Doe d. Bothell *v.* Martyr, 1626
Doe d. Bowerman *v.* Sybourn, 1742, 1743
Doe d. Brune *v.* Martyn, 1596
Doe d. Bryan *v.* Bancks, 1058, 1138
Doe d. Buddle *v.* Lines, 1310
Doe d. Bullen *v.* Mills, 1148
Doe d. Burne *v.* Prideaux, 1040
Doe d. Burrell *v.* Perkins, 1309
Doe d. Cadogan *v.* Ewart, 300, 315, 322, 1553, 1577, 1597, 1605, 1606
Doe d. Calvert *v.* Frowd, 1309
Doe d. Campbell *v.* Scott, 1339
Doe d. Carson *v.* Baker, 1255, 1278
Doe d. Carter *v.* Barnard, 2299
Doe d. Chadborn *v.* Green, 1303, 1314, 1333
Doe d. Cheese *v.* Creed, 1309
Doe d. Clark *v.* Smaridge, 1136, 1303, 1307, 1314, 1333, 1335
Doe d. Clarke *v.* Clarke, 2280
Doe d. Clun *v.* Clarke, 1309
Doe d. Collins *v.* Weller, 1025, 1264, 1323
Doe d. Cooper *v.* Finch, 1807
Doe d. Cornwall *v.* Matthews, 1310
Doe d. Cox *v.* Day, 1040
Doe d. Crisp *v.* Barber, 1352
Doe d. Croft *v.* Tidbury, 1215, 1306
Doe d. Daggett *v.* Snowden, 1308
Doe d. Darke *v.* Bowditch, 1150
Doe d. Darlington *v.* Bond, 1140, 1146
v. Ulph, 1152
Doe d. Davenish *v.* Moffatt, 1310
Doe d. Davies *v.* Davies, 486, 1594, 1597
v. Gatacre, 461
v. Thomas, 1334
Doe d. Davis *v.* Evans, 1309
v. Vincent, 1828
Doe d. De Rutzen *v.* Lewis, 1148, 1862, 1901
Doe d. Dixie *v.* Davies, 1265, 1275
Doe d. Doremus *v.* Zabriskie, 427
Doe d. Dormer *v.* Wilson, 1920, 1930, 1939
Doe d. Dyke *v.* Whittingham, 1570
Doe d. Dymoke *v.* Withers, 1039
Doe d. Egremont *v.* Langdon, 1743

Doe d. Evans *v.* Evans, 307
Doe d. Fisher *v.* Giles, 1279
 v. Prosser, 518
Doe d. Foster *v.* Wandlass, 1060
 v. Williams, 1309
Doe d. Fowler *v.* Peck, 1074, 1075, 1152, 1868,
 1869
Doe d. Godsell *v.* Inglis, 1310
Doe d. Gratrex *v.* Hompray, 299, 1574, 1583,
 1606
Doe d. Graves *v.* Wells, 1144, 1145, 1336
Doe d. Gray *v.* Stanion, 1276, 1290
Doe d. Grubb *v.* Burlington, 549, 550
 v. Grubb, 1309
Doe d. Hall *v.* Tunnell, 2084, 2091
Doe d. Hallen *v.* Ironmonger, 1709
Doe d. Hammond *v.* Cooke, 1743, 1744
Doe d. Hampton *v.* Shotter, 1811
Doe d. Harrington *v.* Lill, 341
Doe d. Harris *v.* Masters, 1062, 1861
Doe d. Harrison *v.* Murrell, 1215
Doe d. Harvey *v.* Francis, 1318, 1326
Doe d. Hatt *v.* Miller, 1272
Doe d. Hayes *v.* Sturges, 1021
Doe d. Herbert *v.* Thomas, 348, 1814
Doe d. Hogg *v.* Taylor, 1308
Doe d. Hollingsworth *v.* Stennett, 1269, 1270,
 1271, 1278, 1284, 1290
Doe d. Holt *v.* Harrocks, 607
Doe d. Howell, *v.* Howell, 1294
Doe d. Hull *v.* Greenhill, 1579
 v. Wood, 1265, 1280, 1306, 1320, 1325
Doe d. Hurrell *v.* Hurrell, 309
Doe d. Jeffries *v.* Whittick, 1309
Doe d. Jones *v.* Jones, 1261, 1275
Doe d. Knight *v.* Nepean, 522
 v. Quigley, 1269, 1278, 1293
Doe d. Knott *v.* Lawton, 312
Doe d. Lancashire *v.* Lancashire, 2280
Doe d. Landsell *v.* Gower, 1309
Doe d. Lean *v.* Lean, 310
Doe d. Leicester *v.* Briggs, 1560, 1574, 1607
Doe d. Lewis *v.* Reed, 1306
 v. Rees, 1215
Doe d. Litscombe *v.* Yates, 265
Doe d. Lloyd *v.* Passingham, 1556, 1558, 1559,
 1583, 1655
Doe d. Lockwood *v.* Clarke, 1076
Doe d. Lord *v.* Crago, 1265, 1320, 1324
Doe d. Martin *v.* Watts, 1299, 1307, 1308, 1318,
 1319, 1320, 1325, 1337
Doe d. Mitchinson *v.* Carter, 1056, 1057, 1105,
 1113, 1869
Doe d. Monck *v.* Geekie, 1314, 1333
Doe d. Muller *v.* Claridge, 1797
Doe d. Muston *v.* Gladwin, 1152
Doe d. Nicholl *v.* McKaeg, 1258, 1260, 1261,
 1275
Doe d. Otley *v.* Manning, 1626
Doe d. Parry *v.* Hazell, 1328, 1335, 1337, 1340,
 1341
Doe d. Peacock *v.* Raffan, 1328, 1339, 1341, 1342
Doe d. Pearson *v.* Ries, 1001
Doe d. Pennington *v.* Tanier, 1320, 1331, 1332
Doe d. Player *v.* Nicholls, 1553, 1595, 1597,
 1694, 1797
Doe d. Phillip *v.* Benjamin, 1001
Doe d. Phillips *v.* Butler, 1336
 v. Rollings, 1309
Doe d. Pidgeon *v.* Richards, 1263, 1293, 1295
Doe d. Pitt *v.* Hogg, 1146
Doe d. Pratt *v.* Timins, 1595, 1596
Doe d. Price *v.* Price, 1267, 1293, 1326
Doe d. Prior *v.* Ongley, 1266
Doe d. Puddicombe *v.* Harris, 1308
Doe d. Rains *v.* Keller, 1150
Doe d. Read *v.* Ridout, 1335
Doe d. Rendle, 1040
Doe d. Rigge *v.* Bell, 1022, 1136, 1323
Doe d. Riggs *v.* Bell, 1013, 1014
Doe d. Roberts *v.* Polgrean, 1360, 1361
Doe d. Robertson *v.* Gardiner, 1320

Doe d. Robinson *v.* Dobell, 1310
Doe d. Roby *v.* Maisey, 1295, 1350
Doe d. Rogers *v.* Coote, 1039
 v. Pullen, 1258, 1294
Doe d. Routledge, 1626
Doe d. Shelley *v.* Edlin, 300, 1595, 1605
Doe d. Sheppard *v.* Allen, 1104
Doe d. Shore *v.* Porter, 1135, 1136, 1254, 1270,
 1299, 1301, 1308, 1334
Doe d. Smyth *v.* Smyth, 1788, 1844
Doe d. Spencer *v.* Clark, 436
Doe d. Spicer *v.* Lea, 1308
Doe d. Stevens *v.* Scott, 1605
Doe d. Strickland *v.* Spence, 1333, 1337
Doe d. Sutton *v.* Harvey, 1040
Doe d. Terry *v.* Collier, 1574, 1655
Doe d. Tilt *v.* Stratton, 1269, 1293, 1310
Doe d. Thompson *v.* Gibson, 1549, 1550
 v. Pitcher, 1687
Doe d. Thomson *v.* Amey, 1313, 1316
Doe d. Tucker *v.* Morse, 1325
Doe d. Upton *v.* Witherwick, 1206
Doe d. Warner *v.* Browne, 1307, 1308, 1313, 1320,
 1336
Doe d. Watt *v.* Morris, 1347
Doe d. Webb *v.* Dixon, 1008
Doe d. Westmoreland *v.* Smith, 1314
Doe d. Whayman *v.* Chaplin, 1027
Doe d. Wheelodon *v.* Paul, 1154
Doe d. Whitaker *v.* Hales, 2065
Doe d. White *v.* Simpson, 1595, 1596
Doe d. Whitehead *v.* Pittman, 1141
Doe d. Wilkinsons *v.* Fleming, 1923
Doe d. Williams *v.* Cooper, 1309
 v. Matthews, 1039
 v. Pasquali, 1309
 v. Smith, 1336
Doe d. Willis *v.* Martin, 1559
Doe d. Wilson *v.* Phillips, 1150
Doe d. Woodcock *v.* Barthrop, 1597, 1605
Doe d. Wooden *v.* Shotwell, 5
Doe d. Wright *v.* Gooden, 234
 v. Plumptre, 651, 1366
Doe d. Wyatt *v.* Byron, 1108
Doe ex d. Bastow *v.* Cox, 1256, 1275, 1278, 1294,
 1295
Doe ex d. Birthwhistle *v.* Vardell, 719
Doe ex d. Bunny *v.* Rout, 2
Doe ex d. Burkett *v.* Chapman, 307
Doe ex d. Callender *v.* Sherman, 1217, 1219
Doe ex d. Carson *v.* Baker, 1258, 1260, 1269,
 1271, 1275, 1278, 1294, 1301, 1324
Doe ex d. Castleton *v.* Samuel, 1308
Doe ex d. Chandler *v.* Douglass, 2328
 v. Smith, 426
Doe ex d. Clarke *v.* Clarke, 618
Doe ex d. Clinton *v.* Campbell, 517
Doe ex d. Cook *v.* Webb, 734, 838
Doe ex d. Cooper, 423
Doe ex d. Cotton *v.* Stenlake, 345
Doe ex d. Cox *v.* Day, 2353
Doe ex d. Dalton *v.* Jones, 564
Doe ex d. Davison *v.* Frew, 791
Doe ex d. De Peyster *v.* Howland, 1025
Doe ex d. Doremus *v.* Zabriskie, 448
Doe ex d. Evans *v.* Evans, 202
Doe ex d. Flower *v.* Pick, 1074, 1075, 1152, 1868,
 1869
Doe ex d. Freeland *v.* Burt, 1015
Doe ex d. Garnous *v.* Knight, 1786
Doe ex d. Glenn *v.* Peters, 1225
Doe ex d. Gorham *v.* Brenon, 1216, 1217
Doe ex d. Gouverneur's Heirs *v.* Robertson,
 214, 215, 675
Doe ex d. Green *v.* Baker, 1138
Doe ex d. Groves *v.* Groves, 1254, 1261, 1275
Doe ex d. Grubb *v.* Burlington, 564
Doe ex d. Harrington *v.* Dill, 326
Doe ex d. Hollingsworth *v.* Stennett, 1308
Doe ex d. Jackson *v.* Ashburner, 993
Doe ex d. Jeff *v.* Robinson, 527
Doe ex d. King *v.* Frost, 321

- Doe ex d. Kluge v. Lachenour, 1217
 Doe ex d. Knight v. Quigley, 1270
 Doe ex d. Lloyd v. Passingham, 298
 Doe ex d. Lockwood v. Clark, 1113
 Doe ex d. Long v. Prigg, 314, 315
 Doe ex d. Lunsford v. Alexander, 1216, 1217
 Doe ex d. Lyster v. Goldwin, 689, 2062
 Doe ex d. Marriott v. Edwards, 1148
 Doe ex d. Martin v. Watts, 1256, 1270, 1299, 1313
 Doe ex d. Miller v. Rogers, 673
 Doe ex d. Morgan v. Morgan, 307
 Doe ex d. Newton v. Roe, 1159
 Doe ex d. Nutt v. Nutt, 752, 835
 Doe ex d. Palk v. Marchetti, 1139
 Doe ex d. Patterson v. Richards, 1251, 1260
 Doe ex d. Peyster v. Howland, 1931, 1932, 1933, 2346
 Doe ex d. Pidgeon v. Richards, 1251, 1260
 Doe ex d. Pitt v. Hogg, 1105
 Doe ex d. Player v. Nicholls, 314, 315, 970, 1711
 Doe ex d. Poor v. Considine, 1797
 Doe ex d. Rawlings v. Walker, 971, 977, 978, 1163
 Doe ex d. Reade v. Reade, 1707
 Doe ex d. Regge v. Bell, 1270
 Doe ex d. Riddell v. Gwinnell, 709, 711, 790, 853
 Doe ex d. Rigge v. Bell, 1135
 Doe ex d. Shore v. Porter, 1310
 Doe ex d. Thomson v. Amey, 563
 Doe ex d. Thorley v. Thorley, 337, 487
 Doe ex d. Thorn v. Phillips, 340, 342
 Doe ex d. Tones v. Chamberlaine, 1272
 Doe ex d. Upton v. Witherick, 47
 Doe ex d. Webb v. Dixon, 970
 Doe ex d. Wheeldon v. Lea, 315
 Doe ex d. Wheelton v. Paul, 1059, 1061
 Doe ex d. White v. Simpson, 1710
 Doe ex d. Winder v. Lawes, 1163
 Doe ex d. Woodcock v. Barthrop, 1710, 1711
 Doebler's Appeal, 249, 1694
 Doellner v. Tynan, 5
 Doggett v. Hart, 1741, 1744, 1745
 v. Norton, 1212
 Doherty v. Allman, 554
 Doidge v. Bowers, 1255, 1324
 Dolan v. Mayor, etc., of Baltimore, 1717
 Dold v. Geiger, 1363, 1364, 1367, 1368, 1369
 Dole v. Olmstead, 1727
 Dolese v. Barberot, 1052, 1331
 Dolf v. Bassett, 841, 843
 Doll v. Anderson, 982
 Dollman v. Harris, 1451
 Dolman v. Cools, 2069, 2079, 2147
 Dolph v. White, 1100
 Domestic Tel. & T. Co. v. Metropolitan Tel. & T. Co., 1087
 Dominick v. Michael, 645, 985, 1031, 1806, 2343
 Dommet v. Bedford, 260, 272, 274
 Donahue's Estate, 355, 2278
 Donahue v. Hubbard, 1955
 v. Mayor of New York, 5
 Donalds v. Plumb, 1580
 Donaldson v. Bank of Cape Fear, 1962
 v. Lamprey, 1465
 v. Phillips, 368, 2058, 2289
 v. Rouzan, 1488, 1502
 v. Smith, 1006
 v. Volts, 1509
 Donegan v. Wade, 267
 Donellan v. Read, 2252
 Donhaven's Appeal, 2334
 Donkersley v. Levy, 1162
 Donley v. Hayes, 2155
 v. Hays, 2099, 2105, 2107, 2111
 Donnell v. Harshie, 1239
 Donnelly v. Decker, 199
 v. Donnelly, 751, 752, 755, 770
 v. Simonton, 1999, 2132
 v. Thieben, 1187
 Donnelly's Heirs v. Donnelly's Heirs, 751, 769
- Donnels v. Edwards, 1885
 Donner v. Redenbaugh, 1476, 1484
 Donnor v. Quartermas, 1975
 Donoghue v. Chicago, 856
 Donohue v. Chase, 2050
 v. McNichol, 1682
 Donovan v. Donovan, 309, 312
 v. Pitcher, 236
 Doody v. Pierce, 2127, 2128, 2129
 Doolan v. McCauley, 1020
 Dooley v. Baynes, 627
 v. Potter, 2033
 Doolittle v. Blakesley, 1900
 v. Eddy, 970, 1268, 1272, 1283, 2212
 v. Lewis, 1820, 1835, 1843
 Door v. Dudderar, 2081
 Dopp v. Albee, 1504, 1517
 Doran v. Chase, 1106
 Dorchester v. Coventry, 823, 843, 844
 v. Effingham, 1602
 Doremus, Doe d., v. Zabriskie, 427
 Dorland v. Dorland, 1807
 Dormer's Case, 1147
 Dorr v. Barney, 1317, 1322, 1323
 v. Harrahan, 267, 268
 v. Munsell, 1033
 v. Wainwright, 434, 437
 Dorrance v. Jones, 1114, 1117, 2266
 v. Scott, 1376, 1674
 Dorrance's Admr. v. Commonwealth, 50
 Dorrell v. Johnson, 1125, 1296, 1310, 1346, 1347, 1350, 1357
 Dorrill v. Stephens, 1132
 Dorrow v. Kelly, 2139
 Dorsett v. Gray, 2251, 2252, 2257, 2258
 Dorsey v. Dorsey, 1707, 1766, 1769
 v. Eagle, 1209
 v. Hall, 2015
 v. McFarland, 1450, 1473
 v. St. Louis, A. & T. H. R. Co., 1071
 v. Smith, 746
 Dostal v. McCadden, 110, 144, 145
 Doswell v. De La Lauza, 2209
 Dotan v. Russell, 1907, 1998, 2085
 Dothard v. Denson, 2296, 2298
 Dott v. Cunningham, 408
 v. Willson, 1878, 1884
 Dotter v. Pike, 1622
 Doty v. Baker, 746
 v. Burdick, 1140, 1159, 1217
 v. Gorham, 131, 142, 147, 1137, 1187
 v. Mitchell, 1375, 1562
 Dougal v. Fryer, 259, 263
 Dougall v. Dougall, 1690
 Dougherty v. Jack, 520
 v. McColgan, 2088, 2168
 v. Morlett's Lessee, 534
 v. Thompson, 1277
 Doughty v. Browne, 306, 310, 331, 334
 v. Hope, 1515
 v. Sheriff, 1510
 Douglas v. Anderson, 1317
 v. Cruger, 677, 1372, 1604, 1753, 1798
 v. Dickinson, 764
 v. Feay, 916, 934
 v. Scot, 2300
 v. Shumway, 55, 2364
 Douglass v. Bryce, 1640, 1647
 v. Clark, 2025, 2026
 v. Cline, 98, 2066
 v. Darin, 2084
 v. Dixon, 765
 v. Durin, 2100, 2102, 2147
 v. Fulda, 1039
 v. Kline, 1036
 v. McCoy, 733, 736, 739, 907
 v. Scott, 1349, 2358
 v. Wells, 2166
 v. Wiggins, 564, 1107
 Dougrey v. Topping, 923, 924
 Doupe v. Genin, 1083, 1106, 1176, 1191, 1196, 1197, 1200

- Dow v. Dow*, 707, 776
v. Jewell, 1646, 1651, 1654, 1976
v. McKenney, 2296
- Dowels v. Pond*, 80
v. Hennings, 2231, 2236
v. Salliotte, 1953
- Downer v. Button*, 2107
v. Clement, 2149
v. Fox, 2136, 2138
v. Smith, 2321
v. South Ralston Bank, 2036
v. South Royalton Bank, 2123
v. Wilson, 2075, 2130, 2172
- Downes v. Grazebrook*, 1580, 1621, 2163
v. Turner, 1868
- Downey v. Borden*, 338
- Downie v. White*, 136
- Downing v. Marshall*, 1559, 1603
v. Palmateer, 2140, 2165
v. Wherrin, 322, 323
- Downs v. Allen*, 732, 1036
v. Cooper, 1149
v. Hopkins, 2085, 2087
- Dows v. Congdon*, 83
- Doyal v. Smith*, 271
- Doyle v. Blake*, 1599, 1786
v. Coburn, 1398, 1403, 1405, 1406, 1450, 1462, 1478
v. Gibbs, 1287, 1289
v. Lord, 2223
v. Mullady, 414, 415, 443, 467, 473
v. Murphy, 1615, 1704
v. O'Neill, 1316
v. Teas, 1777
v. White, 2031
- Doyle v. Attorney-General*, 1816
- Doyle v. Attorney-General*, 1663, 1685, 1841
- Dozier v. Gregory*, 565
- Drake v. Bowditch*, 1138
v. Gilmore, 671
v. Moore, 1432
v. Newton, 981, 996, 1013, 1264, 1322
v. Ramsey, 905, 986, 1031
v. Root, 1441, 2076, 2078
v. Rout, 1479
v. Wells, 55, 56, 2313
- Drane v. Gregory*, 1958, 1976
v. Gregory's Heirs, 1150, 1222
v. Gunter, 1787
- Draper v. Baker*, 783
v. Draper, 1361
v. Jackson, 1837, 1931, 1932, 2014
v. Stouvenal, 1035
- Drayton v. Grimke*, 1835
v. Marshall, 2095, 2158
- Drenneu v. Walker*, 831, 1906
- Dresbock v. McArthur*, 2305
- Dresser v. Dresser*, 1593, 1629
- Dreutzer v. Bell*, 1480, 1481
- Drew v. Lockett*, 2136
v. Rust, 810, 2182
- Drewery v. Montgomery*, 824, 1964
- Drewry v. Barron*, 331
- Drexler v. Tyrrell*, 2059
- Diggs v. Dwight*, 1092
- Drink v. Richtmyer*, 982
- Driver v. Hussey*, 456
v. Maxwell, 1083
- Drohan v. Drohan*, 1037
- Drown v. Smith*, 555, 2319
- Druce v. Dennison*, 943
- Drucker v. Rosenstein*, 1442
- Druhan v. Adam*, 1152, 1228
- Druid Park Heights Co. v. Oettinger*, 1599
- Drum v. Simpson*, 1648
- Drummer v. Pitcher*, 944
- Drummond v. Duke of St. Albans*, 1027, 2162
v. Hopper, 1933
v. Sent, 2094
- Drury v. Batchelder*, 1465
v. Clark, 2150
v. Drury, 923, 952, 957, 960
- Drury v. Foster*, 882, 2340
v. Milwaukee & S. R. Co., 1586, 1616
v. Tremont Imp. Co., 2068, 2069
- Drusadow v. Wilde*, 310
- Druse v. Wheeler*, 2212
- Drybutter v. Bartholomew*, 42, 44, 816
- Dryden v. Hanway*, 1650, 1697, 1699
v. Frost, 491
- Drysdale's Appeal*, 1751
- Dubber v. Trollop*, 409
- Dublin & W. R. Co. v. Black*, 1031
- Dubois' Appeal*, 2102
- Dubois v. Beaver*, 56, 57, 570, 2235
v. Campau, 1990
v. Hull, 2008, 2009
v. Kelly, 55, 119, 1186, 1204
v. Marshall, 2295
v. McLean, 2332
- Dubose v. Dubose*, 1749
- Dubs v. Dubs*, 616, 654, 655, 675, 678, 679, 685, 687, 781, 1372, 1561
- Ducey Lumber Co. v. Lane*, 2261
- Ducker v. Belt*, 2149
v. Rapp, 2267
- Ducland v. Rosseau*, 2078
- Ducommun's Appeal*, 1733
- Dudden v. Guardians*, 2231
- Dudley v. Bergen*, 2130
v. Bosworth, 1639, 1640, 1643, 1646, 1653
v. Cadwell, 2104, 2300
v. Caldwell, 1995
v. Davenport, 963
v. Dickson, 2008
v. Eastman, 927
v. Foote, 105, 107
v. Grayson, 2014
v. Hurst, 106, 117, 132, 133
v. Kelly, 2261
v. Shaw, 1473, 1480
v. Sumner, 2313
v. Warde, 128
v. Witter, 1777
- Dudley Canal v. Grazebrook*, 2227
- Duer v. Boyd*, 416, 433
- Duff v. Beauchamp*, 1919
v. Wilson, 1080, 1081, 1220, 1990
- Duffy v. Calvert*, 1578, 1749
v. Duncan, 695, 1715
v. Ins. Co., 1561
v. Ogden, 1338
- Dufour v. Camfranc*, 1488, 1502
- Dugan v. Gittings*, 679, 959
v. Massey, 792, 914
- Dugdale, Re*, 249, 252, 499
v. Robertson, 92
- Dugger v. Dugger*, 683, 699, 1464
- Du Hourmelin v. Sheldon*, 1657
- Duhring v. Duhring*, 786, 787, 824
- Duke v. Balme*, 2005
v. Brandt, 799
v. Hague, 1026
v. Harper, 996, 1141, 1144, 1146, 1148, 1150, 1256, 1264, 1284, 1297, 1309, 1322, 1348
v. Reed, 1407
- Duke of Cumberland v. Graves*, 221
- Duke of Norfolk's Case*, 372, 1544
- Duke of Rutland v. Hudson*, 1865
- Dulanty v. Pyncheon*, 1461
- Dulency v. Green*, 1033
- Duley v. Kelley*, 1261, 2261
- Dumaresly v. Fishly*, 594, 595, 751
- Dumas, Eq parte*, 1761
- Dumey v. Schoeffler*, 271, 1858
- Dummer v. Pitcher*, 918
- Dumn v. Rothermel*, 996, 997, 1284, 1320, 1325, 1335, 1338
- Dumond v. Magee*, 664
v. Strungham, 341
- Dumont v. Dufore*, 1900
v. Kellogg, 2225
- Dumoulin v. Druit*, 595

- Dumphy *v.* Riddle, 810
Dumpor's Case, 1868
Dumpor *v.* Symmons, 1250
Dunbar *v.* Juniper, 2262
Dunbarton *v.* Franklin, 596, 752
Duncan's Appeal, 794, 913
Duncan *v.* Alexander, 1391, 1393
 v. Bickford, 1947
 v. Blake, 2255
 v. City of Terre Haute, 670, 796, 821, 828,
 893, 921
 v. Dick, 720, 869
 v. Drury, 811, 2097
 v. Duncan, 596, 752, 935, 948, 2365
 v. Farrer, 1883, 1969
 v. Helm, 2057
 v. Hodges, 2338, 2339, 2340
 v. Jaudon, 1623, 1661, 1740, 1761, 1765
 v. McCullough, 1033
 v. Miller, 2025, 2026
 v. Potts, 1260, 1269, 1271, 1313
 v. Smith, 810, 2097
 v. Sylvester, 1905, 1911, 1924, 1967, 1979
Dunch *v.* Kent, 1749
Duncomb *v.* Duncomb, 815
 v. New York, H. & N. R. Co., 1768
Duncombe *v.* Felt, 1223
 v. Mayer, 491
Dundas *v.* Bowler, 2101
 v. Hitchcock, 904
Dunham *v.* Bischoff, 2072
 v. Chatham, 1947
 v. Cincinnati, P. & C. R. Co., 2018
 v. Dey, 2121
 v. Isett, 2018
 v. Osborne, 703, 761, 762, 798, 815, 820,
 826
 v. Railway Co., 2019
 v. Rogers, 1240, 1648
 v. Wright, 2345
Dunk *v.* Hunter, 1281
Dunker *v.* Chedic, 1482, 1483
Unklee *v.* Adams, 1871, 1872
 v. Wilton R. Co., 2242
Dunkley *v.* Van Buren, 2158, 2165
Dunlap *v.* Bullard, 1072, 1115, 1124, 1139, 2257
 v. Thomas, 908
 v. Wilson, 2073
Dunlop *v.* Avery, 2118
 v. Ball, 518
 v. Harrison's Exr., 1759
Dunn *v.* Bagby, 1190
 v. Barton, 1141
 v. Bryan, 543
 v. Keeling, 1806
 v. Kelly, 2272
 v. Leidy, 1763
 v. Raley, 2038
 v. Rogers, 2068
 v. Rothermel, 1275
 v. Sargent, 1910
 v. Tillery, 1292
 v. Tozer, 1450, 1452, 1459, 1462, 1473,
 1475
Dunne *v.* Dunne, 265
 v. Ferguson, 46, 50, 51, 52
 v. Trustees, 1258, 1261, 1269, 1281, 1293,
 1295, 1339
Dunner *v.* Pitcher, 779
Dunnica *v.* Coy, 1641
Dunning *v.* Finson, 1280, 1290
 v. The Ocean National Bank, 94, 1577,
 1662, 1752, 2164
 v. Vandusen, 486
 v. Wherren, 470
Dunscomb *v.* Dunscomb's Exrs., 607, 611, 630,
 679, 680, 695, 1715, 1716, 1725
Dunseth *v.* Bank of United States, 789, 823,
 842
 v. Banks, 841
Dunshee *v.* Grundy, 1144, 1216, 2258
 v. Parmelee, 2133
Dunton *v.* Brown, 1031
 v. Harrison's Exrs., 1621
 v. Woodbury, 1466
Dupas *v.* Wassell, 984, 1035
Duppa *v.* Mayo, 1060, 1061, 1862, 2270
 v. Mayor, 1869
Dupre *v.* Thompson, 1792
Dupree *v.* McDonald, 645
Dupuy *v.* Leavenworth, 824
 v. Wickwire, 2332
Durand *v.* Curtis, 2262, 2265
 v. Isaacks, 2078, 2151
Durando *v.* Durando, 206, 601, 711, 759, 761, 762,
 815, 819
 v. Wyman, 1119
Durant *v.* Johnson, 1918
 v. Ritchie, 208, 1558
 v. Palmer, 1202
Durel *v.* Boisblanc, 2213, 2223
Durfee *v.* Knowles, 2033
 v. Pavitt, 1652
Durham *v.* Angier, 888, 930, 931
 v. Bishop, 2072
 v. Speeke, 2272
Durkee *v.* Felton, 740
 v. Stringham, 44
Durland *v.* Seiler, 1463, 1495, 1496, 1514, 1520,
 1521
Durr *v.* Sim, 1605
Durrett *v.* Whiting, 2156
Durity *v.* Musacchia, 1947, 1948
Duryee *v.* Turner, 2255
Dusenberry *v.* Dawson, 221
Dustin *v.* Cowdry, 1357
 v. Steele, 901, 911, 912
Dutch Church *v.* Mott, 1742
Dutcher *v.* Culver, 2250
Dutoit *v.* Doyle, 2279
Dutton *v.* Colby, 1274
 v. Gerrish, 1054, 1055, 1066, 1175, 1200
 v. Ives, 2297
 v. Warschaner, 1999, 2078
Dutro *v.* Wilson, 976, 1225
Duval *v.* Bibb, 1549, 1566, 2006
 v. McLosky, 2077, 2078, 2110
Du Val *v.* Johnson, 2142
 v. Marshall, 1633, 1646
Duvall *v.* Craig, 729
 v. Waters, 549, 550, 569, 570, 572, 573, 574,
 575, 576, 577, 2334
Dwen *v.* Blake, 2002
Dwenger *v.* Geary, 411
Dwight *v.* Cutler, 1290, 1291, 2260, 2271
 v. Mudge, 1069
Dwinel *v.* Perley, 799, 2105
Dwinnell *v.* Edwards, 1416, 1434
Dwyer *v.* Carroll, 1192, 1193
 v. Garlough, 888
 v. Newman, 1313
Dye *v.* Cook, 1383, 1396
 v. Mann, 1450, 1473, 1475, 1478, 2137,
 2140
Dyer's Appeal, 1689, 1691
Dyer, Matter of, 1023
Dyer *v.* Brannock, 596, 751
 v. City of St. Paul, 2233
 v. Clark, 786, 787, 824, 825, 1671, 1957,
 1961, 1963, 1965
 v. Depui, 2247
 v. Dyer, 1633, 1646, 1647
 v. Martin, 2004
 v. Osborne, 42
 v. Sanford, 2240, 2245, 2246, 2247, 2303
 v. Shurtleff, 2163
 v. Wightman, 1067, 1098, 1117, 1126, 1172,
 1175
 v. Wilber, 1894
 v. Wittle, 629
 v. Wittler, 570
 v. Wrightman, 2269
Dye *v.* North American Coal Co., 1373,
 1562

Dyett *v.* Pendleton, 1127, 1128, 1166, 1168, 1169,
1172, 1174
Dyke *v.* Randall, 952, 953, 956
Dyke, Doe d., *v.* Whittingham, 1570
Dymoke, Doe d., *v.* Withers, 1039
Dyson *v.* Collick, 57
v. Sheley, 1378, 1387, 1420

E.

Eade *v.* Eade, 1627, 1629, 1632
Eadon *v.* Jeffcock, 90, 93
Eads *v.* Retherford, 1905
v. Rucker, 1904
Eager *v.* Commonwealth, 2176
v. Furnivall, 602, 684
Eagle Fire Ins. Co. *v.* Lent, 1032, 2089, 2343
Eagles *v.* Eagles, 861
Eakin *v.* Brown, 1200
v. St. Louis, K. C. & N. R. Co., 1041
Eales *v.* England, 1630
Eardley *v.* Granville, 84
Eare *v.* Snow, 885
Earl *v.* Beadleston, 1193, 1194, 1195
v. De Hart, 72, 2238
v. Grim, 310
Earl of Buckingham *v.* Drury, 923
Earl of Buckinghamshire *v.* Hobart, 510
Earl of Pembroke's Case, 1991
Earl of Pomfret *v.* Windsor, 1783
Earle *v.* Earle, 1407, 1660
v. Hale, 1216
v. Reed, 2343
v. Washburn, 1580
v. Wilson, 2281
v. Wood, 1886
Earle's Admx. *v.* Hale's Admr., 1216, 1217
Early *v.* Burtis, 134
v. Friend, 1905
Earsham *v.* Myers, 1923
Eashy *v.* Larkington, 2064
Easter *v.* Little Miami R. Co., 268
Easterbrooks *v.* Tillinghast, 1611
Eastern R. Co. *v.* Boston & M. R. Co., 2327
Eastham *v.* Anderson, 982
East India Co. *v.* Atkins, 2168
v. Clavell, 1626
East Lincolnshire R. Co., *Re*, 96
Eastman *v.* Amskeag Mfg. Co., 2325
v. Batchelder, 266, 2032
v. Caswell, 1514
v. Foster, 63, 140, 2022
v. Perkins, 1000, 1002
Easton *v.* Pratt, 1040
Eaton *v.* Campbell, 492
v. Eaton, 2345
v. Green, 2038, 2043, 2049, 2052
v. Jacques, 979, 1074, 1077
v. Mason, 2152
v. Simonds, 802, 803, 808, 809, 2090, 2097,
2172, 2182
v. Southby, 52
v. Straw, 487, 1820
v. Tillinghast, 1791
v. Watts, 1630
v. Whitaker, 994, 1024, 1025, 1363, 1368
v. Whiting, 1995, 2050, 2062
Eaves *v.* Estes, 116, 117, 132, 143, 144
Ebbets *v.* Quick, 415
Eberle *v.* Fisher, 888, 890, 907
Eberlien *v.* Abel, 1343
Ebert *v.* Fisher, 1983
v. Gerding, 2136, 2137
v. Wood, 1977
Eberts *v.* Fisher, 1152
Ebey *v.* Ebey, 779, 831
Ebrand *v.* Dancer, 1647
Ebsworth *v.* Alliance Marine Ins. Co., 631
Eby's Appeal, 76, 201
Echelkamp *v.* Schrader, 572
Eckert *v.* Reuter, 1514, 2012

Eckman *v.* Eckman, 2316, 2331, 2359
Eddy *v.* Baldwin, 1647
Edelmen *v.* Yeakel, 2312
Edgerton *v.* Young, 520, 810, 1580
Edge *v.* Worthington, 2002
Edgell *v.* Hazens, 1480
v. Stanfords, 2028, 2029
Edgerton *v.* Huff, 68, 70, 71, 72, 73
v. Page, 1082, 1128, 1129, 1166, 1168, 1169
v. Paige, 1174
v. Young, 2006, 2097, 2105, 2106, 2157
Edgewood *v.* Railway Co., 2328
Edgewood R. Co's Appeal, 2328
Edgington *v.* Hefner, 2132
Edmands *v.* Mut. S. F. Ins. Co., 2117
Edmonds *v.* Crenshaw, 1734
v. Eastwood, 2254
Edmondson *v.* Fort, 1247
v. Hyde, 1483, 1484
v. Kite, 1278
v. Montague, 782
Edmonson *v.* Blessing, 1450, 1467
v. Meacham, 1481
v. Welch, 827
v. Welsh, 764, 765, 831
Edmunds *v.* Povey, 2139
Edmunson *v.* Kite, 1262, 2270
Edrington *v.* Harper, 1363, 1368, 1369, 2037,
2038, 2047, 2052, 2053, 2054
Edsall *v.* Buchanan, 2095
Edson *v.* Colburn, 1236, 1237,
v. Munsell, 2291, 2292
Edward's Appeal, 2272
Edward *v.* Cheyne, 1562
v. Barnes, 2, 307
v. Bibb, 447, 815, 820, 821, 826, 889
v. Bishop, 535
v. Brinker, 2366
v. Candy, 1168
v. Culbertson, 1616
v. Culbertson, 1586
v. Edwards, 1425, 1649, 1653, 2009
v. Farmers' Fire Ins. Co., 799, 2131
v. Freeman, 19
v. Fry, 1443
v. Grand Trunk R. Co., 55
v. Hale, 1348, 1351, 1353, 1355
v. Hall, 42
v. Heatherington, 1200
v. Hetherington, 1177, 1200, 2269
v. Kearzey, 1510, 1512, 1513
v. New York & H. R. Co., 198, 1054
v. Perkins, 974, 975, 981
v. Salter, 1844
v. Sanders, 2155
v. Sheridan, 647
v. Slater, 1826, 1845
v. Sleater, 1805, 1806
v. Stevens, 1514
v. Sullivan, 901
v. Taliaferro, 2013
v. Trumbull, 2003, 2004
v. University, 1781
Edwardsville R. Co. *v.* Sawyer, 281, 531
Eels *v.* Lynch, 75
Egbert *v.* Butter, 1733
Ege *v.* Medlar, 630, 655, 656, 677, 682, 684, 1372,
2298
Egemont *v.* Hellins, 1039
Egerton *v.* Brownlow, 1569, 1570, 1609
v. Brownlow's Estate, 1539
v. Earle, etc., 454
Egg *v.* Devey, 267
Eggleston *v.* Bradford, 2358
v. New York & H. R. R. Co., 1282
Egremont, Doe d. *v.* Langdon, 1743
Ehle *v.* Quackenboss, 2275, 2276
Ehrman *v.* Mayer, 2268
Eichart *v.* Bargas, 1154
Eichelberger *v.* Barnitz, 396, 414, 416, 418, 424
Eicman *v.* Finch, 2171
Eidson *v.* Fountain, 645

- Eitelgeorge v. Mutual House Building Association, 1755
 Elbers v. United Ins. Co., 1456
 Elder v. Reel, 887, 891, 892, 894, 895, 921
 El Dorado Co. v. Davidson, 1035
 Eldred v. Leahy, 1082, 2258
 Eldredge v. Bell, 1143
 v. Forestal, 798
 v. Forrestal, 703, 761, 815
 v. Pierce, 1524
 v. Preble, 634
 Eldridge v. Fisher, 416, 447, 472
 v. Kinsbury, 2083
 v. Pierce, 1381, 1476
 v. Preble, 477, 479, 491, 626
 v. See Yun Co., 1689
 v. Smith, 2021
 Elfe v. Cole, 1993, 1999, 2078
 Elias v. Snowden Slate Quarries, 494
 v. Verdugo, 1426
 Elliot v. Thatcher, 1378, 1379
 Elkin v. Meredith, 890
 Elkins v. Edwards, 2093, 2094
 Elcock v. Mapy, 1637
 Ellerbrock v. Flynn, 1144
 Ellett v. Reid, 2333
 Ellice, *Ex parte*, 1721
 Ellicot v. Welch, 777, 832, 2005
 v. Mosier, 861, 865, 866, 868, 870, 933, 956
 Ellinger v. Crowl, 1623
 Ellingsworth v. Cook, 692, 703
 Elliot v. Davis, 2356
 v. Frakes, 1924
 v. Smith, 542, 545, 546, 724
 v. Sleeper, 2133
 Elliottson v. Fleetham, 2250
 Elliott, *Ex parte*, 1754
 Elliott v. Aiken, 1054, 1068, 1083, 1106, 1107,
 1128, 1200
 v. Armstrong, 1576, 1635
 v. Ashland Mut. Fire Ins. Co., 2113
 v. Bishop, 129
 v. Dycke, 1212
 v. Fisher, 76, 1560
 v. Fitchburg R. Co., 101
 v. Gower, 2012, 2013
 v. Horn, 1624
 v. Iuce, 1034
 v. Maxwell, 2044, 2054
 v. McKay, 1896
 v. Minto, 368, 369, 719, 2057, 2058, 2289
 v. Morris, 1898
 v. Nichols, 1919, 1940, 1950
 v. Northeastern R. Co., 2229, 2232
 v. Pearsall, 411
 v. Pearsoil, 413, 443, 903
 v. Perasoll, 467
 v. Rhett, 2246
 v. Royal Exchange Assurance Co., 1051
 v. Sackett, 2068, 2069
 v. Stone, 1027, 1278, 1284
 v. Teal, 1364, 1366
 v. Turner, 1871, 1872
 v. Wood, 2001, 2038, 2163
 Ellis v. Davis, 1404
 v. Duncan, 2230
 v. Ellis, 870, 1632, 1633
 v. Fisher, 1595, 1709, 1710, 1712, 1797
 v. Foster, 2251
 v. Fusher, 336
 v. Guavas, 2148
 v. Hussey, 1998, 2077
 v. Johnson, 2071, 2166
 v. Kenyon, 2152
 v. Leek, 2144
 v. Lewis, 943, 945
 v. Martin, 2020, 2140
 v. Page, 147, 1269
 v. Paige, 131, 997, 1136, 1137, 1187, 1252,
 1264, 1269, 1270, 1271, 1284, 1285, 1295,
 1296, 1299, 1304, 1305, 1322, 1338
 v. White, 1400
 Ellison's Trust, *Re*, 1788
 Ellison v. Airey, 326
 v. Brigham, 56
 v. Daniels, 1995, 1998, 2063, 2104, 2111
 v. Ellison, 1791
 Ellis v. Kreutzinger, 2118
 v. Nimmo, 1841
 Elloit v. Fitchburg R. Co., 72, 2228
 Ells v. Sims, 2024
 Ellsworth v. Cook, 600, 601, 603, 607, 612, 630
 v. Hale, 1266, 1280
 v. Hinds, 1024, 1362, 1370
 v. Lockwood, 2074, 2136, 2137, 2138, 2150,
 2169
 v. Tarrt, 1240, 1242, 1244
 Ellwell v. Shaw, 1043
 Elmendorf v. Carmichael, 2347
 v. Lockwood, 734, 793, 835, 896, 900, 904,
 911, 923
 v. Taylor, 1785
 Elmendorf v. Carmichael, 211, 215
 Elmer v. Loper, 2087, 2088, 2090
 Elmes v. Sutherland, 1794
 Elmore v. Marks, 2034
 Elms v. Randall, 1220, 1223
 Elore v. Robinson, 2267
 Elsee v. Gatward, 1183, 1191
 Elston v. Jasper, 986
 v. Robinson, 1386, 1443, 1444, 1445
 Elton v. Eason, 1212
 Elwell v. Burnside, 1969
 Elwes v. Maw, 118, 124, 127, 128, 129, 130
 Elwood v. Deifendorf, 2177
 v. Forkel, 1317
 v. Klock, 819
 Ely v. Alcott, 2349
 v. Beaumont, 975
 v. Eastwood, 1516
 v. Ely, 2009
 v. Lyon, 1456
 v. McGuire, 2077
 v. McNight, 2070
 v. Scofield, 2036, 2109, 2110
 v. Wilcox, 2366
 Emans v. Turnbull, 98
 Emanuel v. Hunt, 2104, 2106
 Emanuel College v. Evans, 1996
 Embree v. Ellis, 712, 766, 870, 874, 876
 Embrey v. Owen, 2225, 2228
 Embury v. Connor, 2323, 2324, 2327, 2328
 Emerick v. Tavenor, 1315
 v. Taverner, 1317, 1335, 1350, 1355
 Emerson v. Atwater, 2045
 v. Cutler, 1024
 v. European & M. A. R. Co., 2018, 2019
 v. Fiske, 2212
 v. Harris, 763
 v. Proprietors, 730
 v. Simpson, 1867, 1972
 v. Spicer, 1022, 1023
 v. White, 2345
 v. Wyley, 2362
 Emery v. Chase, 2315, 2316, 2317
 v. Grocock, 1743
 v. Owwings, 2027, 2030
 Emigrant Co. v. County of Wright, 1765
 Emison v. Risque, 2009
 Emmerson v. Heells, 51
 Emmert v. Hays, 681
 Emmes v. Feeley, 2260
 v. Feely, 1171, 1219, 1253, 1294
 Emmett v. Emmett, 223, 2014
 v. Hays, 1025
 Emmons v. Kiger, 1002
 v. Littlefield, 2349
 v. Newman, 1243
 v. Scudder, 1281, 1348, 1352, 1353
 v. Williams, 2334
 Emmott v. Cole, 682, 2250
 Emone v. Turnbull, 72
 Emory v. Keighan, 2127
 v. Wise, 1486

Emporia *v.* Sodam, 2230
Enders *v.* Enders, 1648
Enfield *v.* Day, 212, 2298
Enfield Toll Bridge Co. *v.* Connecticut River
Co., 1869
 v. Hartford R. Co., 197
Engelbrecht *v.* Shade, 1387
Engels *v.* Mitchell, 1253
England *v.* Dowes, 654
 v. Downs, 659, 795
 v. Lewis, 2167
England d. Sybourn *v.* Slade, 1742, 1743
Engle *v.* Fitch, 1092
 v. Haines, 2068
 v. Underhill, 2082
Englebrecht *v.* Shade, 1419
Englefield's Case, 1544, 1842
Engles *v.* McKinley, 1117
English *v.* Duncan, 2272
 v. English, 945, 946
 v. Foxall, 1666
 v. Key, 1120, 2250, 2257
 v. Lane, 2037
 v. Register, 1259
 v. Roche, 2024
Englishbe *v.* Helmuth, 207, 601
Eno *v.* Del Vecchio, 2208, 2234, 2235, 2236, 2237
Enos *v.* Cook, 1046
 v. Sutherland, 2038, 2169
Ensign *v.* Colburn, 1027, 2188
Enthoven *v.* Hoyle, 2339
Enyeart *v.* Kepler, 1032, 1945, 1955
Episcopal Charitable Society *v.* Episcopal
Church, 1020, 1042
Eppes *v.* Cole, 2270
Epstein *v.* Greer, 1159, 1213
Equitable Life Assn. Soc. *v.* Bostwick, 2070,
2151
Equitable Life Ins. Co. *v.* Bostwick, 2166
 v. Stevens, 2165
Equitable Life Ins. Soc. *v.* Von Glahn, 2080
Erickson *v.* Michigan Land & Iron Co., 93, 94
 v. Patterson, 1207
 v. Rafferty, 1998
 v. Willard, 1593, 1629, 1631
Erie *v.* Caulkins, 1193
Ernest *v.* Croysdill, 1761
Erskine *v.* Plummer, 54, 55
 v. Townsend, 2040, 2041, 2049, 2077, 2127,
2128
Ervine's Appeal, 2324
Erwin *v.* Blanks, 2170
 v. Clark, 1246
 v. Hurd, 33, 36, 39
 v. Olmstead, 1282, 1903, 1922
 v. Parham, 1758
 v. Shuey, 2037
Erwin's Appeal, 1964
Escheator *v.* Smith, 1672, 1673
Esdon *v.* Colburn, 1234
Eskridge *v.* McClure, 2005, 2007, 2009
Eslava *v.* Lepetre, 826, 829, 925, 926
Espy *v.* Fenton, 2270
Essex *v.* Atkins, 1562
 v. Essex, 1964
Essex Sav. Bk. *v.* Meridan F. Ins. Co., 2113
Estabrook *v.* Hughes, 1139
 v. Smith, 1094
Estate of Sunderland, 2283
Estate of Wiley, 2263, 2264
Estave *v.* Lepetre, 804
Estcourt *v.* Estcourt, 953, 955, 957
Estep *v.* Estep, 1106, 1196
 v. Morton, 479
Esterbrooks *v.* Tillinghast, 1637
Esterly *v.* Purdy, 2028, 2030
Estes *v.* Keedsey, 1356
Estill *v.* Rogers, 594, 595
Estwick's Case, 184
Esty *v.* Baker, 997, 1253, 1269, 1270, 1286, 1293,
1296, 1304, 1354
Ethenidge *v.* Vernoy, 2148

Ethridge *v.* Malempre, 218, 750
Ettenheimer *v.* Hefferman, 221
Etting *v.* Bank of the United States, 518
Eureka Clothes Wringing Machine Company *v.*
Bailey W. W. Machine Company,
1042
Eureka Co. *v.* Bailey Co., 1020
Eustache *v.* Rodaquest, 220
Eustis *v.* Keightley, 964
Euston *v.* Friday, 2133
Evan *v.* Jayne, 2236
Evans' Estate, 1634, 1733
Evans *v.* Brittain, 1883, 1919
 v. Chew, 1662, 1752
 v. Clapp, 1051, 1052
 v. Evans, 690, 691, 780, 788, 815, 820, 826,
885, 888
 v. Gibbs, 2354
 v. Hardy, 1021, 2257, 2258
 v. Hastings, 1125, 1310
 v. Huffman, 2093, 2094
 v. Iglehart, 537
 v. Jackson, 1037
 v. John, 1786
 v. Jones, 2120, 2173
 v. Ketterell, 2056
 v. Kimball, 809, 810
 v. King, 1609
 v. Kingberry, 1364
 v. Kingsberry, 76, 77, 1367
 v. Lamar, 1794, 2020
 v. Montgomery, 1511, 1518
 v. Norris, 2031, 2254
 v. Pierson, 935
 v. Read, 1350
 v. Reed, 1355
 v. Roberts, 46, 49, 50, 52, 53, 537
 v. Rosser, 274
 v. Webb, 723, 917, 918, 938, 940, 942,
945
 v. Webbs, 944
 v. Wells, 1042
 v. Womack, 1388
Evans, Doe d., *v.* Evans, 307
Evansville Gas Light Co. *v.* State, 2153
Evanturel *v.* Evanturel, 267
Evarts *v.* Nason, 1782
 v. Steger, 2331
Evelyn *v.* Raddish, 1091
Evens *v.* Hardy, 2251
Everett *v.* Potter, 733, 734, 736
 v. Strong, 2102
Everitt *v.* Everitt, 1793, 1807
 v. Thomas, 2358
Everman *v.* Robb, 1051, 2020
Everson *v.* Carpenter, 2343
Everts *v.* Beach, 1894
 v. Chittendon, 315
Evertson *v.* Booth, 2105, 2107, 2164
 v. Sawyer, 976, 1149
 v. Tappen, 802
Evoy *v.* Tewksbury, 2267
Ewan, Doe d., *v.* Cox, 412, 415, 423, 427
Ewart *v.* Smith, 1099
Ewer *v.* Heyden, 1176
 v. Hobbs, 1866, 1998
 v. Moyle, 2268
Ewing *v.* Burnet, 2296
 v. City of St. Louis, 1515
 v. Coddington, 2254
 v. Jones, 1790, 1791
 v. Shannahan, 1792
 v. Smith, 1375, 1562
 v. Wilson, 1789
Ewing's Lessee *v.* Burnet, 209, 211
Excelsior F. Ins. Co. *v.* Royal Ins. Co., 2113,
2117, 2118
Exchange & Deposit Bank *v.* Stone, 1935
Executors of Lord v. Carbon Iron Mfg. Co.,
2233
Exeter *v.* Odiome, 1548, 1560, 1606, 1607
Exeter Bank *v.* Stowell, 1702

Ex parte Allen, 2263
Ex parte Coburn, 2212
Ex parte Duble, 2263
Ex parte Faxon, 2266
Ex parte Hall, 2252
Ex parte Martin, 2324
Ex parte Merriam, 2179, 2180
Ex parte Morrish, 2263
Ex parte Withers, 2325
 Extension of Central Park, Matter of, 922
Exter v. Odiome, 297, 299, 300
Exton v. St. John, 820, 821
Exum v. Cauty, 2316
Eyre v. Potter, 1757, 1758
Eyrick v. Hetrick, 254, 485, 1674, 1675, 1748, 1786, 1788
Eysaman v. Eysaman, 1344
Eyster v. Goff, 2152
 v. Hatheway, 1409, 1490, 1491, 1497, 1498, 1524, 2060
Eyton v. Jones, 1141
Ezelle v. Parker, 1283, 1291, 2345

F.

Fabb v. Archer, 645
Faber v. Police, 1570
Fagan v. Scott, 1282
Fahnestock v. Faustenauer, 1300, 1308, 1315, 1335, 1336
Failing v. Schenck, 981
Fair v. Brown, 2079, 2091
Fairbank v. Cudworth, 2080, 2188
Fairbanks v. Metcalf, 2353
Fairchild v. Chastelleux, 1024, 1364, 1367, 1930, 1931, 1932, 1940, 1941, 1945
 v. Fairchild, 824, 1964
 v. Lynch, 2068
Fairfax v. Hunter, 2347
Fairfax's Devisee v. Hunter's Lessee, 214, 215, 236, 672, 673, 1657
Fairfield v. Jeffreys, 1247
 v. Lawson, 1685, 1686
Fairis v. Walker, 113
Fairman v. Bavin, 1620
 v. Beal, 317, 319, 337, 536, 1815
 v. Peck, 1758
Faivre v. Daley, 1467, 1468, 1473, 1474
Falis v. Conway Ins. Co., 2055
Falk v. Turner, 1791
Falkner v. Campbell Printing Press Co., 2064, 2065
Fall v. Hazeltregg, 1290
 v. Moore, 1133
Fall River Whaling Co. v. Dorden, 824, 1957, 1960
Fallon v. Schilling, 198
Falls Village W. P. Co. v. Tibbetts, 572
Famworth v. Ferrers, 559
Faming v. Chadwick, 1896, 1903
 v. Dunham, 2060
 v. Kerr, 2160
Fansworth v. Cole, 731
Fant v. Cathart, 2343
Fardy v. Williams, 998, 1042
Farewell v. Cuttings, 728
Farley v. Craig, 1004, 1120, 1139, 2251, 2267, 2269
 v. Farley, 1869
 v. Thompson, 2250, 2255, 2258
Farmer v. Francis, 309
 v. Grose, 2045, 2047, 2052
 v. Ray, 887
 v. Rogers, 1160
 v. Simpson, 1492, 1497
 v. Turner, 1428
Farmers' Bank v. Corder, 1937, 1952
 v. Duval, 2335
Farmers & Mechanics' Bank v. Bronson, 2091, 2122
 v. Gregory, 1920

Farmers & Merchants' Bank of Rochester v. Gregory, 1952, 1980
Farmers & Merchants' National Bank v. Wallace, 1936
Farmers' F. I. & L. Co. v. Edwards, 2131
Farmers' F. & L. Co. v. Edwards, 2129
Farmers' Ins. Co. v. Snyder, 2115
Farmers' Loan & Trust Co. v. Carroll, 1550, 1810
 v. Commercial Bank, 2018
 v. Fisher, 2018
 v. Hughes, 1662
 v. Maltby, 2154
 v. McKinney, 2014, 2322
 v. St. Jo. & D. R. Co., 98, 1019, 1020
Farmers' Nat. Bank v. Moran, 1797
Farnam v. Brooks, 1621, 1781
 v. Holman, 2262
 v. Loomis, 767
Farnham v. Clements, 1586, 1645
Farnival v. Crew, 1008, 1009
Farnsworth v. Boston, 688, 2062
 v. Duffer, 1045
Farnum v. Burnett, 2030, 2059
 v. Loomis, 764
 v. Peterson, 1005, 2301
 v. Platt, 2206, 2208, 2222
Farquharson v. Eichleberger, 289, 1553, 1594, 1597
 v. McDonald, 1600, 1789, 2023
Farr v. Dudley, 2082
 v. Gilreath, 298, 1564
 v. Sherman, 1362
 v. Smith, 1246, 1904, 1905, 1969
Farrand v. Gleason, 1891
 v. Marshall, 2231, 2232
Farrant v. Lovel, 575, 576, 2080, 2185
 v. Thompson, 984
Farrar v. Ayres, 306, 330, 337, 340
 v. Chauffetete, 112, 114, 116, 126, 2334
 v. Cooper, 2245
 v. Dean, 216
 v. Eastman, 1913
 v. Stackpole, 103, 104, 105, 106, 107, 113, 133, 135
 v. Winterton, 76
Farrell v. Lloyd, 682, 1647
 v. Patterson, 1376
Farrer v. Beswick, 1246
Farrington v. Baley, 2273
 v. Barr, 1538, 1586, 1610, 1612, 1637
 v. Kimball, 1072, 1073, 1115, 1117
 v. Morgan, 233
Farris v. Houston, 1219, 1222, 2087, 2258
 v. Walker, 104, 136
Farrow v. Edmundson, 1144, 1296
 v. Farrow, 896, 898, 899, 923, 956
Farrowe v. Beam, 841
Farson v. Goodale, 1273, 1334, 1344
Farwell v. Cotting, 925
 v. Dickenson, 1176, 2250
 v. Murphy, 2174
 v. Rogers, 209, 1005, 2256
Farwell Brick, Tile & Clay Shingle Co. v. McKenna, 1464
Fash v. Blake, 2323
 v. Kavanagh, 1343
Fassett v. First Parish in Baylston, 36, 38, 39, 40
 v. Mullock, 2106, 2153
Fassitt v. Middleton, 975
Faubanks v. Codworth, 2081
Faulkner v. Anderson, 1253
 v. Brockenborough, 1998, 2077
 v. Daniel, 510
 v. Daniels, 2170
 v. Davis, 1738, 1739
 v. Warren, 2251
Faure v. Winans, 2089
Faurote v. Carr, 1427, 1428
Fawcett v. Whitehouse, 1621
Fawcetts v. Kinney, 2177

- Fawley *v.* Craig, 2253
Faxon, *Ex parte*, 1173
 v. Folvey, 1589
Fay *v.* Brewster, 553, 563, 1153, 2086
 v. Cheney, 688, 1996, 2014
 v. Fay, 1605, 1810
 v. Holloran, 984, 2249, 2252, 2259
 v. Muzzey, 78, 79
 v. Salem & D. Aqueduct Co., 71
 v. Taft, 1560, 1614
 v. Valentine, 2174
Faysoux *v.* Prather, 1723
Fearon *v.* Aylesford, 773, 939, 965
Fears *v.* Brooks, 1371, 1373, 1561
Feather *v.* Strohoecker, 1989, 1990
Featherstonhaugh *v.* Lee Moor Porcelain Clay
 Co., 1019
 v. Bradshaw, 2271
Fee *v.* Swingly, 2085
Fevary *v.* Braesch, 1050, 2271
Felch *v.* Finch, 841, 844
 v. Harriman, 1207
 v. Hooper, 1614
 v. Taylor, 1108, 1117, 2062
Fell *v.* Brown, 2073, 2149
 v. Rich Hill Coal Mining Co., 976
Fellows' Appeal, 1791, 1792
Fellows *v.* Fellows, 1770
 v. Heermans, 1680
 v. Lee, 197
 v. Lewis, 1480
 v. Mitchell, 1732
 v. Smith, 1623
 v. Tann, 1561
Felthouse *v.* Birdley, 1000
Feltman *v.* Butts, 393
Felton *v.* Bissell, 2177
 v. Deall, 982, 1232
Fenn *v.* Holme, 1516
 v. Smart, 1849
Fennings *v.* Granville, 1246
Fenny *v.* Durrant, 852
Fenton *v.* Embler, 961
 v. Holloway, 1034
 v. Lord, 2058
 v. Reed, 596, 752, 757, 758, 769, 883
 v. Stump, 759
Fenwick *v.* Floyd, 1501
Fereday *v.* Hordern, 1240
Ferguson *v.* ———, 1068
 v. Cornish, 1007, 1008
 v. Franklin, 1554
 v. Hardy, 2257
 v. Hass, 786
 v. Kimball, 2154
 v. Kumler, 1431
 v. Neville, 2014
 v. Peden, 2298
 v. Reed, 1425
 v. Stuart's Exrs., 76
 v. Tweedy, 592, 593, 598, 601, 604, 616,
 624, 692, 693, 703
 v. Wetsell, 2248
 v. Witsell, 2242
Ferguson's Lessee *v.* Zepp, 307, 308, 332, 536
Fergusson *v.* Brent, 1099
Ferlat *v.* Gojon, 594
Ferraby *v.* Hobson, 1038
Ferrall *v.* Kent, 1233, 1234, 1909
Ferre *v.* American Board Comrs., etc., 1842
Ferrin *v.* Kennedy, 1294
 v. Kenny, 1293
Ferris *v.* Cooper, 2335, 2336
 v. Crawford, 2070, 2071, 2112, 2150, 2166
 v. Ferris, 2051
 v. Gibson, 322, 323
 v. Quimby, 123
 v. Van Buskirk, 2237
 v. Van Vechten, 1622, 1760
Ferriss *v.* Harshea, 730
Ferry *v.* Burnell, 739
 v. Meckert, 2107
Ferry *v.* Purnell, 733
Fesmire *v.* Brock, 1026
Fessler's Appeal, 2002, 2050
Fetrie *v.* Shoemaker, 1034
Fetrow *v.* Merriwether, 2318
 v. Wiseman, 2344
Fetters *v.* Humphrey, 2211
 v. Humphreys, 2216
Fettiplace *v.* Gorges, 1562
Fewell *v.* Kessler, 2134
Fickett *v.* Durham, 778
Field *v.* Arrowsmith, 1598, 1716, 1766, 1795
 v. Columbet, 2322
 v. Craig, 1904
 v. Helms, 2168
 v. Herrick, 1030, 1066, 1316, 1327, 1329,
 1340
 v. Hollowell, 970
 v. Howell, 971, 974, 981
 v. Mayor, etc., of New York, 2017
 v. Mills, 1057, 1104, 1111, 1113, 1159
 v. Pierce, 42
 v. Schiefflin, 1022
 v. Stagg, 2341
 v. Swan, 1110, 2065, 2257
Fielden *v.* Slater, 1185
Fielder *v.* Darrin, 2045, 2060
 v. Murphy, 2152
Fields *v.* Fields, 1953
Fiero *v.* Bett, 1229, 1234
Fifty Assoc. *v.* Howland, 1059, 1062, 1138, 1155
Figart *v.* Halderman, 2071
Fightmaster *v.* Beasley, 1969
 v. Beasley, 1905
Filbert *v.* Hoff, 1904
Files *v.* Magoon, 1277
Fillebrown *v.* Hoar, 1171, 1173, 1174, 2268
Filley *v.* Register, 1623, 1625, 1626
Filliter *v.* Phippard, 568
Fillman *v.* Divers, 1622
Fillor *v.* United States, 1035
Finaly *v.* King's Lessee, 1864
Finch's Case, 1348
Finch *v.* Finch, 650, 962, 966, 1647, 1653
 v. Miller, 1316
 v. Newham, 2170
 v. Shackelford, 1153
Finden *v.* Stephens, 1627
Findlay *v.* Smith, 340, 495, 544, 550, 552, 553,
 561, 562, 742, 776, 806, 812
Findlay's Exrs. *v.* Findlay, 899
Findley *v.* Findley, 933, 956
 v. Wilson, 1668
Finlay *v.* King's Lessee, 270, 305, 1770
Finlayson *v.* Finlayson, 1586, 1616
Finley *v.* Diedrick, 1388, 1513
 v. Dietrick, 1300
 v. McConnell, 1381, 1476
 v. United States Bank, 2147, 2148
Finklemeier *v.* Bates, 1159
Finney *v.* Cochran, 1782
 v. Watkins, 128
Finney's Trustees *v.* St. Louis, 1131, 1315, 1316,
 1348
Fipps *v.* McGehee, 2364
Fiquet *v.* Allison, 1234, 1246
Firchburg Cotton Manf. Co. *v.* Melven, 1028
Fire Ins. Patrol *v.* Boyd, 1751
Firebrass *v.* Pennant, 646
Firestone *v.* Firestone, 764, 804, 827, 832
First Baptist Church *v.* Bigelow, 31
First Baptist Society *v.* Grant, 33, 36
First Baptist Church of Hartford *v.* Witherell,
 33, 35, 36, 39
First Congregational Society *v.* Atwater, 1555
First Methodist Episcopal Society *v.* Brayton,
 37
First Natl. Bank *v.* Bennett, 975
 v. Hughes, 1795
 v. Vevay, 1316
First National Bank of San Luis Obispo *v.*
 Bruse, 1421, 1447

- First National Bank of Santa Barbara *v.* La Suerra, 1425
First National Bank of Sioux City *v.* Gage, 2066
First National Bank of Stewart *v.* Hollingworth, 1383, 1443, 1445
First National Bank of Waterloo *v.* Elmore, 810
First Parish in Brunswick *v.* Dunning, 234
First Parish of Sudbury *v.* Jones, 142
First Presby. Church's Lessee *v.* Pickett, 1139, 1140
First Presbyterian Society of Chili *v.* Bowen, 1671
First Religious Society in Whitestown *v.* Stone, 1671
Fish *v.* Chapman, 1099
 v. Dodge, 1199, 2070
 v. Fish, 783, 940, 2074, 2182
 v. Howland, 2008
 v. Potts, 2257
 v. Wilson, 1782
Fishbach *v.* Lane, 1469
Fisher's Appeal, 1621
Fisher *v.* Banta, 76
 v. Brown, 1749
 v. Bush, 1211
 v. Cornell, 1443, 1445, 1459, 1462
 v. Derring, 1120, 2258
 v. Dewerson, 1972
 v. Dixon, 104, 127
 v. Fair, 2218
 v. Fields, 288, 289, 290, 1542, 1563, 1574, 1575, 1592, 1594, 1596, 1689, 1690, 1691, 1796
 v. Filbert, 1561
 v. Fisher, 1021
 v. Forbes, 53, 724, 959
 v. Glover, 32, 39
 v. Grimes, 784, 821, 907
 v. Horicon, etc., Co., 1554
 v. Johnson, 2005, 2007
 v. Jewitt, 2343
 v. Klein, 2347
 v. Krutz, 1643
 v. Lackey, 1511
 v. Meister, 2059, 2147
 v. Milliken, 1098, 1172
 v. Morgan, 874, 875
 v. Mossman, 924
 v. Otis, 2028, 2105, 2108
 v. Prosser, 1170
 v. Provin, 1024, 1930, 1932, 1942, 1952
 v. Smith, 1151, 2256
 v. Tallman, 2169
 v. Taylor, 273, 500, 1674, 1675, 1748
 v. Thirkell, 1202
 v. Wigg, 1246, 1883
Fisher, Doe d., *v.* Giles, 1279
 v. Prosser, 518
Fisk *v.* Chandler, 1866
 v. Eastman, 692, 703, 761, 815
Fiske *v.* Fiske, 2031, 2032, 2033
 v. Flores, 2359
 v. Tolman, 2068
Fitch *v.* Archibald, 2254
 v. Ayer, 647
 v. Burk, 2020
 v. Cotheal, 2131
 v. Harrington, 1241
 v. Pinckard, 1997
 v. Renner, 2057
Fitchburg Cotton Co. *v.* Melvin, 2064
Fitchburg Cotton Manfg. Corp. *v.* Melvin, 119, 407, 1127, 1167, 1171, 1172, 1174
Fitchburg R. Co. *v.* Page, 2295
Fitcher *v.* Remer, 2057
Fite *v.* Beasley, 1686
Fitton *v.* Inhabitants of Hamilton City, 1043, 1317, 1328, 1342
Fitts *v.* Fitts, 1949
 v. Hoyt, 703, 729, 1093
Fitz *v.* Smallbrook, 1807
Fitzgerald *v.* Anderson, 1187, 1188
 v. Barker, 2068, 2166
 v. Beebe, 1125, 1169, 1212
 v. Fernandez, 1426
 v. Foulkes, 2272
 v. Reed, 986
 v. Topping, 1798
Fitzherbert *v.* Shaw, 130
Fitzhugh *v.* Anderson, 2176
 v. Barnard, 1777
 v. Cregham, 2364
 v. Crigham, 517
 v. Croghan, 206, 601, 730, 2354, 2365
 v. Hellen, 486
Fitzpatrick *v.* Childs, 1131, 1132
 v. Fitzgerald, 1706, 1707, 1713
 v. Fitzpatrick, 597, 1648
 v. Waring, 1038
Fitzsimmons *v.* Ogden, 2124
Flacks *v.* Kelly, 2136
Fladland *v.* Delaplaine, 2000
Fladung *v.* Rose, 1919, 1932, 1939
Flagg *v.* Bean, 641, 642, 666
 v. Ely, 1715
 v. Geltmacker, 2071
 v. Mann, 1590, 1738, 1990, 1993, 2037, 2041, 2043, 2044, 2045, 2046, 2048, 2049, 2053, 2054, 2064, 2079, 2204, 2328
Flaherty *v.* McCormick, 2296
Flanagan *v.* Flanagan, 75
 v. Pearson, 1144, 1145, 1160
 v. Westcott, 2112
Flanders *v.* Clark, 1816, 1841, 1888
 v. Flanders, 1776
 v. Lamphear, 2032, 2033, 2064
 v. Thompson, 1623
Fleek *v.* Zilhaver, 1933
Fleeson *v.* Nicholson, 831, 891, 927
Fleet *v.* Dorland, 504, 505, 506
Fleetwood *v.* Hull, 1076
Fleming *v.* Brush, 2356
 v. Buchanan, 1821, 1825
 v. Chunn, 2252, 2259
 v. Fleming, 597
 v. Gilmer, 1784
 v. Sitton, 2165
Flemming *v.* Culbert, 1781
Fletcher *v.* Ashburner, 94, 679, 695
 v. Ashley, 654
 v. Chase, 2097, 2178
 v. Com. Ins. Co., 1224
 v. Fletcher, 1791
 v. Herring, 81
 v. Holmes, 722, 924, 1999, 2106, 2167
 v. Mayor, 2100
 v. McFarlane, 1076, 2263, 2264
 v. Peck, 19, 1512
 v. Rylands, 199
 v. Smiton, 307, 311
 v. State Bank, 1093
 v. State Capitol Bank, 1412, 1501
 v. Thunder Bay River Boom Co., 70
 v. Walker, 1720
Fletcher *v.* Dyche, 2356
Fleureau *v.* Thornhill, 1245
Flinn *v.* McKinley, 1990
Flint *v.* Clinton Co., 1786, 1788, 2013
 v. Hughes, 347, 1632, 1684
 v. Phipps, 2033
 v. Sheldon, 2038, 2046
Flint & P. M. R. Co. *v.* Gordon, 2203
Flinthan's Appeal, 338, 1814
Flinthan's Case, 317
Flood *v.* Blood, 1348, 1354
Florence *v.* Adams, 1766, 1776
 v. Hopkins, 1917, 1982,
Florence Sewing Machine Co. *v.* Grovor & Baker Sewing Machine Co., 1157
Florentine *v.* Barton, 2333
Flournoy *v.* Johnson, 1743
Flowers *v.* Elwood, 2133, 2161

- Flower, Doe d., *v.* Peck, 1074, 1075, 1152, 1868,
1869
 Flower *v.* Miller, 1380, 1381
 Flowry *v.* Beeker, 662
 Floyd *v.* Calvert, 596
 v. Carow, 21
 v. Floyd, 1300, 1308, 1335, 1337
 v. Morrow, 2018
 v. Ricks, 45, 2364
 Floper *v.* Lavington, 2168
 Flud *v.* Flud, 518
 Fluke *v.* Fluke, 1754, 1810
 Flureau *v.* Thornhill, 1190
 Fly *v.* Brooks, 2331
 Flynn *v.* Coffee, 523
 v. Hatton, 1054, 1086, 1248
 v. Powers, 2011
 Flynt *v.* Arnold, 829, 2365
 v. Conrad, 48
 v. Hubbard, 1647, 2080
 Fogal *v.* Pino, 514
 Fogarty *v.* Finley, 2364
 v. Sawyer, 2078, 2159
 Fogg *v.* Clark, 2, 305, 307, 308, 310, 331
 v. Fogg, 1380, 1442, 1443, 1501, 1502, 1503,
1519
 v. Price, 1053, 1093
 Fogle *v.* Chancy, 1309
 Folden *v.* State, 970, 990, 1001
 Foley *v.* Cooper, 1524
 v. Cowgill, 1701
 v. Howard, 2033,
 v. Parry, 347
 v. Perry, 1630
 v. Wyeth, 1253, 1282, 1290, 2231, 2232,
2248
 Folger *k.* Evis, 1638
 v. Kenner, 110
 v. Mitchell, 2191
 Folkingham *v.* Croft, 257
 Follansbe *v.* Kilbreth, 1735, 1736, 1746
 Follitt *v.* Heath, 2027, 2031
 v. Rose, 1757
 v. Tyrer, 684, 1372
 Folschow *v.* Werner, 1427
 Folsom *v.* Belknap Co. Mut. F. Ins. Co.,
2115
 v. Carl, 1445, 1504, 1505
 v. Chesley, 541
 v. Moore, 107, 1269
 v. Perrin, 994
 Folts *v.* Huntley, 1127, 1167
 Foltz *v.* Prouce, 2250, 2251, 2258
 Fonda *v.* Sage, 1861, 1862, 1873
 v. Van Horne, 1023, 2344
 Fontain *v.* Ravenel, 2348
 Fontaine *v.* Bostman's Sav. Bank, 765
 Fonte *v.* Horton, 1734
 Fooler *v.* Cooke, 1729
 Foos *v.* Scarf, 1822
 Foose *v.* Whitmore, 1591, 1593
 Foot *v.* New Haven & N. Co., 1280, 2212, 2213
 v. New Haven R. R., 2212
 v. Tewksbury, 1033
 v. Wiswall, 517
 Foote *v.* Bryant, 1615
 v. Cincinnatti, 1127, 1129, 1167, 2268
 v. Colvin, 45, 1229, 1233, 1234, 1235, 1579,
1615, 1622, 1638, 1642, 1648, 1747
 v. Gooch, 132
 v. Hartford Ins. Co., 2116
 Footner *v.* Cooper, 2, 307
 Forbes *v.* Appleton, 1180
 v. Balenseifer, 2212, 2213
 v. Eden, 34
 v. Forbes, 1947
 v. Hall, 1741
 v. McCoy, 2025, 2026
 v. Moffatt, 810, 1164, 1580, 2097
 v. Ross, 1708
 v. Scannell, 1795
 v. Smiley, 1258, 1273, 2260
 Forbes *v.* Smith, 679, 680
 v. Sweezy, 592, 628, 634, 635, 668, 669
 Forbush *v.* Lombard, 2021
 Ford *v.* Conb, 61, 81, 110, 117, 122, 125, 141, 143,
144
 v. Cook, 447, 448, 468
 v. Erskine, 867, 868
 v. Gray, 1913
 v. Grey, 208, 1968
 v. Irskine, 807
 v. Johnson, 1514
 v. Joyce, 2330
 v. Knapp, 1891, 1892
 v. Lacy, 2293
 v. Peering, 491
 v. Phillips, 1031
 v. Philpot, 782
 v. Smith, 2005, 2009
 v. Tynite, 60
 v. Williams, 141
 v. Wilson, 2300
 Forde *v.* Herron, 1062
 Fordyce *v.* Hicks, 1425
 v. Willis, 1590
 Foreman *v.* Foreman, 94, 434
 Forgy *v.* Merryman, 2071
 Fornsill *v.* Murray, 752, 757, 759
 Forrer *v.* Forrer, 1889
 Forrest *v.* Forrest, 771, 772, 920, 1359
 v. Tremmell, 764, 766
 Forrester *v.* Forrester, 750
 Forsaith *v.* Clark, 310
 Forsey *v.* Luton, 497
 Forshaw *v.* Higginson, 1787
 v. Welsby, 1801
 Forster *v.* Hale, 1590, 1591, 1592, 1691, 1692
 Forsyth *v.* Preer, 1479
 Forsythe *v.* Price, 539, 540, 1208
 Fort *v.* Burch, 799, 2365
 Fortesque *v.* Hennah, 795
 Forth *v.* Ballance, 1146
 Fortier *v.* Darst, 2106
 Fortman *v.* Goepfer, 116, 143, 144
 Forward *v.* Deetz, 1914
 v. Pittard, 498, 1099
 Foscue *v.* Foscue, 1781
 Fosdick *v.* Fosdick, 323
 v. Gooding, 791, 851, 857, 870
 v. Schall, 2018
 v. Southern Car Co., 2018
 Foss *v.* Crisp, 659, 660, 673, 674, 750, 2014
 v. Hildreth, 1033
 v. Strachn, 1383, 1449, 1451, 1455
 v. Van Driele, 1169, 1170, 2258
 Foster's Appeal, 75, 1961
 Foster *v.* Abbott, 2092
 v. Atwater, 2068
 v. Reals, 2110
 v. Browning, 2212, 2213
 v. Byrne, 1428
 v. Cook, 943
 v. Davis, 1724, 1728
 v. Dawber, 1788
 v. Deacon, 2152
 v. Dugan, 1349
 v. Dwinell, 764, 803, 827
 v. Equitable Ins. Co., 2118
 v. Foster, 1412, 1910
 v. Groton, 735
 v. Hall, 636
 v. Hawley, 759
 v. Hilliard, 509, 2182
 v. Joyce, 285, 477, 532
 v. Mansfield, 2353
 v. McGregor, 1481
 v. Marshal, 489, 589, 590, 624, 626, 630,
632, 666
 v. Maybe, 144
 v. Merchant, 1034
 v. Morris, 1172, 1220
 v. Peyser, 1054, 1066, 1067, 1081, 1175,
1200, 1201

- Foster *v.* Potter, 2164
v. Preutiss, 142
v. Reynolds, 2030
v. Robinson, 1209
v. Romney, 1564
v. Rowland, 999
v. Shreve, 534
v. Stewart, 2, 308, 309
v. The Essex Bank, 2332
v. Trustees, 1652
v. Trustees of Athenæum, 2007
v. Van Reed, 2117
v. Westmoreland, 2272
- Foster, Doe d., *v.* Wandlass, 1060
v. Williams, 1309
- Foteaux *v.* Lepage, 2251, 2253
Fothergill *v.* Fothergill, 1839
Fouch *v.* Wilson, 2004, 2037
Foucher *v.* Leeds, 1316
Fougere *v.* Cohn, 1300, 1317, 1321, 1335, 1442
Foulk *v.* McFarlane, 1773
Foulkes, Succession of, 1497
Fountaine *v.* Pellett, 504, 1726
Fourth Ecclesiastical Society *v.* Mather, 647
Fowell *v.* Franter, 1007
Fowke *v.* Slaughter, 1050
v. Woodward, 1047
Fowle *v.* Lawrason, 1669
v. Torrey, 646
- Fowler, *in re*, 2260
v. Aetna Fire Ins. Co., 2115
v. Bailey, 786, 825
v. Bailley, 1957
v. Bott, 1082, 1099, 1175, 1179, 2250
v. Bush, 2133
v. Fay, 810, 2068
v. Fowler, 661, 1604, 1687, 1891
v. Griffin, 739, 740, 780, 856
v. Hawkins, 2272
v. Payne, 1099, 1100
v. Poling, 1172
v. Shearer, 900
v. Stoneum, 2046
v. Thayer, 1878
v. Treboin, 647
- Fowler, Doe d., *v.* Peck, 1074, 1075
Fowley *v.* Palmer, 2089
- Fox *v.* Blossom, 2293
v. Carlyne, 1848
v. Cash, 1781
v. Corey, 970, 2257, 2263
v. Fletcher, 1887, 1919, 1932
v. Hanbury, 1246
v. Lipe, 2060
v. Long, 504, 520
v. Mackreth, 76, 1619, 1621, 1761, 1772
v. Nathans, 1006, 1320
v. Phelps, 289, 331, 332, 340, 342, 533, 536
v. Phoenix Ins. Co., 2113, 2117
v. Pratt, 803, 885, 2164
v. Southack, 214, 215, 672, 673, 750, 774, 1657, 2014
v. Swann, 1250
- Foxcroft *v.* Barnes, 1983
Foxton *v.* Manchester & Liverpool District Banking Company, 1783
Foxwell *v.* Craddock, 223
Foxworth *v.* White, 760
- Foy *v.* Foy, 1590
Frail *v.* Ellis, 2006
Frakes *v.* Elliott, 1904
Frame *v.* Frame, 1589
Frampton *v.* Stephens, 770
France's Estate, 210
France *v.* Harrow, 722
Francestown *v.* Deering, 1646
Francis' Appeal, 2242
Francis The, 1456
Francis *v.* Cockrell, 1054, 1055
v. Francis, 507
v. Garrard, 841, 844
v. Nash, 43
- Francis *v.* Porter, 1999, 2140, 2141
v. Sayles, 1211
v. Wells, 2004
- Franciscus *v.* Reigart, 58, 251, 1552, 1559, 1583, 1672, 1673
- Frank's Appeal, 959
- Frank *v.* Brunemann, 1184
v. Davis, 2167
v. Murphy, 2171
v. McGuire, 2263, 2264
v. Stovin, 424
- Franke *v.* Youmans, 1110
- Frankland *v.* Moultoob, 143
- Franklin *v.* Brown, 1054, 1056, 1066
v. Carter, 1172
v. Coffee, 1378, 1379, 1380, 1386, 1416, 1439, 1442, 1443, 1444, 1445, 1457, 1458, 1483, 1495, 1514
v. Gorham, 2074
v. Harter, 331
v. McEntyre, 1613, 1651
v. Merida, 1212
v. Osgood, 1663, 1731, 1810, 1813, 1814, 1832, 1833, 1834, 1835, 1841, 1842, 1843
v. Palmer, 1164
v. Robinson, 1889
v. Thornbury, 985
- Franklin Land, etc., Co. *v.* Card, 1130, 1131
- Franklin Sav. Inst. *v.* Central Mut. F. Ins. Co., 2119
- Franklin Savings Institution *v.* People's Savings Bank, 1885
- Franklyn, *Ex parte*, 1721
- Franklyn *v.* Hayward, 2147
- Frary *v.* Booth, 1373, 1374, 1562
- Fraser *v.* Davie, 2255
v. Davis, 2273
- Frasur *v.* Hurey, 536
- Fratt *v.* Whittier, 105, 106, 107, 108, 121, 135, 136, 138, 141
- Fraunces' Case, 1867
- Fray *v.* Packer, 281, 285
- Frazier *v.* Hightower, 655, 677, 682, 683, 1372
v. Hilliard, 2017
v. McPherson, 2314
v. Pigott, 2281
v. Robinson, 1213
- Frazier *v.* Barnum, 254, 1747
v. Brown, 2226, 2230
v. Brownlow, 1373, 1562
v. Frazier, 1671
v. Pankey, 2333
- Frazier, Trustees of, *v.* Center, 766, 830
- Freak *v.* Hearsey, 2148
- Frear *v.* Drinker, 2005
v. Hardenburgh, 52
- Frederick's Appeal, 1790
- Frederick *v.* Devoal, 142, 143
v. Gray, 1915
v. Haas, 1700
v. Youngblood, 1698
- Freeborn *v.* Wagner, 1808, 1809
- Freedland *v.* Manderville, 955
- Freeholders *v.* Henry, 1689
- Freeland *v.* Burt, 1176
v. Freeland, 2059
v. Harris, 2064
v. Southworth, 107, 111
- Freeman *v.* Baldwin, 2038
v. Barber, 1951
v. Burnham, 1623
v. Carpenter, 1514, 1515
v. Coit, 345
v. Cooke, 1707
v. Dawson, 77
v. Dunn, 658, 669
v. Foster, 1094
v. Freeman, 1696
v. Hartmen, 588, 658, 669, 1362, 1377
v. Headly, 1259, 1277, 1282, 1292
v. Howe, 1516

- Freeman v. Kelly**, 1634, 1653
v. McGaw, 809, 2016
v. Ogden, 1317
v. Parsley, 1828
v. Peay, 2033
v. Schofield, 2148
v. Schroeder, 2125
v. Smith, 76
v. Underwood, 982, 983
v. West, 1040
v. Wilson, 2045, 2054
Freeman, Den ex d., v. Heath, 1160
Freemantle v. Bankes, 648
Freer v. Lake, 1690, 2096
v. Stotenbur, 812, 1204, 1227
Freere v. Moore, 2139
Freethy v. Freethy, 1514
Fregonwell v. Sydenham, 1692
Freidlander v. Ryder, 1187
Freidly v. Scheetz, 889
Freigh v. Platt, 31, 35, 36, 38, 40
Fremont v. The United States, 88
French v. Braintree Manf. Co., 2247
v. Brewer, 88
v. Burns, 2046
v. Caddell, 418
v. Crosby, 864, 911
v. Edwards, 1800, 1801
v. Freeman, 79, 81
v. French, 297, 534, 1548, 2319, 2321
v. Fuller, 1252
v. Hatch, 319
v. Hobson, 1733
v. Lord, 796, 813, 821, 828, 911, 921, 922
v. Lund, 1925
v. Macale, 1872
v. Marstin, 2219, 2220
v. Mayor, 1106
v. McIlhenny, 302, 306, 309, 331, 333
v. Mehan, 1920, 1933, 1939, 1940, 1941, 1942, 1945
v. Pearce, 210, 211, 2298
v. Peters, 854, 860, 900, 904
v. Pratt, 849, 854, 856, 859, 860
v. Rollins, 515, 665, 666, 1142
v. Sturdivant, 2038, 2052, 2054
v. Turner, 2104, 2106
French's Heirs v. French, 1033
Frewen v. Relfe, 1888
Frey v. Rockefeller, 2364
v. Vanderhoof, 2131
Freyvogel v. Hughes, 1674, 1675
Frick Co. v. Petels, 1380, 1381
Friedhoff v. Smith, 996, 1322
Friedland v. Johnson, 1712, 1761
Friedlander v. Ryder, 1188
Friedly v. Hamilton, 2042, 2119, 2126
Friend v. Garcelon, 1428, 1429
Friendly v. Sheetz, 1773
Frier v. Jackson ex. d. Van Allen, 518
Frierson v. Blanton, 2066, 2067
v. Frierson, 647
v. Williams, 720
Frieze v. Chapin, 2160
Frink v. Branch, 2027
v. Le Roy, 2175
v. Murphy, 2171
Frisbie v. Fogarty, 2155
v. Price, 1271, 1280, 1289
v. Whitney, 2308
Frissell v. Rosier, 646, 647, 895, 1938
Frith, In re, 1669, 1974
Frische v. Kramer's Lessee, 2078
Frogmorton v. Holday, 331
v. Wharrey, 234, 437
v. Wright, 331, 533
Frogmorton d. Fleming v. Scott, 1352
Frogmorton d. Robinson v. Wharrey, 442
Frontier v. Ballance, 1140
Frontin v. Small, 1989
Fronty v. Wood, 1132, 1317
Frosdick v. Sterling, 1366, 1369, 1370
- Frost v. Reekman**, 1777, 2038, 2121, 2122, 2123
Frost v. Brisbin, 1456
v. Butler, 1859
v. Cloutman, 470
v. Crisp, 2025
v. Deering, 901, 903
v. Earnest, 1067
v. Frost, 2150
v. Peacock, 818, 925
v. Raymond, 1989, 2362
v. Shaw, 2071, 2112
v. Wolf, 1960
v. Yonkers Savings Bank, 2138, 2172
Frothingham v. McKusick, 2186, 2187
Frout v. Hardin, 1230
Fry v. Fry, 636
v. Jones, 1230, 1237, 2255
v. Merchants' Ins. Co., 858
v. Shehee, 2146
v. Smith, 336
Fryatt v. Sullivan, 2186
v. The Sullivan Co., 103, 104, 143
Frye v. Bank of Illinois, 2030
v. Porter, 1692
Fryer, In re, 1732
Fryer v. Fryer, 596, 752
Fudge v. Durn, 1713, 1714, 1723, 1728
Fuhr v. Dean, 1356, 1357, 2212, 2240
v. Deane, 2213
Fullas v. Pierce, 2366
Fullenwider v. Watson, 1821
Fuller v. Ferguson, 1946
v. Fuller, 1889
v. Hodgdon, 2079
v. Hodgson, 2091
v. Hunt, 2068, 2069
v. Parish, 2045, 2050
v. Ruby, 1128, 1168, 1172, 1173, 1174
v. Scribner, 2152
v. Sweet, 999, 1275, 1281, 1307, 1319
v. Swett, 1171, 1172
v. Tabor, 116, 123
v. Tates, 535
v. Wason, 541, 542, 543, 545, 546, 724
v. Watson, 807
v. Wright, 730
v. Yates, 917, 918, 942, 944, 965
v. Young, 2251, 2253
Fulmer v. Williams, 199
Fulthroe v. Foster, 2010
Fulton v. Davidson, 1735
v. Hood, 136
v. Johnson, 603
v. Norton, 103, 110
v. Stewart, 1139
v. Stuart, 1112, 1115
Fulwiler v. Infield, 1428
Fulwood's Case, 723
Funk v. Brigaldi, 112
v. Creswell, 2321
v. Eggleston, 319, 337, 340, 1806, 1836, 1837
v. Halderman, 1973, 2189
v. McReynolds
v. Newcomer, 1990, 2301
v. Walter, 1522
Funk's Lessee v. Kincaid, 1120, 1213
Furbish v. Sears, 2032
Furbush v. Goodwin, 2077, 2084, 2103, 2104, 2147
Furlong v. Leary, 1273
Furman v. Coe, 1725, 1728
v. Fisher, 1598, 1599, 1600, 1601, 1786, 1789, 1790, 1795
v. Johnson, 2263
v. McMillan, 1890
Furnas v. Durgin, 2069
Furrow v. Athey, 1469
Fusselman v. Worthington, 1144, 1296
Fyffe v. Beers, 1422, 1457, 1458, 1459, 1460, 1461, 1465, 1466, 1495

G.

- Gabbert *v.* Schwartz, 2106
 Gable *v.* Daub, 402
 v. Miller, 34
 Gadberr *v.* Shepard, 261
 v. Sheppard, 1855, 1857, 1860, 1867
 Gaddard *v.* Bolster, 2186
 Gadsden *v.* Cappedeveille, 1797
 v. Whaley, 1587, 1592
 Gaffee's Trust, *In re*, 1561
 Gaffee *v.* Gaffee, 1361
 Gaffield *v.* Hapgood, 115, 118, 119, 128, 129, 130,
 144, 145, 146, 1187
 Gafford *v.* Stearns, 1909
 Gagar *v.* Eckert, 746
 Cage *v.* Bates, 1154
 v. Brewster, 2158, 2172
 v. Jenkinson, 2166
 v. Steinkrauss, 71
 v. Ward, 765, 766
 Gaillard *v.* Farcher, 645
 Gaines *v.* Chew, 1609, 1662
 v. Gaines' Exrs. & Heirs, 821, 822
 v. Green Pond Iron Mining Co., 494, 495,
 496, 812
 v. Relf, 770
 v. Walker, 722
 v. Wilson, 736
 Gains *v.* Poor, 647
 Gaius *v.* Cannon, 1417
 Galbraith *v.* Galbraith, 1883
 v. Gedge, 786, 1963
 v. Greene, 711, 759, 760
 Gale *v.* Coburn, 2317, 2319
 v. Edwards, 2250
 v. Gale, 1586, 1645
 v. Hines, 1903
 v. Kinzie, 776, 844
 v. Mensing, 1777, 1794
 v. Morris, 2001
 v. Nixon, 1063
 v. Oil Run Petroleum Co., 1145
 v. Ward, 105, 108, 112, 114, 116, 126, 133
 Galena & Chic. U. R. R. Co. *v.* Jacobs, 1288
 Gallagher *v.* Mars, 2004
 v. Shipley, 78, 79, 80
 v. Waring, 1199
 Gallaher *v.* Herbert, 1157
 Gallatin Co. *v.* Beattie, 2063
 Gallego's Exr. *v.* Attorney-General, 1684
 Gallego *v.* Chevallie, 636
 Galleo *v.* Eagle, 1980
 Galliers *v.* Moss, 1552, 1554, 2084
 Galligher *v.* Smiley, 1381, 1384, 1513
 Galligo *v.* Chevallie, 635
 Gallop *v.* Newman, 1240
 Galloway *v.* Bonesteel, 2241
 v. Finley, 1617, 2304
 v. Herbert, 1284
 v. Kerby, 1316
 Galloway, Lessee of, *v.* Ogle, 1213
 Galt *v.* Dibrell, 1712, 1795
 v. Dibsall, 2366
 v. Jackson, 2054
 Galusha *v.* Sinclair, 1891
 Galveston, H. & H. R. Co. *v.* Cowdrey, 2018,
 2019
 Galway *v.* Fullerton, 2107, 2152
 Gambette *v.* Brook, 1416, 1460
 Gamble's Estate, 616
 Gamble, Succession of, 31, 32
 Gamble *v.* Voll, 2171
 Gambriel *v.* Gambriel, 515
 v. Doe ex d. Rose, 281, 284
 Gamhill *v.* Newby, 1904
 Gammis *v.* Clark, 2362
 Gammon *v.* Freeman, 2357
 v. Vernon, 1072
 Gandy *v.* Jubber, 1300
 Ganet *v.* Hall, 2316
 Gangwere's Estate, *In re*, 899
 Gangwere *v.* Gangwere, 957
 Gann *v.* Chester, 2007
 Gannaway *v.* Tarpley, 760
 Gannon *v.* Freeman, 764
 v. Nowell, 355
 Gano *v.* Vanderveer, 994, 1081
 Gans *v.* Thieme, 2101
 Gansen *v.* Tomlinson, 2101
 Ganter *v.* Atkinson, 1320
 Gantley's Lessee *v.* Ewing, 1511
 Gantz *v.* Toles, 2172
 Garaty *v.* Dubois, 1394, 1421, 1422
 Garber *v.* Henry, 2120
 Garbut *v.* Bowlin, 896
 Gardeline *v.* Michel, 2336
 Gardener *v.* Finley, 47
 Gardenhire *v.* Hinds, 1797
 Gardiner *v.* Astor, 2097, 2098
 v. Corson, 1063
 v. Derring, 541, 544, 546, 557
 v. Painter, 1626
 Gardiner Mfg. Co. *v.* Heald, 1976
 Gardinier *v.* Corson, 2362
 Gardner *v.* Astor, 2095, 2097
 v. Barnes, 1093, 2083
 v. Bennett, 1194, 1195
 v. Board of County Commissioners, 1131,
 1133, 1134, 1135
 v. Collins, 2286
 v. Commissioners of Dakota Co., 1313,
 1315, 1316
 v. Corson, 1855
 v. Emerson, 2136
 v. Finley, 2022
 v. Gardner, 1044, 1562, 1580
 v. Green, 761, 815
 v. Hazleton, 909, 1283, 1305
 v. Heartt, 800, 2186
 v. Heyer, 2281
 v. Hoeg, 2020
 v. Hooper, 634
 v. James, 2134
 v. Keteltas, 978, 1079, 1128, 1201
 v. Klutts, 617
 v. Moore, 1485, 2038
 v. Newburgh, 2224
 v. Ogden, 1621
 Garesche *v.* Priest, 1719
 Garfield *v.* Crow, 417
 v. Hatmaker, 768, 1548, 1559
 v. Williams, 1093
 Gariss *v.* Gariss, 1292
 Garit *v.* Chambers, 69
 Garland *v.* Executors of Crow, 480, 519
 v. Garland, 1677, 1678, 1679
 v. Jackson, 1037
 v. Richeson, 2105
 v. Towne, 198
 v. Wynn, 2307
 Garlick *v.* Strong, 708, 726
 Garner *v.* Bond, 1503
 v. Byard, 2263
 v. Garner, 1609
 v. Hannah, 1059, 1139, 1140, 1141, 1152,
 1157, 1158
 v. Jones, 1020, 1932, 1952
 v. Manhattan Building Assoc., 1140,
 1141, 1158
 Garnett *v.* Macon, 1758
 Garnhart *v.* Finney, 1058, 1086, 1155, 1156
 Garnous, Doe ex d., *v.* Knight, 1786
 Garnsey *v.* Mundy, 1609, 1791, 1792, 1793
 v. Rogers, 2070, 2072
 Garrard *v.* Garrard, 956
 v. Lauderdale, 1713, 1793
 v. Tuck, 1261
 Garraud, *Re* Estate of, 1648
 Garretsie *v.* Van Ness, 498
 Garretson *v.* Brien, 734, 741
 Garrett's Appeal, 1509
 Garrett *v.* Beaumont, 671
 v. Buckett, 2106

- Garrett *v.* Cheshire, 1380, 1510, 1512, 1518
v. Clark, 531, 1308, 1320, 1335
v. Cummins, 1166
v. Moss, 909
v. Sconten, 1873
Garrison, *Re*, 856, 859, 860
Garrison *v.* Moore, 59
v. Ridd, 2217
v. Sandford, 1093
Garritt *v.* Sharpe, 2218, 2220, 2246, 2247
Garson *v.* Green, 2005, 2006
Garth *v.* Baldwin, 300, 1606
v. Cotton, 575
v. Mois, 1626
Gartshore *v.* Chahle, 954, 956
Gartside *v.* Outley, 1125, 1169, 1319, 2065
Garvey *v.* Dodyns, 2256
v. Jarvis, 1738
Garvin *v.* Hatcher, 923
v. Jennerson, 1292, 2261
Gary *v.* Esterbrook, 1501, 1519
Gascoigne *v.* Thwing, 1648, 1700
Gaskell *v.* Gaskell, 515
Gaskill *v.* Sine, 2153, 2154, 2179, 2180
v. Trainer, 1061, 1154, 1164
Gassage *v.* Taylor, 442
Gassert *v.* Bogk, 2043, 2052
Gast *v.* Baer, 414
Gaston *v.* Wright, 1948
Gate *v.* Wiseman, 648
Gate City Land Co. *v.* Heilman, 1045
Gates *v.* Adams, 2180
v. Andrews, 1795
v. Butler, 211
v. Caldwell, 1989
v. Salmon, 1911, 1924, 1967
Gates d. Markham *v.* Cooke, 289
Gateward's Case, 2193
Gatewood *v.* Gatewood, 2173
Gather *v.* Welch, 2333
Gathings *v.* Williams, 755, 883
Gaule *v.* Bilyeau, 1226
Gaulstine *v.* Royal Ins. Co., 632
Gault *v.* McGrath, 2133
v. Neal, 1340
v. Stormont, 1278
Gause *v.* Hale, 645
v. Wiley, 416, 424, 462
Gausen *v.* Tomlinson, 2125
Gaven *v.* Hagen, 1282
Gawtry *v.* Leland, 199, 2245
Gay's Case, 969, 974
Gay *v.* Baker, 31, 32, 35, 36, 37, 39, 40, 83
v. Edwards, 1781
v. Gay, 588, 634
v. Hunt, 1648, 1701
v. Joplin, 1189
v. Mitchell, 1259
v. Mottiff, 2297
Gay, Exrx., *v.* Davey, 1179
Gayetty *v.* Bethune, 2205, 2242, 2295
Gayford *v.* Moffatt, 2238
Gayle *v.* Johnston, 1894
v. Price, 764
Gaylord *v.* City of Lafayette, 1791
v. Imhoff, 1432
Gayner *v.* Laresborough, 883
Gazely *v.* Price, 729
Gazzolo *v.* Chambers, 1067, 1081
Geary *v.* Bearcroft, 526
Geay *v.* McCune, 917
Gebb *v.* Rose, 646, 882
Gee *v.* Gee, 1464, 1453, 1640
v. Moore, 1450, 1455, 1469, 1478, 1502, 1518
v. Thompson, 773, 920
v. Young, 48, 538
Geeber *v.* Kleckner, 988
Geggetts *v.* Geggetts, 727
Geheebec *v.* Stanby, 1316, 1331, 1340
Geiger *v.* Braum, 996, 1329, 1339, 1343
v. Browne, 1324
Geisy *v.* Cincinnati, 2325, 2326
Gellespie *v.* Worford, 604
Gellet *v.* Rhode, 1013
Gellig *v.* Maas, 2121
Gelpcke *v.* Blake, 136
v. Dubuque, 1516
Gelston *v.* Burr, 2066
v. Sigmund, 1053
Gelzer *v.* Gelzer, 923, 927, 933, 950, 951, 954, 957, 964
Genet *v.* Tallmadge, 1023
Genner *v.* Tracey, 2176
Gennings *v.* Lake, 2216
Gent *v.* Mayor, 1194
Genter *v.* Morison, 2354
Gentleman *v.* Soule, 2206
Gentry *v.* Wagstaff, 703, 1363, 1370
George *v.* Andrews, 2071
v. Baker, 2085, 2101
v. Bussing, 650, 651
v. Cooper, 826
v. Gardner, 2175
v. Goldby, 1034, 1368
v. Kent, 2153, 2178, 2183
v. Morgan, 424, 466
v. Putney, 1169, 1170, 2258
v. Wake, 795
v. Wood, 2153, 2178, 2181, 2183, 2184
George's Creek Coal & Iron Co. *v.* Detmold, 1997, 2079
Georges *v.* Stanfield, 543, 544
Georgia Home Ins. Co. *v.* Kinnier, 2116
Gerald *v.* Elley, 2331
Gerard *v.* Basse, 2356
Gerard Ins. Co. *v.* Chambers, 300, 328, 1605
Gerber *v.* Grabel, 2223
Gerdine *v.* Menage, 2137, 2138
German *v.* Gabbald, 1642, 1648, 1649, 1697, 1699
v. German, 327
German Bk. *v.* Leyser, 2333
German Ins. Co. *v.* Hyman, 631
German Reformed Church *v.* Seibert, 34
Germond *v.* Jones, 767
Gerrish *v.* Brown, 2225
v. Mace, 2060
Gerry *v.* Stimson, 801, 1537
Gervoy's Case, 966
Gerzebek *v.* Lord, 1034, 1086
Getman *v.* Getman, 1635, 1696
Gettings *v.* Eastman, 368
Getzandaffer *v.* Caylor, 2251, 2257, 2258, 2268
Getzler *v.* Saroni, 1409
Geuger *v.* Braun, 1340
Geyer *v.* Wentzel, 313, 348
Ghegan *v.* Young, 2263
Ghenny *v.* City National Bank, 1094
Ghormley *v.* Smith, 1677, 1678
Gibbes *v.* Jenkins, 1089
v. Smith, 1599
v. Vincent, 523
Gibbens *v.* Thompson, 2255
Gibbins *v.* Dayton, 1310
v. Eyden, 539
v. Shepard, 317
Gibbon *v.* Gibbon, 898
Gibbons *v.* Dayton, 1330, 1340
v. Dillingham, 45, 1698, 2250
Gibbs *v.* Diekma, 1586
v. Estey, 847, 851, 2021
v. Esty, 601
v. Marsh, 1599, 1737, 1754, 1830
v. Ougier, 77
v. Penny, 1677, 2044, 2046, 2055
v. Ross, 1120, 2249, 2251
Gibett *v.* Peteler, 1856, 2359
Giblin *v.* Jordan, 1426
Gibson *v.* Chedic, 1795
v. Chouteau's Heirs, 2304, 2322, 2323
v. Courthope, 1343
v. Crehore, 510, 803, 866, 808, 809, 810, 1494, 1921, 2074, 2090, 2095, 2097, 2172, 2176, 2182, 2364

- Gibson *v.* Eller, 1068, 1106, 1107, 1281, 1284,
2037, 2054
v. Foote, 1589, 1610, 1646
v. Gibson, 635, 636, 889, 897, 899, 945,
954, 956, 963
v. Holden, 2235
v. Holland, 1000
v. Jeyes, 1707
v. Maulton, 415
v. McCormick
v. Montfort, 288, 289, 290, 335, 1563, 1594,
1595
v. Moulton, 447, 472
v. Mulligan, 2257, 2272, 2274
v. Partee, 2354
v. Taylor, 2031
v. Rees, 1795
v. Smith, 573
v. Soper, 1032
v. Sopier, 986
v. Wells, 570
v. Zimmerman, 1929, 1930, 1931, 1932,
1940, 1950
- Giddens *v.* Dodd, 1007
- Giddings *v.* Cox, 676, 677, 1362
v. Eastman, 1621, 2058, 2289
v. Palmer, 1665, 1689, 1790
v. Smith, 401, 411, 412
- Giddon *v.* Andrew, 2074
- Gies *v.* Green, 2167
- Gifford *v.* Choate, 344, 351, 352
v. First Presbyterian Society of Syracuse,
37, 1110
v. McCloskey, 2166
- Gilbert *v.* Beach, 1194, 1195
v. Carter, 1620
v. Chapin, 1627
v. Columbia Turnpike Co., 1515
v. Dickerson, 1905
v. Gilbert, 682, 2136
v. Holmes, 2059, 2060
v. Husman, 2169
v. Penn, 2016
v. Peteler, 268, 1777, 1849
v. Reynolds, 923
v. Richards, 1878, 1884
v. Sanderson, 2072
v. Smith, 1974
v. Wiman, 1101
- Gilbertson *v.* Richard, 2259
v. Richardson, 1552
- Gilbraith *v.* Gedge, 824
- Gilchrist *v.* Stevenson, 1599, 1660, 1787
- Giles *v.* Austin, 1157
v. Baremore, 2004, 2146
v. Boston F. & W. Soc., 1686
v. Ebsworth, 1220, 2273
v. Dugro, 2236
v. Gullion, 722, 828
v. Hallock, 2309
v. Law, 722
v. Little, 339, 345, 1822
v. O'Toole, 1245
v. Palmer, 1750, 1751
v. Simonds, 55, 56
- Gilhooley *v.* Washington, 979, 1199
- Gillian *v.* Norton, 1184, 1185
- Gilky *v.* Dickerson, 1231
- Gill's Estate, *Re*, 219, 774
- Gill *v.* Clark, 2001, 2180
v. Cook, 720
v. Edwards, 1504
v. Fauntleroy, 1928
v. Logan, 1796
v. Lyon, 2154
v. Middleton, 1106, 1182, 1191
v. Newell, 1639, 1652
v. Ogburn, 1125
v. Pinney, 2027, 2029
- Gillam *v.* Taylor, 1685
v. Dixon, 1886, 1920, 1931, 1933
- Gilleau *v.* Moore, 765
- Gillenwaters *v.* Miller, 1643
- Gillespie *v.* Bailey, 1031, 2011
v. Jones, 2297
v. Mayor, 2268
v. Moon, 2331
v. Nabors, 274, 1980
v. Smith, 1758
v. Sommersville, 781, 782, 827
v. Thomas, 1127, 1129, 1167, 1170, 2268
v. Van Rensselaer, 695
- Gillet *v.* Balcom, 47, 2142, 2146
v. Eaton, 2000
v. Stanley, 985
v. Treganza, 574
- Gillian *v.* Swift, 901
- Gilligan *v.* Aldermen of Providence, 976
- Gilliman *v.* Moore, 805, 818, 829, 836
- Gilling *v.* Maass, 1047
- Gillion *v.* Finley, 1315
- Gillis *v.* Bailey, 1019, 1972
v. Brown, 637, 712, 784, 820, 821
v. Martin, 2040, 2043, 2052, 2086, 2185
v. McKay, 1577, 1741
- Gillispie *v.* Walker, 1579
- Gillitt *v.* Truax, 49
- Gilman *v.* Brown, 2005, 2008
v. Gilman, 1456
v. Illinois & M. Tel. Co., 2066
v. McArdle, 1548
v. Milwaukee, 1029, 1132
v. Moody, 2027, 2028
v. Morrill, 1919
v. Reddington, 1798
v. Stetson, 1883
v. Stevens, 2056
v. Williams, 1514, 1515
v. Wills, 2084
- Gilmer *v.* Limepoint, 197, 2326, 2327
- Gilmore *v.* Burch, 679, 681
v. Driscoll, 2231, 2232, 2233, 2248
v. Gilmore, 652
v. Hamilton, 1002
v. Ontario Iron Co., 983
v. Wilbur, 1901
- Gilpin *v.* Davis, 1625
v. Hollingsworth, 1928
v. Howell, 42, 43, 817
- Gilson *v.* Boston, 1010, 2260
v. Gilson, 2040, 2031, 2037, 2041, 2042,
2102
v. Hutchison, 794, 913
v. Zimmerman, 1920
- Gilworth *v.* Cody, 1500
- Gindrat *v.* Western R. of Ala., 1800
- Ginger *v.* White, 423
- Gingrich *v.* Foltz, 1751
- Girard *v.* Hughes, 2294
v. Philadelphia, 1658, 1659
- Girard Life Ins. & Trust Co. *v.* Chambers,
318, 500, 1675
v. Stewart, 2070
- Girland *v.* Sharp, 1582
- Gist *v.* Cattel's Heirs, 938
- Givan *v.* Tout, 2103
- Given *v.* Doe, 2318
v. Marr, 729, 771, 772, 810, 869, 919, 1093,
1376, 2127, 2128
- Givens *v.* McCalmont, 2087, 2185
- Givins *v.* Easley, 2274
- Gladding *v.* Warner, 2087
- Gladwyn *v.* Hitchman, 2140, 2146,
- Glaister *v.* Hower, 779
- Glascok *v.* Robards, 1271, 1290
- Glascow *v.* Hortiz, 2192
- Glascow (Earl) *v.* Hurlet Alm. Co., 92
- Glass *v.* Ellison, 1993, 1697, 2063
v. Gilbert, 1781
v. Glass, 755
v. Hulbert, 2045
v. Warwick, 2152
- Glasscock *v.* Glasscock, 2363
- Gleason *v.* Emerson, 772, 919, 920

- Gleason *v.* Fayerweather, 239, 240, 249, 318
v. Scott, 456, 462, 463
 Glegg *v.* Glegg, 963
v. Rees, 1794
 Glein *v.* Rise, 1149
 Gleises *v.* Maignan, 2147
 Glen *v.* Gibson, 1160
 Glendale Woolen Co. *v.* Protection Ins. Co., 1693, 1701
 Glenn *v.* Bank of U. S., 902
v. Canby, 1070
v. Clark, 782, 804, 926
v. Davis, 1867
v. Glenn, 719
v. Peters, 974, 976
 Glenorchy, Lord, *v.* Bosville, 443
 Glidden *v.* Bennett, 63, 103, 104
v. Blodgett, 645
v. Strumpler, 924
 Glisson *v.* Hill, 2047
 Globe Marble Works Co. *v.* Quinn, 122, 132
 Gloninger *v.* Franklin Coal Co., 2189
 Glover *v.* Monckton, 1596
v. Payn, 2053, 2054
v. Reid, 1822
 Goddard's Case, 2353
 Goddard *v.* Bolster, 105, 2186
v. Brown, 1740
v. Chase, 130, 137, 146, 2334
v. Hall, 2271
v. Lethbridge, 316
v. Pomeroy, 225
v. Sawyer, 2058, 2059
v. Russ, 794
v. Snow, 795
v. South Carolina R. Co., 1308
 Goddard's Executors *v.* Railroad Co., 1335
 Godden *v.* Crowhurst, 274
 Godfrey *v.* Beardsley, 2304, 2365
v. Bryan, 1024, 1945
v. Cartwright, 1026, 1925
v. Godfrey, 1630, 1633
v. Humphrey, 202, 305, 306, 308, 312, 335
v. Poole, 1792
v. Thornton, 1468, 1475
v. Watson, 2185
 Godfrey ex p. Warren *v.* Rudall, 573
 Godley *v.* Hagerty, 1197, 1202
 Godolphin *v.* Godolphin, 1658
 Godrow *v.* Atkinson, 1883
 Godsell, Doe d., *v.* Ingulis, 1310
 Goebel *v.* Iffla, 1548
 Goehring's Appeal, 500
 Goelt *v.* Gori, 1951, 1952
 Goeway *v.* Urig, 1014
 Goff *v.* Anderson, 617, 618
 Goig *v.* Emery, 118, 706, 1754
 Gold *v.* Ryan, 928
 Gold Mining Co. *v.* National Bank, 1020
 Goldbeck *v.* Goldbeck, 596
 Golden *v.* Prince, 2056
 Golden Fleece Co. *v.* Cable Con. Co., 221
 Golding *v.* Golding, 1948
 Goldman *v.* Clark, 1387, 1391, 1417, 1418
 Goldsberry *v.* Bishop, 1285, 1290
 Goldsborough *v.* Martin, 1682
 Goldsmid *v.* Tunbridge Wells Improvement Commissioners, 2227
v. Wilson, 1266, 1280
 Gomer *v.* Hackett, 1156
 Gomez *v.* Tradesman's Bank, 1592, 1691
 Gonnon *v.* Hargadon, 20
 Gonsolis *v.* Donchouquette, 1364
 Gooch *v.* Atkins, 715, 734, 735, 741, 838
 Good *v.* Coombs, 1924
v. Fogg, 1514
v. Good, 411, 417
v. Zercher, 904, 2324
 Goodall's Case, 1996
 Goodall *v.* Mopley, 2148
v. New England Fire Ins. Co., 1668
 Goodburn *v.* Stevens, 786, 825, 1957, 2181
 Goode *v.* Crow, 890
 Goodell *v.* Jackson, 197
 Goodenough *v.* Warren, 2364
 Goodenow *v.* Allen, 1252, 1262, 1273, 1281
v. Ewer, 1894, 1999, 2151
 Goodere *v.* Lloyd, 1638
 Goodhue *v.* Barnwell, 1782
 Goodill *v.* Brigham, 487, 1039, 1820
 Gooding *v.* Gibbes, 1664
 Goodlee *v.* Rogers, 1247
 Goodlet *v.* Cleveland, 1309
v. Smithson, 2304, 2305
 Goodlittle *v.* Billington, 1568
v. Holdfast, 1870
v. Jones, 1595
v. Newman, 703
 Goodman *v.* Grierson, 2044, 2168
v. Hannibal & St. Jo. R. Co., 1188
v. Kine, 2081, 2188
v. Randall, 2033, 2037, 2060, 2071
v. White, 2073, 2146
 Goodmorst *v.* Goodmorst, 781
 Goodnow *v.* Empire Lumber Co., 1031
 Goodrich *v.* City of Milwaukee, 1607, 1655, 1656
v. Harding, 334, 416
v. Jones, 20, 78, 79, 96, 104, 106, 107, 136
v. Pendleton, 1781
v. Proctor, 288, 1594, 1754
v. Russel, 215, 227, 673
v. Staples, 2146
v. Thompson, 1021
v. Walker, 2353
 Goodright *v.* Cator, 1844, 1845, 1862
v. Davids, 1139, 1143
v. Mead, 387
v. Noright, 1157
 Goodright d. Lisle *v.* Pullin, 424
 Goodright d. Nicholls *v.* Mark, 1007
 Goodright d. Walter *v.* Davids, 1868
 Goodright ex d. Drewry *v.* Barron, 320
 Goodrum *v.* Goodrum, 1371
 Goodsell *v.* Myers, 2343
 Goodson *v.* Ellison, 1742, 1743
 Goodspeed *v.* Fuller, 1700
 Goodtitle *v.* Bailey, 2358
v. Burtenshaw, 405
v. Funnican, 1040
v. Jones, 1713, 1742
v. Maddern, 340, 343, 344
v. Newman, 359, 618
v. Otway, 338, 1814
v. Tombs, 1903
v. Way, 993
v. Whitby, 315
 Goodtitle d. Curnel *v.* Wood, 1572
 Goodwin *v.* Gilbert, 1063
v. Goodwin, 784, 823, 969, 974
v. Hubbard, 208
v. Hudson, 2259
v. Jones, 367, 720, 2057, 2288
v. Richardson, 1886, 1960, 1963, 2077
v. Winston, 827
 Goodwright *v.* Wells, 1574, 1582, 2096
 Goodyear *v.* Vosburg, 501
 Gould *v.* Great Western Coal Co., 90, 93
 Goon *v.* Anthony, 2303
 Gordon *v.* Armstrong, 1238
v. Bell, 2004
v. Bulkley, 1042
v. Dickinson, 763, 766
v. George, 1074, 1075, 1076, 1304
v. Gilman, 1270, 1274
v. Hobart, 2174, 2185
v. Ingraham, 485
v. Lewis, 2087, 2184
v. Little, 1208
v. Massachusetts Ins. Co., 2113
v. Milne, 2235
v. Overton, 1810
v. Pearson, 1987
v. Phillips, 1701
v. Preston, 2014, 2016

Gordon v. Sizer, 2297
v. Small, 1781
v. Sterling, 1985
v. Stevens, 916, 918, 940, 942, 944, 945, 946, 956
v. Tweedy, 746, 747
v. Ware, 2128
v. West, 1715
v. Whieldon, 1939
Gore v. Brazier, 822, 841, 844, 845, 1095
v. Gibson, 987, 1032, 1034
v. Gore, 1569
v. Jennison, 2187
v. Stevens, 1127, 1169
v. Townsend, 726, 727, 729, 822
Goreton v. George, 1135
Gorges v. Stanfield, 559
Gorman v. Daniels, 237, 297, 776, 835, 1548, 1549, 1550
Gorham v. Arnold, 1999, 2078
v. Daniels, 2315
v. Gorham, 1980, 1984
v. Luckett, 706
Gorton v. Hadsell, 32
Goshen v. Stonington, 1517, 2332
Goslin v. Agricultural Hall Co., 1195
Goss v. Froman, 774, 892, 894
v. Singleton, 1598, 1785, 1786, 1788
Gossin v. Brown, 2137
Gossom v. Donaldson, 1990
Gothard v. Flynn, 2003
Gott v. Cooke, 1560, 1604, 1684, 1798
v. Gandy, 1106
Gotzler v. Saroni, 1481
Goudie v. Johnston, 1822
Gough v. Bult, 1782
v. Manning, 271, 939, 1858
Gouhenant v. Cockrell, 1461
Gould v. Boston Duck Co., 2227
v. Cayuga Co. Nat. Bank, 225
v. Chappell, 1664
v. Crow, 661, 771, 772, 919, 920
v. Garrison, 2154
v. Kemp, 1968
v. Kerr, 2266
v. Lamb, 284, 285, 287, 288, 289, 290, 1594, 1597, 1710, 1796
v. Lamp, 1754
v. Lynde, 1537, 1586, 1637
v. Marsh, 2107
v. Mather, 1814
v. Newman, 2091, 2102, 2147
v. School District, 969
v. Sub-District No. 3, 1111
v. Tancred, 2088
v. Thompson, 1, 1257, 1260, 1261, 1281, 1290, 2248
v. Webster, 539, 661, 662, 1025, 1368
Gould's Exrs. v. Womack, 898
Gourley v. Woodbury, 1988
Gouverneur v. Lynch, 2154
v. Robertson, 1657, 2014
Govdell v. Pierce, 2354
Gove v. Cather, 790, 843, 858, 867, 891, 908
v. Persue, 861
Goverin v. Humboldt Safe Deposit & Trust Co., 2127
Governor v. Campbell, 1794
Govier v. Hancock, 774, 894, 895, 921
Gowen v. Shaw, 1904
Gower v. Eyre, 557
v. Howe, 2105, 2106, 2147
v. Quinlan, 1922
v. Winchester, 2174
Gowza v. Grantham, 1029
Grabenhorst v. Nicodemus, 1166
Grable v. McCulloh, 1999
Grace v. Denison, 1053
v. Newton Board of Health, 5
v. Smith, 1241, 1243
v. Webb, 271
Gradner v. Rowe, 1691

Grady v. McCockle, 791, 888
v. Wolsner, 1194
Graff v. Bonnett, 1548
v. Castleman, 1667
v. Fitch, 50, 51
Graffney v. Peeler, 2301
Grafton v. Grafton, 2295
Grafton Bank v. Foster, 2133
Gragg v. Gragg, 1411
Graham v. Bennett, 596, 757
v. Bleakie, 2156
v. Cammamm, 517
v. Campbell, 2007
v. Carondelet, 1140
v. Crockett, 1400
v. Davidson, 1734
v. Dunighan, 740
v. Graham, 671, 718, 736, 781, 784
v. Lambert, 1691
v. Long, 2152
v. Luddington, 621
v. Moore, 741
v. Newman, 2104, 2105, 2106
v. Peat, 1351, 1352
v. Pierce, 1904
v. Public Admr., 1456
v. Roberts, 513
v. Stewart, 1521
v. Way, 1117
Graig v. Eastin, 1425
v. First Presbyterian Church, 41
Gramham v. Houston, 983
Granby v. Amherst, 1456
Grand Canal Co. v. Fitzsimons, 1173
Grand Gulf Bank v. Archer, 1554
Grand Rapids Booming Co. v. Jarvis, 976
Granderson v. Granderson, 965
Grandona v. Lovdal, 57
Grandy, Doe ex d., v. Bailey, 1169, 1170
Granger v. Illinois & Michigan Canal, 1037
Grannis v. Clark, 1081, 2362
Grant v. Bissett, 2120, 2126
v. Carpenter, 348
v. Chase, 515, 743, 1142, 2242, 2245
v. Cosby, 1513, 1516, 1517
v. Duane, 2073, 2169
v. Fowler, 210, 211, 2296, 2297, 2300
v. Grant, 75
v. Holmes, 2051
v. Parham, 717
v. Ramsey, 1264
v. Tallman, 1092
v. United States Bank, 2139
v. White, 1213, 1281, 1285, 1316, 1317
Grantham v. Hawley, 538
Grapengether v. Fejervary, 1758, 2004, 2106
Grass v. Lange, 915
Grassby v. Reinbach, 2106
Gratrex, Doe d., v. Homprey, 299, 1574, 1583, 1606
Grattan v. Wiggins, 2078, 2147, 2175
Graty v. Du Bois, 1400
Gratz v. Ewoldt, 2362
v. Gratz, 1976
Gravel Hill School District v. Old Farm School District, 233
Gravenor v. Woodhouse, 1149
Graves' Case, 556, 562, 564
Graves v. Berdan, 65, 66, 1015, 1126, 1175, 1176, 1177, 1179, 1180, 2270
v. Boston Marine Ins. Co., 1669
v. Boyle, 326
v. Braden, 925
v. Carter, 1698
v. Cochran, 737, 740, 837
v. Dolphin, 246, 253, 273
v. Graves, 1538, 1610, 1652, 2349
v. Porter, 1075
v. Sawcer, 1247
v. Sayre, 2055
v. Smith, 2235
v. Trueblood, 697

- Graves *v.* Waterman, 1770
v. Weld, 48, 49, 53
 Graves, Doe d., *v.* Wells, 1144, 1145, 1336
 Gravillon *v.* Richards' Exr., 1456
 Gray's Case, 28
 Gray, *Ex parte*, 225, 969, 974
 Gray *v.* Actor, 1025
v. Baird, 1502
v. Baldwin, 2187
v. Bartlett, 2302
v. Bates, 1897
v. Blanchard, 259, 263, 267, 268, 269, 1849,
 1861, 1862, 1868, 1972
v. Clement, 2262
v. Cox, 1200
v. Fox, 1720, 1721, 1724
v. Givens, 1897, 1898, 1899
v. Gray, 1630
v. Henderson, 1662
v. Hill, 1712
v. Holdship, 104, 105, 106, 113, 144, 567,
 2022
v. Jenks, 2076, 2132
v. Johnson, 1213
v. Jones, 2310
v. La Fayette Co., 2314
v. Lynch, 1663, 1730, 1810, 1811, 1885
v. McCune, 711, 949
v. Mannock, 525, 526
v. Mathis, 1360
v. Obear, 501
v. Palmer, 1957, 1964
v. Rogers, 2258
v. Shaw, 1755
v. Smith, 1631
v. Stivers, 2024
v. Ulrich, 1777, 2364
v. Wilson, 1050
v. Winkler, 321
 Gray, Doe d., *v.* Stanion, 1276, 1290
 Graydon *v.* Church, 2016
 Grayson *v.* Atkinson, 306, 308, 326
 Greason *v.* Keteltas, 1037, 1038, 1086
 Great Falls Co. *v.* Worster, 1998, 2085
 Great Luxembourg R. Co. *v.* Magnay, 76, 1621
 Great Northern Dispatch Co. *v.* Nova Cæsarea
 Harmony Lodge, Ohio, 2263, 2264
 Great Northern R. Co. *v.* Harrison, 1063
 Greatred *v.* Greatred, 249
 Greathead's Appeal, 734
 Greatorez *v.* Carey, 943
 Greeawalt *v.* Greeawalt, 465
 Greeley *v.* Scott, 1379, 1419, 1420, 1433, 1434
 Green's Case, 1863
 Green *v.* Armstrong, 20, 21, 49, 52, 53, 54, 55
v. Arnold, 1911, 1987
v. Beals, 2356
v. Bheha, 2243
v. Blackwell, 1662
v. Biddle, 1512
v. Bridges, 1157
v. Burke, 50, 2072
v. Butler, 2025, 2132
v. Carsey, 767
v. Chelsea, 207, 209, 760
v. Clark, 2358
v. Crockett, 2007, 2146
v. Crow, 1411
v. Demoss, 2006, 2007
v. Dietrich, 1008
v. Dixon, 2152
v. Drummond, 1634, 1641
v. Eales, 1099
v. Early, 1777
v. Garrington, 1122
v. Green, 694, 887, 916, 934, 935, 955, 1693,
 1737
v. Harman, 2296
v. Hart, 1995, 2101, 2107
v. Hewitt, 534
v. Houston, 2071
v. Hurt, 2099
 Green *v.* Keene, 742
v. Kemp, 2060, 2125
v. King, 1920
v. Litter, 209, 600, 602, 607, 608, 613
v. Marks, 1451, 1496
v. Marsden, 1627
v. Massie, 2250, 2251, 2258
v. Neal's Lessee, 1516
v. Otte, 1377
v. Pettingill, 1862
v. Phillips, 103, 105, 117, 123, 126, 132,
 135, 137
v. Porter, 955
v. Putman, 88, 692, 703, 718, 736, 761, 815,
 826, 1985, 1988
v. Ramage, 2181
v. Rampage, 2154
v. Redding, 1192
v. Sargeant, 1717, 1776
v. Siter, 2304
v. Smith, 1243
v. Spicer, 253
v. Stephens, 434
v. Sternberg, 2258
v. Sutton, 1815
v. Tanner, 1624, 2136, 2139
v. Tennant, 822, 842, 844
v. Thomas, 2314
v. Turner, 2020, 2068, 2069, 2071, 2075,
 2085, 2094
v. Williams, 1245, 1246
v. Winter, 1708, 1726, 1727, 1768
v. Wynn, 2172
 Green Bay & Mississippi Canal Co. *v.* Hewitt,
 1822
 Green d. Cren *v.* King, 1930
 Greenaway *v.* Adams, 1104, 1111
 Greenbaum *v.* Austrian, 799, 802
 Greenby *v.* Wilcocks, 1093
 Greene *v.* Barnard, 1497
v. Beesley, 1240
v. Cole, 553, 564, 570
v. Couze, 1213
v. Crowe, 1407
v. Dennis, 1541, 1555
v. Greene, 769, 786, 824, 825, 826, 885
v. Keene, 735
v. Rutherford, 1540
v. Tyler, 2060
v. Westcott, 2087
v. Windham, 1456
 Greener *v.* Klein, 728
 Greenfield's Estate, 1792, 1801
 Greenhold *v.* Stanforth, 215, 216
 Greenhouse, *Ex parte*, 1662
 Greenia *v.* Greenia, 220
 Greenlaw *v.* Greenlaw, 1919
 Greenleaf *v.* Allen, 1069, 2361, 2362
v. Edes, 2120
v. Francis, 2226, 2230
 Greenlee *v.* Davis, 2279
 Greenly *v.* Hall, 569
 Greeno *v.* Munson, 1144, 1145, 1150, 1160, 1214,
 1222
 Greenough's Appeal, 1001
 Greenough *v.* Turner, 901, 902, 909, 911
v. Welles, 1810
 Greenup *v.* Sewell, 1975, 1986
 Greenvault *v.* Davis, 1081, 1082
 Greenway *v.* Adams, 1057
v. Hockin, 39
 Greenwich Hospital Improvement Act, *Re*, 307
 Greenwood *v.* Clarke, 519
v. Coleman, 1796
v. Curtis, 753, 754
v. Ligon, 729, 730, 1093
v. Maddox, 1398, 1423, 1475
v. Murdock, 2021
v. Tyber, 1025, 1026
v. Wakeford, 1787
 Greer *v.* Blanchar, 1877
v. Mayor of New York, 519, 520, 746

Greer *v.* Sankston, 775
v. Tripp, 1897
 Gregg *v.* Blackmore, 1976, 2303
v. Bostwick, 1378, 1379, 1384, 1386, 1387,
 1416, 1419, 1435, 1436, 1437, 1438,
 1439, 1442, 1443, 1445, 1446, 1447
v. Coates, 267
v. Currier, 1810
v. Irish, 1029
v. Sanford, 2018
 Greggs *v.* Smith, 764, 766
 Gregor *v.* Cady, 1191, 1193
 Gregory *v.* Cowgill, 1806, 1815
v. Ford, 1364
v. Gregory, 1987, 1989
v. Hartley, 2025, 2026
v. Henderson, 1607
v. Paul, 2346
v. Price, 2346
v. Rosenkranz, 2067
v. Savage, 2096
v. Setter, 1648, 1649
v. Smith, 1627
 Gregson *v.* Harrison, 1156
 Greider's Appeal, 1126, 1159, 1160, 1161, 1164
 Greiger *v.* Brown, 1322
 Greiner *v.* Klein, 879
 Greither *v.* Alexander, 2071, 2150
 Grellet *v.* Heilshorn, 810
 Grendon *v.* Bishop of Lincoln, 297
 Gresham *v.* King, 1936
 Gresley *v.* Mousley, 76
 Greton *v.* Smith, 1013, 1168, 1258, 1322, 1323
 Greve *v.* Coffin, 2104
 Grey *v.* Cuthbertson, 1071, 1078
v. Northumberland, 84
 Grice *v.* Scarborough, 1094, 1702
v. Shaw, 2098
 Grider *v.* Eubank, 938
v. Payne, 1707, 1769
 Gridley *v.* Bloomington, 1201, 1202
v. Watson, 1623
v. Wynant, 1658, 1696
 Grier *v.* Sampson, 1201
 Griffin *v.* Banks, 769
v. Bixby, 57
v. Blanchard, 1622
v. Colver, 1247, 1248
v. De Veuille, 756
v. Dighton, 29
v. Fellows, 516, 1140, 1142
v. Ford, 1038, 1039, 1040, 1682
v. Griffin, 1708, 1975, 2058
v. Kinsey, 2261
v. Knisely, 1133
v. Lovell, 2129
v. Macauley, 1732
v. Marine Co., 2017
v. McKenzie, 1517
v. Nicholas, 2302
v. Nichols, 1405, 1500
v. Proctor, 1422, 1424
v. Ransdell, 145
v. Reece, 891, 927
v. Sheffield, 1348, 1349, 1354
v. Shely, 1457
v. Sutherland, 1398, 1457, 1514
v. Thompkins, 1104
 Griffith's Case, 563, 1153
 Griffith *v.* Buffum, 1244
v. Eustin, 1900
v. Eyan, 1627, 1629
v. Godey, 1586, 1645
v. Griffith, 764, 938, 1371, 1599
v. Harrison, 1040, 1807
v. Henderson, 983
v. Hodges, 1167
v. Lovell, 2155
v. Paramaley, 1023
v. Parmley, 1212
v. Pownall, 1811
v. Puleston, 540

Griffith *v.* Rickets, 76, 1794
v. Robinson, 1806
v. Schwendeman, 1030, 1031
v. Spratley, 519, 1758
v. Watson, 42
v. Wilcox, 719
v. Wright, 2302
 Griffiths *v.* Hamilton, 1888
v. Morrison, 2241
 Grigg *v.* Banks, 2064
v. Cocks, 1761
v. Smith, 826
 Griggsby *v.* Hair, 2007
 Grignon *v.* Astor, 2304
 Grim's Appeal, 535
 Grim *v.* Dyar, 1917
v. Wicker, 1905
 Grimes *v.* Byrn, 1510
v. Kimball, 2134
v. Orrand, 292, 293
 Grimley *v.* Riley, 2363
 Grimshawe *v.* Burnham, 106
 Grimestone *v.* Bruce, 1870
v. Carter, 2365
 Gring's Appeal, 2138
 Grisham *v.* State, 595, 752
 Grissell *v.* Swinhoe, 918, 944
 Grissom *v.* Hill, 247
 Grist *v.* Hodges, 1079
 Griswold *v.* Fowler, 2149, 2150, 2151
v. Golding, 2056
v. Griswold, 2133
v. Huffaker, 1440
v. Johnson, 1911, 1924, 1967, 1997
v. Messenger, 1537
v. Penniman, 686
 Gristwold *v.* Mather, 1997
 Grizzle *v.* Pennington, 1141
 Grob *v.* Cushman, 2170
 Grocers' Co. *v.* Donne, 199
 Groff *v.* Rohrer, 681
v. Levan, 1234
 Grogan *v.* Garrison, 898, 899, 957
 Grogroby *v.* Duncan, 1758
 Grosholz *v.* Newman, 1393, 1444
 Gross *v.* Jackson, 107, 110, 112
v. Lange, 792
v. McKee, 2060
v. Welwood, 2295
 Grossley *v.* Lightowler, 2227
 Grosvenor *v.* Allen, 2036, 2123, 2124
v. Henry, 1281, 1289, 1310
 Groton *v.* Roxborough, 689
 Groustra *v.* Bourges, 1252
 Grout *v.* Townsend, 427, 471, 489, 513, 516, 629,
 633, 643, 666, 690, 691, 744, 2349
v. Van Schoonhoven, 1798
 Grove *v.* Barclay, 2261
v. Barklay, 2260
v. Brien, 2177
v. Cather, 922
v. Todd, 882, 896, 900, 904, 909
v. Trueblood, 688
 Grover *v.* Flye, 2127, 2128, 2131
v. Thatcher, 809, 810, 2097
 Groves *v.* Groves, 1635, 1697
v. Steel, 1698
 Grubb *v.* Bayard, 93, 2189
v. Guilford, 2189
 Grubb, Doe d., *v.* Burlington, 549, 550
v. Grubb, 1309
 Grube *v.* Wells, 2296, 2297
 Grubbs *v.* McGlawn, 1775
 Gruenewald *v.* Schaales, 1334, 1335, 1340
 Grumley *v.* Webb, 1619, 1620, 1766
 Grundin *v.* Carter, 1124, 1220
 Grute *v.* Locroft, 1024
 Gruve *v.* Wells, 2295
 Grymes *v.* Boweren, 129
 Guard *v.* Bradley, 1016
 Guardians *v.* Nathans, 596
 Guardians of the Poor *v.* Nathan, 752

Guardians of the Woodbridge Union, *The*, *v.*
The Guardians of Colneis, 1266
Gudgell *v.* Duval, 996, 1189
Gudger *v.* Burnes, 1284
Gue *v.* Tidewater Canal Co., 98
Guertin *v.* Moore, 707, 841, 843
Guernsey *v.* Kendall, 2068, 2069
Guest *v.* Farley, 1548, 1559, 2515
Guffey *v.* Hukill, 1162
Guier *v.* O'Daniel, 1456
Guild *v.* Richards, 1154, 1849, 1868
v. Rogers, 2270, 2273
Guinn *v.* Locke, 2175
Guido *v.* Guido, 1396, 1449, 1452, 1454, 1455,
1457, 1461, 1470, 1471, 1524
Guion *v.* Anderson, 489, 589, 590, 591, 604, 622,
623, 624, 1364, 1366, 1369, 1370
v. Knapp, 2154
Gulf R. Co. *v.* Owen, 2297
Gulliver d. Tasker *v.* Barr, 1308, 1337
Gully *v.* Crego, 1629
v. Ray, 760, 763, 765, 766, 781, 782, 819,
827, 893
Gunn *v.* Barry, 1510, 1512, 1513, 1515, 1517,
1705
v. Brantley, 2175
v. Gudehaus, 1395
v. Pollock, 2254
v. Sinclair, 1164, 1335, 1339, 1340
v. Thornton, 1513
Gunning *v.* Carman, 505, 511, 519, 520, 746
Gunnis *v.* Kater, 1164
Gunnison *v.* Twitchell, 1383
Guns *v.* Scovil, 2270
Gunsolus *v.* Lormer, 1285
Gunson *v.* Healy, 2220
Guphill *v.* Isbell, 1639, 1642, 1707, 1729, 1741,
1784, 1800
Guptil *v.* McFee, 1399, 1432
Guthrie's Appeal, 402, 459, 472, 1674
Guthrie *v.* Field, 2175
v. Gardner, 779, 1647
v. Jones, 109, 110, 122, 123, 138, 139, 145,
1225
v. Kahle, 2039
v. Murphy, 985
v. Owens, 873, 931
Gutteridge *v.* Munyard, 1098
Guttman *v.* Scammell, 712
Guy *v.* Butler, 2099
v. De Uprey, 2130, 2138
v. Downs, 1459
Guyer *v.* Maynard, 1605
Guyther *v.* Pettijohn, 1246, 1905
Gwineth *v.* Thompson, 1891
Gwinell *v.* Eames, 1085, 1199, 1204
Gwynn *v.* Jones' Lessee, 212, 1285, 1348
v. Turner, 2123
Gwynne *v.* Cincinnati, 796, 828, 893, 921

H.

Haas *v.* Shaw, 646
Habergham *v.* Vincent, 315, 1831
Habit *v.* Dodge, 1985
Hackensack Sav. Bank *v.* Terhune Mfg. Co.,
2137
Hackett *v.* Reynolds, 2003
Hackley *v.* Draper, 2158
Haddock *v.* Perham, 415
Haden *v.* Buddenseck, 2025, 2059
Hadley *v.* Hadley Mfg. Co., 1850
v. Morrison, 1291
v. Pickett, 2008
Hadlock *v.* Bulfinch, 2133
v. Gray, 1939
Hafer, *In re*, 1399
Haffic *v.* Stober, 115, 145, 146, 147, 1224
Hagan *v.* Brainard, 2015
v. Lucas, 1516
v. Walker, 2149

Hagar *v.* Brainard, 2186
Hagar *v.* Brainerd, 688, 1998, 2015, 2078
v. Buck, 1074
v. Wiswall, 1937
Hageman *v.* Sutton, 2107
Hager *v.* Schindler, 2331
v. Spect, 1923
Hagerty *v.* Lee, 2240, 2241
Haggard *v.* Benson, 1610
Haggart *v.* Morgan, 1456
Haggin *v.* Haggin, 1975
Hagthorp *v.* Hook, 1612, 1777
Hague *v.* Cummings, 1138
Hahn *v.* Concordia Soc., 1872
v. Gilford, 1220
Haigh, *Ex parte*, 2002
Haight *v.* Hall, 678, 698
Haines *v.* Beach, 2074, 2147, 2169, 2172
v. Burnett, 1096
v. Ellis, 652
v. O'Connor, 1699, 1739
v. Thomas, 2039
v. Thompson, 2053, 2055
v. Witmer, 416
Hait *v.* Howle, 1450, 1473, 1475, 1478
Halbrook *v.* Halbrook, 2349
v. State, 755
Halcomb *v.* Halcomb, 2163
Haldane *v.* Johnson, 1151
Haldeman *v.* Haldeman, 411, 413, 420, 423
v. Jennings, 1872
Hale *v.* Bower, 1034
v. Glidden, 212, 2298
v. Hale, 618, 1666
v. Heaslip, 1386, 1441, 1442
v. Henrie, 1648
v. James, 823, 840, 841, 842, 843, 844, 845,
846, 934
v. Jewell, 2039, 2045
v. Lawrence, 4, 5
v. Marsh, 317, 318, 536
v. Munn, 764
v. Nashua & E. R. Co., 1028
v. Omaha Nat. Bank, 2272
v. Pew, 1693
v. Plummer, 786, 825
v. Rider, 2158
v. Wilkinson, 1697
Hales *v.* Petit, 442, 443
Haley *v.* City of Philadelphia, 671
v. Hickman's Heirs, 1335, 1337
Halford *v.* Hatch, 1124
v. Stains, 1637
v. Tetherow, 1903, 1904
Hall's Case, 916, 942, 949
Hall's Estate, *Re*, 813
Hall *v.* Ashby, 232, 278
v. Bliss, 2163, 2316
v. Benner, 1017, 1142, 1149
v. Burgess, 1162
v. Caldwell, 2176
v. Carter, 1734
v. Chaffee, 322, 470
v. Comfort, 1027
v. Commonwealth, 522
v. Davis, 1894
v. Dean, 1093
v. Dennison, 1795
v. Dewes, 1817, 1818
v. Dewey, 1144, 2295
v. Dickinson, 330, 333
v. Doe d. Surtees, 2095
v. Gay, 2298
v. Goodwin, 304, 353, 536
v. Hall, 221, 629, 633, 643, 657, 750, 935,
938, 940, 1319, 1334, 1336, 1799, 1793,
1801, 1946, 1947, 1949, 2142
v. Hancock, 2280
v. Heyden, 2016
v. Heydon, 1624
v. Huggins, 2151
v. Lance, 2063

- Hall v. Lawrence, 2151, 2195, 2198, 2199, 2200, v
2201, 2295
v. Leonard, 2357
v. Loomis, 1485
v. Mayor of Swansea, 1332
v. McCaughey, 2246, 2247, 2248
v. McDuff, 2003
v. McLeod, 2220
v. Meyers, 1134, 1136
v. Mobile, etc., B. Co., 2068
v. Myers, 1135, 1307, 1337
v. Mullin, 184
v. Nelson, 2149, 2151
v. Page, 1246
v. Pehny, 1514
v. Piddock, 1893, 1896
v. Priest, 415, 418
v. Ryder, 1045
v. Savill, 1999
v. Saville, 2053
v. Sayre, 1365
v. Sewald, 122
v. Smith, 2007
v. Southmayd, 1131, 2270
v. Sprigg, 1638, 1642, 1644, 1648
v. Stephens, 1920, 1929, 1992, 1945
v. Stevens, 1917, 1930
v. Surtees, 1279
v. Swift, 2247
v. Thayer, 252, 396, 411, 465, 466
v. Towne, 2163
v. Tufes, 249
v. Tuffts, 1857
v. Tuffts, 2028, 2029, 2030
v. Tullerton, 1469
v. Tunnell, 1998, 2078
v. Vandergrift, 409, 423, 427
v. Wadsworth, 1254, 1300, 1301, 1303,
1307, 1308, 1322, 1325, 1336, 1337,
1343
v. Western Transportation Co., 1295
v. Young, 1576, 1587
- Hallen, Doe d., v. Ironmonger, 1709
Hallen v. Runder, 143, 145, 1186
Hallenbeck v. Dewitt, 2352
Hallesey v. Jackson, 2175
Hallett's Estate, *In re*, 1621, 1761
Hallett v. Collins, 595, 752, 1545, 1578, 1585,
1765, 1782
v. Oakes, 986, 1032
v. Thompson, 246, 253, 273, 1747, 1798
v. Wyley, 1175
v. Wylie, 992, 1175, 1176, 1179, 1126
- Halley v. James, 368
v. Northampton, 252
v. Oldham, 1773
- Hallifax v. Higgins, 2051
Halligan v. Wade, 1128, 1168, 1174, 2268
Hallihan v. Hannibal & St. Jo. R. Co., 1197
Halloway v. Lacy, 1110
Hallowell v. Saco, 1456
Halluck v. Brush, 1016
Halseg v. Brown, 2111
Halsey v. Beer, 221, 222
v. Blood, 1883
v. Fairbanks, 1713, 1795
v. Martin, 2042
v. Reed, 2069, 2072, 2112, 2150, 2166, 2178,
2179
- Halstead v. Bank of Kentucky, 2120
v. Board of Commissioners of Lake, 215,
1657
v. Commissioners, 2014
- Ham v. Ham, 1777, 1911, 1931, 2301
v. Kendall, 1268
v. Santa Rosa Bank, 1447
- Hambleton v. Duhaïn, 2307
Hamblin v. Wardecke, 1455, 1502
Hambly v. Trott, 1228
Hamburger, *Re*, 2260
Hamby v. Walls, 1893
Hamilton v. Hempstead, 448
- Hamel v. Lawrence, 1213, 1218, 1271
Hamer v. Sidway, 1589
Hamerton v. Stead, 1162, 1254, 1298, 1313
Hamilton v. Badger, 2208
v. Browning, 2111
v. Buckminster, 1754
v. Buckwalter, 917, 918, 938, 942, 944, 949
v. Clanricarde, 1018, 1039
v. Conine, 1889, 1902
v. Dobbs, 2074, 2136, 2150, 2169
v. Doolittle, 2321, 2322
v. Elliott, 1864, 1867, 1991
v. Fowlkes, 2006
v. Greenwood, 1625
v. Halpin, 1958
v. Hempstead, 414
v. Hughes, 782
v. Huntley, 132, 133
v. Lubukee, 1670, 2106, 2110, 2163
v. McPherson, 1248
v. Marsden, 1149
v. Nutt, 2359
v. Royse, 2155
v. Wilson, 1093
v. Wright, 1065, 1082, 2298
- Hamit v. Lawrence, 1213, 1309
Hamlin v. Hamlin, 781, 787, 1376
v. Parsons, 2022
- Hammann v. Jordan, 2235
Hammekin v. Clayton, 216, 218, 2014
Hammersley v. Smith, 1673
Hammon v. Douglas, 1264, 1312, 1324, 1330,
1331
- Hammond v. Crosby, 2298
v. Dean, 996, 1322
v. Hammond, 307, 309, 312
v. Harper, 2272
v. Hicks, 1783
v. Myrick, 2155
v. Port Royal & A. R. Co., 1856
v. Zehner, 2242
- Hammonds v. Hopkins, 2039
Hamper, *Ex parte*, 1240, 1244
Hampshire v. Wickens, 257, 1096, 1097
Hampson v. Full, 1633, 1646
Hampton v. Hodges, 2188
v. Levy, 2120
v. Nicholson, 2134
v. Spencer, 1691
v. Wheeler, 1900
v. White, 2264
- Hamrick v. People's Bank, 1409
Hanbury v. Kirkland, 1733
Hanchet v. Whitney, 1136, 1300, 1301, 1303,
1308, 1313, 1319, 1320, 1322, 1336, 1337,
1338
- Hancock v. American Life Ins. Co., 523
v. Austin, 2252
v. Carlton, 688, 1870, 1871, 1872, 2060,
2244
v. Day, 552, 575
v. Fishing Ins. Co., 631
v. Fleming, 2071
v. Hancock, 810, 2098, 2148
v. Harper, 2047
v. Jordan, 105, 108
v. Morgan, 1378, 1387, 1419, 1434, 1446
v. Titus, 1751
v. Watson, 2023
v. Wentworth, 2243, 2244
- Hancom v. Allen, 1720
Hand v. Fairbanks, 2334
v. Kennedy, 2068
v. Winn, 1449, 1455
- Handley v. Cunningham's Trustee, 2256
v. Wrightson, 1627
- Handlin, *Re*, 1390, 1432
Handy v. Foley, 2361
v. McKim, 285
Handly v. Sydenstricker, 2305
Hanford v. Fitch, 2176
v. McNair, 1042

- Hanham *v.* Sherman, 1161
 Hanke *v.* Finke, 635
 Hanna's Appeal, 349
 Hanna *v.* Spotts' Hears, 1728
 Hannah *v.* Carrington, 1995
 v. Osborn, 533
 v. Swarner, 75
 v. Wadsworth, 2349
 Hannahs *v.* Felt, 1512
 Hannan *v.* Hannan, 2059
 v. Osborn, 1895
 v. Towers, 1878, 1932, 1940
 Hannay *v.* McEntire, 573
 Hannen *v.* Ewalt, 1108, 2262
 Hannibal & St. Jo. R. Co. *v.* Green, 1777
 Hannon *v.* Christopher, 2301
 v. Sommer, 1475
 Hannum *v.* McInturf, 1513
 Hanover Fire Ins. Co. *v.* Tomlinson, 2167
 Hanrahan *v.* O'Reilly, 146
 Hanrick *v.* Patrick, 223
 Hansard *v.* Hardy, 2095
 Hansell *v.* Hubbell, 414, 415
 Hansen *v.* Buckner, 2359
 v. Dennison, 2020
 v. Kairtley, 982
 v. Meyer, 1070, 1078
 Hansford *v.* Elliot, 316
 Hanson *v.* Buckner, 2350
 v. Gardiner, 577
 v. McCue, 2230
 v. Willard, 1973, 1979, 1982
 Hantz *v.* Seely, 595, 596, 752
 Hapgood *v.* Blood, 1998
 Haralson *v.* Bridges, 1359, 1363, 1364, 1368, 1369
 v. Redd, 319
 Harbison *v.* Lemon, 1033
 Harbuck *v.* Toledo, 2327
 Harburg *v.* Hussey, 1979
 Harcourt *v.* Wyman, 1363, 1364, 1368, 1369
 Hard *v.* Nearing, 2324
 Hardcastle, *Ex parte*, 1761
 Harde *v.* Harde, 544
 Hardeman *v.* Downer, 1510
 Harden *v.* Cullins, 2301
 v. Hays, 331, 333, 341, 342
 v. Parsens, 1664
 Hardenbergh, Den ex d., *v.* Hardenbergh, 1024,
 1876, 1881, 1919, 1920, 1930, 1931, 1950
 Hardenburgh *v.* Blair, 499
 Harder *v.* Harder, 563, 1612
 Hardin *v.* Baird, 1691
 v. Forsythe, 1212, 1217, 1220
 v. Gerard, 1292
 v. Iowa R. & C. Co., 2155
 v. Wolf, 1506
 Harding *v.* Alden, 771, 782
 v. Cobb, 1035
 v. Glyn, 326, 1593, 1629, 1685
 v. Harding, 661
 v. Mill River Co., 2146
 v. Springer, 1919, 1931, 1932, 1940, 2203
 v. St. Louis Life Ins. Co., 336, 1709
 v. Wheaton, 1616
 Hardwicke *v.* Vernon, 1783
 Hardy *v.* De Leon, 216
 v. Gregg, 1883
 v. Johnson, 1901
 v. McCullough, 2241
 v. Redman's Admrs., 280, 335
 v. Van Harlingen, 677, 1372, 1373, 1562
 v. Waters, 2343
 v. Winter, 1257
 Hare *v.* Celey, 1233, 1235
 v. Groves, 1181
 v. Van Deusen, 2008
 Harford *v.* Johnson, 286
 v. Lloyd, 1761
 Hargis *v.* Price, 1309
 Hargrave *v.* King, 256, 1057, 1104, 1111, 1113,
 1643
 Hargreaves *v.* Mitchell, 1782, 1783
- Harker *v.* Bitbeck, 990
 Harker, Den ex d., *v.* Gustin, 1217
 Harkins *v.* Forsyth, 2157
 v. Pope, 1131, 1132, 1135, 1315, 1316
 Harkness *v.* Burton, 1280
 v. Sears, 118, 119, 122, 131, 134, 135,
 137
 v. Underhill, 2307
 Harkrader *v.* Leiby, 1998
 Harlan *v.* Emery, 2260
 v. Harlan, 105, 133, 138
 v. Lehigh Coal Co., 88, 983
 v. Smith, 2156
 v. Stout, 1983
 Harland *v.* Bromley, 1343
 v. Trigg, 346, 347, 1627, 1629, 1631, 1632
 Harle *v.* McCoy, 1283
 v. Richards, 1391, 1459
 Harley *v.* Platts, 1553
 v. King, 2265
 v. State, 218, 219, 2014
 Harlow *v.* Lake Superior Iron Co., 982
 v. Thomas, 730, 1095
 Harman *v.* Allen, 1211, 1225
 v. Kelly, 1983
 Harmes *v.* Chesapeake & O. C. Co., 2325
 v. Palmer, 2074
 Harmon *v.* Brown, 1858
 v. Gartman, 1969
 v. James, 214, 672
 v. Kelly, 1973, 1979
 Harmony Building Association *v.* Berger, 108,
 111
 Harmony Lodge *v.* White, 1100, 2263, 2264
 Harner *v.* Dipple, 2011
 Harnett *v.* Maitland, 1228, 1277
 v. Yielding, 1009
 Harney *v.* Donohoe, 220
 v. Dutcher, 1722
 Harnickell *v.* Orndorff, 2160
 Harpending *v.* Dutch Church, 1899, 1913, 1914
 Harper's Appeal, 2086, 2088
 Harper *v.* Archer, 1980
 v. Barsh, 2038
 v. Blean, 304, 306, 313, 326
 v. Ely, 1998, 2077, 2088, 2089, 2090
 v. Forbes, 1457, 1461, 1465, 1466
 v. Gilbert, 902
 v. Hampton, 367, 720, 2057, 2288
 v. Leal, 1506
 v. Phelps, 1591, 1593, 1635, 1651
 Harr *v.* Bridges, 1008
 Harrell *v.* Harrell, 1986
 v. Miller, 53, 55, 56
 Harrer *v.* Wallner, 1934, 1954
 Harriman *v.* Gray, 905, 906, 910
 v. Queen's Ins. Co., 1391, 1392, 1417
 v. Stowe, 1194, 1195
 Harrington *v.* Allen, 2126
 v. Brown, 1770
 v. Fortner, 2038
 v. Harte, 1820, 1825
 v. Murphy, 729, 730, 1092, 1093, 1095
 v. Price, 443
 v. Watson, 1015, 1083, 1176
 v. Wilkins, 2295
 Harrington, Doe d., *v.* Dill, 341
 Harris, *In re*, 534
 Harris *v.* Bannon, 2081
 v. Barnett, 1592, 1614
 v. Booker, 1579
 v. Cannon, 1031
 v. Carson, 1205, 1207
 v. Casson, 1211
 v. Cohen, 1202
 v. Cook, 2107
 v. Elliot, 89
 v. Evans, 1007
 v. Frank, 1072
 v. Frink, 49, 50, 52, 973, 976, 980, 1206,
 1207, 1208, 1255, 1256, 1257, 1257,
 1267, 1268, 1269, 1271, 1272, 1275,

- 1276, 1278, 1280, 1282, 1286, 1289,
1291, 1297
Harris v. Gilbert, 2358
v. Gillingham, 63, 2212, 2213
v. Glenu, 1513
v. Hackman, 2264
v. Haynes, 96, 138
v. Hyding, 63, 88, 92, 93, 94, 533
v. Ingleden, 2176
v. Jones, 2020
v. Knapp, 318, 1806
v. Larkins, 1979
v. Lloid, 2231
v. Marshall, 1309
v. McElroy, 1741, 1753
v. McLaran, 293
v. Mills, 2093, 2094, 2095, 2099
v. Miller, 2240
v. Mins, 566
v. Morris, 983
v. Norton, 2126
v. Pepperell, 2331
v. Potts, 533
v. Ryding, 2233, 2237
v. Rucker, 1599
v. Sumner, 1623
v. Slaght, 76, 225
v. York Ins. Co., 632
Harris, Doe d., v. Masters, 1062
Harrisburgh v. Crangle, 493
Harrisburgh Electric Light Co. v. Goodman,
45
arison v. Battle, 1820, 1825
v. Botts, 1908, 1925
v. Boyd, 736, 782
v. Brolaskey, 1674
v. Carroll, 909
v. Eldridge, 791, 891, 925, 927
v. Foreman, 1909
v. Graham, 1733
v. Griffith, 832
v. Harrison, 1890
v. Harrison's Admx., 943, 1591, 1593,
1627, 1631, 1727
v. Hefin, 872
v. Hicks, 2127, 2128
v. Howard, 1649
v. Jackson, 1030, 1042
v. Laverty, 1698
v. Leach, 1515
v. Lemon, 2040
v. Lincoln, 883
v. McHenry, 1775, 1776
v. Metz, 671
v. Middleton, 1261, 1269, 1281, 1293, 1294,
1297, 1350
v. Page, 2192
v. Phillips, 2034, 2039, 2132, 2353
v. Rays, 1955
v. Ricks, 1238, 1288
v. Smith, 1762
v. Southampton, 661
v. Stryes, 2058
v. Town, 1697
v. Trader, 959
v. Trustees, 2038
v. Trustees' Phillips' Academy, 2042,
2055
v. Wine, 2085, 2087, 2184
Harrison, Doe d., v. Murrell, 1215
Harrison's Exrs., v. Payne, 855, 858
arrow v. Johnson, 783, 802, 817, 847, 940
v. Meyers, 722
Harrow School, Keepers, etc., v. Alderton, 554
Harrower v. Heath, 1229, 2263
Harston v. Tenison, 1782
Hart's Appeal, 95
Hart v. Burch, 717
v. Chalker, 2026, 2027
v. Chase, 810
v. Evans, 2225
v. Finney, 1315
Hart v. Gregg, 1913, 1914, 1915, 1916, 2256,
2301
v. Hart, 1008
v. Hill, 69
v. Horn, 1456
v. Hudson River Bridge Co., 1109
v. Isreal, 1120
v. Lindley, 1335, 1340, 1456
v. Logan, 799
v. Marks, 1883
v. McCullum, 914
v. McGraw, 629
v. Robertson, 1901
v. Sheldon, 116
v. Soward, 1372
v. Thompson, 419
v. Tribe, 1630
v. White, 308, 310, 312
v. Windsor, 1054, 1055, 1080, 1082, 1097,
1110, 1175, 1200, 1201
Hartford Bridge v. East Hartford, 2303
Hartford, etc., Ore Co. v. Miller, 1924
Hartley's Appeal, 1811, 1843
Hartley v. Harrison, 2070, 2071, 2072, 2112,
2166
v. Hurle, 1371
v. O'Flaherty, 2155
Hartman v. Kendall, 1031
v. Munch, 1421, 1422
Hartness v. Thompson, 1031
Harton v. Harton, 299, 1561, 1574, 1594, 1608,
1655, 1672, 1673, 1712
Hartshorne v. Hartshorne, 783, 802, 803, 813,
814, 818, 866, 1975
v. Hubbard, 2079
Hartwell v. Bissell, 49, 52
v. Blocker, 2147
v. Cammen, 84, 85, 88
v. Kelly, 63, 1154, 2256, 2272
v. McDonald, 1519
Hartwick v. Mynd, 1818
Harvard v. Underwood, 2169
Harvard College v. Alderman of Boston, 505
v. Boston, 1102
v. Gore, 1456
Harvey's Estate, Re, 1836
Harvey v. Alexander, 1698
v. Aston, 1857
v. Ball, 720
v. Bridges, 1351
v. Brydges, 1357
v. Cherry, 1912
v. Harvey, 127, 563, 1909
v. McGraw, 1076, 1107, 1124
v. Olmstead, 332, 342, 536
v. Wickham, 603, 605, 612, 635, 637, 1512
Harvey's Admrs. v. Thornton, 2149
Harvey, Doe d., v. Francis, 1318, 1326
Harville v. Holloway, 785
Harvy v. Aston, 271
Harwood v. West, 1627, 1630, 1863
Hasbrook v. Paddock, 1089, 1139
Haseltine v. Donahue, 2363
Haskell v. Bailey, 2093, 2094, 2147
v. Hervey, 1783
v. House, 1810
v. New Bedford, 2325
v. Putnam, 1214
Haskill v. Sevier, 2033, 2034
Haskins v. Hawkes, 2085
v. Tate, 535
Haslage v. Krugh, 2252, 2257, 2259
Haslem v. Lockwood, 78, 79, 81
Hasler v. Hasler, 695
Haslett v. Glenn, 538
Hass v. Choussard, 2226
Hasselman, v. McKernan, 2171
Hassett v. Ridgely, 1977
Hasson v. Barrett, 2045
Hastie & Silver v. Aiken, 1783
Hastings v. Clifford, 932, 939
v. Crunkleton, 495, 552, 743, 806

Hastings *v.* Dickinson, 889, 897, 898, 899, 927,
950, 951, 953, 954, 956, 958, 963, 964, 966
v. Dollarhide, 1031
v. Drew, 1620, 1760
v. Hastings, 1904, 1969
v. Hopkinson, 1242
v. Livermore, 1252, 2248
v. Merriam, 286
v. Stevens, 511, 783, 802
v. Vaughn, 2364, 2365
v. Weber, 998, 1000
v. Wilson, 1115
Hasty *v.* Wheeler, 564
Haston *v.* Castner, 1623
Hatch *v.* Barr, 2013
v. Dana, 1581
v. Hart, 1234
v. Hatch, 1016, 2287, 2353
v. Kimball, 2097, 2130
v. Palmer, 802, 805
v. Pendergast, 1144
v. Smith, 2295
v. Sykes, 2257
v. White, 2142, 2157
Hatchell *v.* Kimbrough, 1230, 1231, 1237
Hatcher *v.* Hatcher, 1281
Hatfield *v.* Fullerton, 2269
v. Sneden, 447, 533, 585, 588, 626, 653, 670,
673, 678, 690, 691, 885, 889, 1361, 1362,
1372, 1377
Hathaway *v.* Spooner, 492, 503
Hathorn *v.* Calef, 1512
v. Lyon, 622, 651, 668, 670, 701, 1362
v. Maynard, 1718, 1934
v. Stimson, 2241
Haistat *v.* Packard, 1344
Hatt *v.* Doe d. Miller, 1272
Hatton *v.* Weems, 415
Haughabaugh *v.* Honald, 1381
Haughery *v.* Lee, 982
Haughton *v.* Harrison, 326
v. Haughton, 270
Haughery *v.* Lee, 999, 1010
Haulenbeck *v.* Conkright, 740
Hause *v.* Hause, 1894
Haussknecht *v.* Claypool, 1516
Hauxhurst *v.* Lobre, 1135, 1309, 1350, 1353
Haven *v.* Adams, 1028
v. Emery, 97, 116, 142, 144, 2018
v. Foster, 355, 2181
Havens *v.* Havens, 917, 918, 944, 955, 965
v. Klein, 2224
v. West Side Electric Light Co., 45
Haverstick *v.* Sipe, 2223
Haviland *v.* Halstead, 754
Hawes *v.* Show, 1149
Hawey *v.* Thomas, 1026
Hawke *v.* Senseman, 2296
Hawkes *v.* Hubback, 1561
v. Pike, 2033, 2034
Hawkins *v.* Clermont, 2031
v. Holmes, 998, 1017, 1042
v. Hudson, 2298
v. Kemp, 1040, 1830, 1831, 1843
v. Luscombe, 1608
v. McDougall, 1981
v. McPugh, 1476, 1490
v. Ragsdale, 720
v. Reichert, 1288
v. Senseman, 2297
v. Shewen, 365
v. Skegg, 48, 271, 538, 539
v. Taylor, 1986
Hawsworth *v.* Hawsworth, 202, 307
Hawley *v.* Bradford, 813, 814, 818, 926, 2164
v. Burgess, 647
v. City of Baltimore, 2205
v. Clowes, 575, 1903
v. Cramer, 1768, 1769, 1770
v. James, 274, 434, 767, 780, 781, 782, 828,
948, 1576, 1637, 1638, 1667, 2058, 2289
v. Kramer, 1771

Hawley *v.* Moody, 998
v. Northampton, 249, 255, 329, 401, 415,
416, 448, 449, 450
Haworth *v.* Wallace, 1226
Hawralt *v.* Warren, 1486
Haws *v.* Haws, 1910
Hawshill Bridge *v.* County Commissioners,
2327
Hawthorne *v.* Smith, 1447, 1448, 1499, 1514
Haxall's Exrs. *v.* Shippin, 513
Haxton *v.* Bishop, 2142
Hay *v.* Cohoes Co., 198, 2231, 2233
v. Cumberland, 984
v. Estell, 1975, 1987
v. Hill, 2123
v. Mayer, 619, 656, 1837
v. Palmer, 1172
v. The Cohoes Co., 2232
v. Watkins, 1837
Haycraft *v.* Bland, 1677, 1678
Haydell *v.* Hurck, 1739
Hayden *v.* Bradley, 1084, 1085
v. Inhabitants of Stoughton, 1854
v. Meintzer, 2349
v. Merrill, 1894, 1969
v. Patterson, 1901
v. Smith, 2132
Haydon *v.* Stoughton, 265, 266, 1849, 1850, 1853,
1855, 1856, 1864
v. Wesser, 741
Hayes *v.* Berwick, 522
v. Fickerstaff, 2362
v. Bickerstaff, 1989
v. Fessenden, 1211
v. Kedzie, 2130
v. Kershaw, 2316
v. Kershow, 1558
v. Livingston, 2302
v. N. Y. Mining Co., 123, 128, 145
v. People, 596, 757
v. Sanderson, 1369
v. Tabor, 1559, 1655, 2301
v. Waldron, 2225
v. Ward, 2136, 2177, 2178
v. Whitall, 928
Hayes, Doe d., *v.* Sturges, 1021
Hayford *v.* Benlows, 76
v. Spokesfield, 2245, 2247
Haygood *v.* Cuthbert, 855
v. Harley, 2354
v. Marlowe, 832
Hayne *v.* Cummings, 1049, 1063
Hayner *v.* Hayner, 963
v. Smith, 1128, 1167, 1168, 1174
Haynes *v.* Aldrich, 1131, 1132
v. Bourne, 598, 599, 677, 696, 697
v. Jones, 1723
v. Powers, 868
v. Swan, 2046
v. Thomas, 2205
v. Wellington, 2148
Haynew *v.* Bailey, 1048
Haynie *v.* Hall's Exrs., 489, 1782
Hayrover *v.* Thompson, 596
Hays *v.* Davis, 1981
v. Doane, 123, 129, 130
v. Jackson, 1684
v. Lewis, 2104
v. Quay, 1594
v. Richardson, 2213
v. Sanderson, 661, 662, 663
Hayse *v.* Ferguson, 2268
Hayward *v.* Angel, 1870
v. Clark, 1427, 1428
v. Cuthbut, 874
v. Dimsdale, 2331
v. Howe, 415, 417, 447
v. Mayor, 2323
v. New York, 197
v. Range, 1184
v. Sedgley, 1253
v. Stillingfleet, 575

- Haywood *v.* Cope, 999
v. Fulmer, 990, 1001
v. Kinney, 1863
v. Miller, 1287, 1288
v. Rogers, 1237, 1238
v. Thomas, 2298
 Hayworth *v.* Worthington, 1701
 Hazard *v.* Draper, 2118
v. Robinson, 2241, 2245
 Hazard Powder Co. *v.* Loomis, 974, 975
 Hazelbaker *v.* Goodfellow, 2303
 Hazeltine *v.* Colburn, 1257, 1274, 1285, 1305
 Hazelton *v.* Lesure, 766
v. Putnam, 2211, 2212, 2213
 Hazlett *v.* Powell, 1066, 1081, 1127, 1167
 Head *v.* Head, 648, 1313, 1335
v. Sutton, 2251, 2257, 2258
v. Temple, 1832
 Headley *v.* Goudry, 1995
 Headman *v.* Rose, 750
 Heald's Petition, 898
 Heald *v.* Heald, 1682
 Healy *v.* Alston, 1580
 Heap *v.* Barton, 145, 1186
 Heard *v.* Baird, 1741
v. Downer, 1450, 1479, 1514
v. Eldredge, 1581
v. Fairbanks, 49
v. Pilley, 1644, 1648
 Heardson *v.* Williamson, 1797
 Hearn *v.* Greenback, 598, 599, 609, 611, 654, 680, 684, 685, 1035, 1372, 2125, 2127
 Hearn *v.* Gray, 1319
v. Kennedy, 1383, 1519
 Hearst *v.* Pujol, 1589, 1785
 Heart *v.* State Bank, 817
 Heartley *v.* Nicholson, 1587
 Heath *v.* Biddle, 2303
v. Bishop, 253
v. Crealock, 1621
v. Hall, 2147
v. Heath, 325
v. Henly, 1782, 1783
v. Hewitt, 234, 293
v. Hubbard, 1247
v. Knapp, 1371
v. Nutter, 1041
v. Randall, 56, 2213
v. West, 2011, 2343
v. White, 274, 581, 590, 593, 620, 621, 622, 623, 626, 627, 630, 633, 2281
v. Williamson, 1144, 2043, 2045, 2053, 2058, 2067
 Heathcote *v.* Paignon, 519
 Heatherly *v.* Weston, 1026
 Heathman *v.* Holmes, 1385, 1390, 1391
 Heathon *v.* Lyon, 633
 Heatley *v.* Thomas, 1836
 Heaton *v.* Fryberger, 1480, 1702, 1758, 2331
v. Pralter, 2121
 Hebblethwaite *v.* Hepworth, 596
 Hebron *v.* Centre Harbor, 2037, 2040
 Heburn *v.* Warner, 1993
 Hocht *v.* Ferris, 1221
 Heck *v.* Borda, 1320
 Hedge *v.* Drew, 1016
v. Rose, 2261
 Hedges *v.* Bungay, 1786
v. Everard, 964
v. Riker, 1037, 1038
 Hedgepath *v.* Rose, 1286
v. Ford, 828, 893
 Heeney *v.* Brooklyn Society, 215, 216, 217, 221
v. St. Peter's Church, 32, 35, 36, 38
 Heermance *v.* Vernoy, 104, 110
 Heermans *v.* Clarkson, 2130
 Heeter *v.* Eckstein, 1138, 1156
 Heffner *v.* Heffner, 883
v. Knapp, 416
v. Knapper, 411, 414, 426
v. Lewis, 126
 Hegan *v.* Johnson, 1276, 1282
 Hegeman *v.* Fox, 1456
v. McArthur, 1174
 Heigate *v.* Williams, 2208
 Heim *v.* Vogel, 2166
 Heimstreet *v.* Howland, 1241, 1244
v. Winnie, 2171
 Heinsler *v.* Nickman, 765
 Heirs of Clay *v.* Clay, 216
 Heiss *v.* Murphy, 1603
 Heisseltine *v.* Seavey, 1160
 Heister *v.* Fortner, 2121, 2168
v. Futner, 2121
v. Maderia, 2168
 Helburn *v.* Moffard, 1100
 Hele *v.* Bexley, 1027, 2162
 Helfenstein *v.* Cave, 1451, 1503, 1515, 1523
v. Garrard, 297, 1549, 1550
 Helfrich *v.* Obermeyer, 888
 Hellawell *v.* Eastwood, 117, 134
 Heller, *Re*, 1892
 Heller *v.* Crawford, 2061
v. Huffsmith, 1905
 Helm *v.* Frisbie, 412
 Hellman *v.* Howard, 2338
 Helmbold *v.* Man, 520
 Helmer *v.* Shoemaker, 311
 Helmes *v.* Stewart, 1221
 Helms *v.* Franciscus, 648
v. May, 149
 Helms' Exrs. *v.* Rogers, 1783
 Helphenstein *v.* Meredith, 725
 Helwig *v.* Jordan, 1194
 Hemenway, *Ex parte*, 1188
 Hemenway *v.* Cutler, 63
 Hemmingway *v.* Scales, 1024, 1887, 1919, 1932, 1936, 1942, 1950, 1952
 Hemphill *v.* Flynn, 1313, 1322, 1310, 1318
v. Giles, 2064, 2065
v. Haas, 1490
v. Ross, 688, 1998
 Hempstead *v.* Dickson, 319
v. Johnston, 1600, 1601, 1677, 1789, 1794
 Henagan *v.* Harilee, 801, 817, 2181
 Henderson *v.* Allen, 1229, 1234, 1287
v. Baltimore, 2355
v. Cardwell, 1267, 1269, 1301
v. Cross, 1684
v. Eason, 1804
v. Ford, 1407, 1411
v. Grewell, 2364
v. Hill, 298, 336, 1560, 1709
v. Hay, 1096, 1097
v. Herderson, 1093, 1594, 1700, 1888
v. Herod, 2106
v. Hunter, 1849
v. Mayhew, 1701
v. McGhee, 2126
v. Miller, 1292
v. Overton, 889, 1773
v. Pilgrim, 2042, 2100, 2102
v. Squire, 1098
v. Vaulx, 536
v. Warmack, 1763
v. Williamson, 1596
 Hendrick *v.* Cannon, 1310
v. Crowley, 1700
v. Judas, 1114
 Hendricks *v.* Rasson, 1900
v. Stark, 2235
 Hendrickson's Appeal, 2120
 Hendrickson *v.* Cardwell, 1205
v. Ivins, 55
 Hendrix *v.* McBeth, 561, 811, 812, 838
 Hendry *v.* Squier, 1192, 1201
 Hendy *v.* Dinkerhoff, 139
 Hene *v.* Brooklyn Society, 775
 Henegan *v.* Haralles, 763, 802, 940
 Henisler *v.* Nickum, 804, 829, 830
 Henkle *v.* Allstadt, 2155, 2180
 Henley *v.* Branch Bank, 1212, 1216, 1217
v. Hotaling, 2044, 2052, 2053, 2054
 Hennen *v.* Hayden, 1162

- Hennessey *v.* Walsh, 1646, 1648
Hennesy *v.* Farrell, 2000
Henning *v.* Burnett, 2218
 v. Price, 755
 v. Barberson, 980
Henrietta *v.* Oxford, 1456
Henrison *v.* Cloud, 2364
Henrose *v.* Griffith, 2358
Henry's Appeal, 1481
Henry's Case, 760, 2091, 2172
Henry *v.* Bell, 2082
 v. Carson, 1723
 v. City of Newburyport, 4
 v. Compton, 2177
 v. Davis, 2015, 2016, 2037, 2040, 2050,
 2055
 v. Henry, 962
 v. Stevens, 2252, 2258
 v. Tupper, 1871, 1872, 2032
Henshaw *v.* Wells, 1998, 2065, 2077
Henson *v.* Kinard, 1785
 v. Moore, 586, 893
Henstead's Case, 1026, 1294
Henwood *v.* Cheeseman, 1278, 2260, 2270, 2271
Hepburn's Case, 2169, 2328, 2323
Hepburn *v.* Curtis, 1517
 v. Dubois, 993
 v. Hepburn, 1706, 1714
Hepsham *v.* Dettre, 1224
Herad *v.* James, 62
Herbaugh *v.* Zentmyer, 2262
Herbert's Case, 2178
Herbert *v.* Dupaty, 1070
 v. Gray, 671
 v. Hanrick, 211, 212, 2091, 2297
 v. Herbert, 1016
 v. Kenlon, etc., Assn., 1479
 v. Wren, 814, 858, 866, 918, 932, 936, 944
Herbert, Doe, d. *v.* Thomas, 348
Herbin *v.* Chard, 1024
Herkimer *v.* Rice, 719
Herkimer, Admr., *v.* Rice, 1912
Herlakenden's Case, 22, 128, 134
Herman *v.* Watts, 1988
Herndon *v.* Kimball, 2366
 v. Pratt, 1784
Heron *v.* Hoffner, 949
Herr's Estate, 1621
Herrell *v.* Sizeland, 1254, 1261, 1275, 1280, 1294,
 1295, 1302, 1307, 1308, 1324, 1336
Herrick *v.* Graves, 1459, 1461
Herring *v.* Harris, 1020
 v. Wickham, 959
 v. Woodhull, 2099, 2102
Herron *v.* Hill, 2272
Hersey *v.* Gilbert, 999
Hershey *v.* Metzgar, 46, 47, 52
Hershizer *v.* Florence, 668
Hershly *v.* Clark, 1912, 1918
 v. Shenk, 522
Herskell *v.* Bushnell, 1231
Hersom *v.* Henderson, 1698
Hertell *v.* Vanburen, 1841
Hertle *v.* McDonald, 2175, 2176
Hervey *v.* Hervey, 932, 954
Herzo *v.* San Francisco, 2342
Heslet *v.* Heslet, 75
Heslop *v.* Heslop, 894
Hess's Estate, 2177
Hess *v.* Marks, 1226
 v. Singler, 346, 1591, 1593, 1632, 1683,
 1824
Hesse *v.* Briant, 76
Hestell *v.* Bogart, 1888
Hester, *Re*, 890
Hester *v.* Hester, 1752
 v. Wilkinson, 1664, 1716, 1727, 1728
Heth *v.* Cocke, 826
 v. Richmond F. & P. R. Co., 1578, 1721,
 1716, 1759, 1764, 1777, 1779
Hetherington *v.* Graham, 774, 892, 894, 895,
 921
Hewell *v.* Coulburn, 2111
Hewes *v.* Wiswell, 492
Hetzel *v.* Barber, 1165, 1808, 1809
Hewett, *Ex parte*, 1512, 1513
Hewett *v.* Rankin, 824, 1421, 1425, 1432
Hewitt *v.* Foster, 1733
 v. Long, 1464
 v. Templeton, 1381, 1382, 1450, 1478
Hewlins *v.* Shippam, 475, 477, 478, 531, 2112,
 2211
Hext *v.* Gill, 84, 89, 90, 94, 2233, 2238
Hexter *v.* Knox, 1085, 1086
Hey *v.* McGrath, 1320
 v. Moorhouse, 1350
 v. Sterratt, 2223
Heydon's Case, 435, 540, 542
Heyer *v.* Deaves, 2154
 v. Pruyn, 2095
Heyhoe *v.* Burge, 1242
Heyman *v.* Lowell, 1251
Heysham *v.* Dettre, 109, 135, 138
Heyward *v.* Mayor, 2325
 v. Heywood, 2255
 v. Mayor, 2328
Hibbard *v.* Lamb, 1663
Hibbeler *v.* Gutheart, 1139
Hibben *v.* Soyer, 1480
Hibblewhite *v.* McMorine, 1042, 1044
 v. Nivrine, 2339
Hibberd *v.* Bower, 2120
Hickey *v.* Hazard, 69
Hicman *v.* Cantrell,
 v. Irvine, 558, 806, 861
 v. Perrin, 1211
Hickman's Case, 2327
Hickok *v.* Buck, 984
Hickox *v.* Low, 2031, 2053
Hicks *v.* Bell, 87
 v. Bingham, 2091
 v. Bullock, 1900, 1923
 v. Dowling, 1109
 v. Hicks, 491, 2040, 2168
 v. Morris, 1497
 v. Stebbins, 782
 v. Ward, 1815, 1816, 1823
Hidden *v.* Hopkins, 2088
 v. Johnson, 1651, 2088
Hieatt *v.* Morris, 2235, 2236
Hiester *v.* Maderia, 2055
 v. Shaeffer, 2262
Higbee *v.* Rice, 208, 601
 v. Rodman, 1864
Higby *v.* Rice, 209
Higdon *v.* Higdon, 1647
Higginbotham *v.* Barton, 1992
 v. Cornwell, 744, 880, 916, 934, 935,
 956
 v. Holmes, 260, 272, 935
 v. Short, 1973, 1979, 1988
Higgins *v.* Breen, 714, 715, 755, 756, 769, 770
 v. Halligan, 1133, 2261
 v. Johnson's Heirs, 1947
 v. Kendall, 2004
 v. Kusterres, 68
 v. Turner, 1164
 v. Wasgutt, 2361
 v. York Buildings Co., 1027, 2162
Higginson *v.* Dall, 2113
Higson *v.* Mortimer, 89
High *v.* Battle, 1754
Higham *v.* Baker, 2216
Highberger *v.* Stiffler, 1735, 1769
Highway, *Re*, 2325
Higley *v.* Millard, 1475
Higman *v.* Stewart, 2179
Hilch *v.* Peck, 576, 1906
 v. Peck, 1853, 1855
Hilary *v.* Walker, 1742
Hilbourn *v.* Fogg, 1219, 1253, 1356
Hildreth *v.* Conant, 1139, 1294
 v. Eliot, 1791
 v. Jones, 926

- Hildreth *v.* Thompson, 717, 732, 733, 734, 735,
736, 739, 877
 Hileman *v.* Bouslaugh, 214, 281, 424, 531, 672,
1694
 Hiles *v.* Coult, 2179, 2180
 Hiley *v.* Bridges, 1513
 Hillhouse *v.* Mix, 1908
 Hill's Case, 941
 Hill *v.* Bacon, 1094, 1440
 v. Bailey, 1781
 v. Barclay, 265, 1091, 1157, 1158, 1870,
1871, 1872
 v. Barrow, 416
 v. Barry, Hayes & J., 983
 v. Bishop of Exeter, 1626
 v. Bishop of London, 347, 1631
 v. Burrow, 414
 v. Chambers, 588, 651, 668, 670
 v. Crosby, 2219
 v. Cutting, 2212
 v. Den, 1587, 1592
 v. De Rochemont, 78, 79
 v. Draper, 2335
 v. Edmonds, 2152
 v. Edwards, 2031, 2104
 v. Eldred, 2002
 v. Eliot, 1623, 1696
 v. Epley, 2305
 v. Farmers & Mechanics' Nat. Bank, 120,
126
 v. Frazier, 1707, 1769
 v. Givin, 2064
 v. Grange, 2216
 v. Grant, 2044
 v. Gregory, 785
 v. Gwin, 2022
 v. Hagaman, 2242
 v. Hill, 396, 1291, 1510, 1641, 2212
 v. Holliday, 2170
 v. Josselyn, 1731
 v. Kessler, 1510, 1511, 1518
 v. La Crosse & M. R. Co., 2018
 v. Lancaster, 1481, 1482
 v. Lord, 2213, 2214
 v. Manchester & Salford Water Works
 Co., 2013, 2342
 v. McCarter, 2153, 2179, 2180
 v. McRae, 247, 254, 1747, 1748
 v. Meyers, 1614
 v. Mitchell, 705, 707, 847, 851, 861
 v. Moore, 2280
 v. More, 1051, 2031, 2103
 v. Newman, 2224
 v. Packard, 122
 v. Reno, 1165
 v. Ressegieu, 729
 v. Robertson, 1998, 2078, 2131
 v. Robinson, 1159
 v. Samuel, 2364
 v. Saunders, 1024, 1025
 v. Sewald, 104, 106, 115, 133, 144
 v. Smith, 2078, 2238
 v. Stocking, 2274
 v. Thomas, 533
 v. Trustee, 2254
 v. Wentworth, 96, 116, 117, 118, 133, 144,
1046
 v. White, 2172
 v. Woodman, 1126, 1175
 v. Wynn, 720
 Hillard *v.* Binford, 932, 935
 Hillary *v.* Waller, 1743, 2094, 2291, 2292
 Hilleary *v.* Hilleary, 717, 731, 732, 815, 820, 826
 Hillebrant *v.* Brewer, 1248
 Hillgartner *v.* Gebhart, 853, 854, 855
 Hillhouse *v.* Chester, 600
 v. Dunning, 2053
 Hilliard *v.* Scoville, 1982
 Hills *v.* Dey, 1982, 1988
 v. Doe, 1910
 v. Eliot, 2147
 v. Loomis, 2046
 Hills *v.* Miller, 2211, 2214, 2215, 2216
 Hilsendagan *v.* Scheich, 1251, 1262, 1269, 1281,
1293, 1327, 1329
 Hilton *v.* Bender, 1149
 v. Granville, 94
 v. Merrill, 1211
 Himesworth *v.* Edwards, 1010, 1233, 2259
 Hinchliffe *v.* Shea, 792, 906, 907
 Hinchman *v.* Emans, 810, 1580
 v. Isle, 1297
 v. Stiles, 783, 817, 928, 2164
 Hinchman, Den ex. d., *v.* Clark, 415, 444
 Hindan *v.* Jordan, 2271
 Hinde *v.* Chorlton, 39, 83
 v. Longworth, 518, 1625
 Hinds' Estate, 110
 Hinds *v.* Allen, 2146, 2156
 v. Ballou, 766, 802, 809, 810, 826, 2097,
2100, 2103, 2104, 2130
 v. Pugh, 726
 v. Stevens, 886
 v. Terry, 1246, 1905
 Hinely *v.* Margaritz, 2344
 Hines *v.* Ament, 116, 123
 v. Ballou, 2130
 v. Duncan, 1397
 v. Fratham, 2100
 v. Robinson, 1969, 2226
 v. Trantham, 1908
 Hingham *v.* Sprague, 1252, 1284
 Hingham & Quincy Bridge Co. *v.* County of
 Norfolk, 2327
 Hinklc's Appeal, 1815
 Hinkle *v.* Wanzer, 1585
 Hinkle's Lessee *v.* Shadden, 236
 Hinkley *v.* Russell, 561
 Hinkley & E. Iron Co. *v.* Black, 63, 139
 Hinman *v.* Cranmer, 209
 Hinsdale *v.* Humphrey, 1043, 1063
 Hinton, *Ex parte*, 1677
 v. Goye, 1825
 Hintze *v.* Thomas, 2262, 2264
 Hipp *v.* Babin, 1669
 Hiram *v.* Pierce, 753
 Hiscock *v.* Jacox, 824
 v. Jaycock, 787
 v. Phelps, 1671, 1962
 Hissem *v.* Johnson, 1428
 Hitchcock *v.* Carpenter, 764, 870
 v. Harrington, 688, 764, 782, 783, 799, 800,
803, 804, 805, 830, 864, 867, 874, 809,
930, 1580, 2052
 v. Hotchkiss, 485
 v. Merrick, 2101
 v. North-Western Ins. Co., 2116
 v. United States Bank of Pa., 2144
 Hitchen *v.* Hitchen, 970, 973, 980
 Hitchens *v.* Ricketts, 1039
 v. Shallor, 2212
 Hitchins *v.* Hitchins, 816, 819, 886, 935
 v. Masterson, 135
 Hutchison *v.* Kay, 126
 Hitchman *v.* Walton, 132, 135
 v. Wilton, 968
 Hith *v.* Cocke, 924
 Hitner *v.* Ege, 506, 686, 693, 703
 Hitt *v.* Holliday, 2073
 Hittinger *v.* Eames, 71
 Hitz *v.* Metropolitan Bank, 641, 642, 1598
 Hixon *v.* George, 1457
 Hoadges *v.* Tennessee M. F. Ins. Co., 2116
 Hoadley *v.* Hadley, 2033, 2124
 Hoag *v.* Hoag, 1149
 v. Wallace, 211
 Hoagland's Case, 2266
 Hoagland *v.* Crum, 2260
 Hoare *v.* Dawes, 1242
 v. Osborne, 1687, 1688
 Hobart *v.* Frisbie, 2334
 v. Sanborn, 1998
 Hobbs *v.* Blanford, 658, 794
 v. Harvey, 841, 842

Hobbs v. Hobson, 2012
 v. Lowell, 2302
 v. Smith, 204
Hobday v. Peters, 1826
Robert's Case, 2176
Hobson v. Koles, 2103
 v. Trevor, 1573
 v. Whitlow, 1690
 v. Yancy, 2252, 2259
Hoby v. Hoby, 811, 850, 801
 v. Koeback, 2252
Hockley v. Mawbey, 1812
Hoddell v. Pugh, 76
Hodge v. Giese, 1046
 v. Hollister, 1478, 1479
 v. Wyatt, 1704
Hodgen v. Guttely, 2126, 2171, 2174
Hodges v. Eddy, 2240, 2297, 2298
 v. Green, 31
 v. Heal, 1021
 v. Howard, 908, 999
 v. Isaac, 325
 v. Raymond, 2227
 v. Shields, 1160, 1169, 1170, 1213, 1219, 1222
 v. Tennessee Marine & Fire Ins. Co., 1702, 2037
Hodgkins v. Ennor, 2230
 v. Price, 1151
 v. Robson, 1072
Hodgkinson v. Crowe, 1065, 1096, 1097
 v. Petitioner, 1981
Hodgman v. Smith, 1241, 1242
Hodgson v. Field, 90
 v. Lovell, 1477
 v. Shaw, 2137
Hodley v. Taylor, 1202
Hodson v. Sharpe, 1353
 v. Treat, 2152, 2156
Hoeveler v. Fleming, 1166, 1167, 1193
Hoff v. Bann, 1133
 v. McCauley, 2181
Hoffar v. Dement, 1027, 1028
Hoffman v. Armstrong, 20, 56
 v. Burke, 2158
 v. Clark, 1280
 v. Harrington, 1999, 2140, 2175
 v. Hill, 1473
 v. Kuhn, 2235
 v. Mackall, 1738, 1756
 v. McCallum, 1330
 v. Newhaus, 1390, 1403, 1414
 v. Porter, 2350
 v. Risk, 2150
 v. Savage, 725, 742
 v. Stigers, 1024, 1919, 1920, 1034, 1042, 1051, 1058, 1077
Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co., 1618, 1619, 1620, 1770, 1774
Hoffstetter v. Blattner, 1898
Hogan v. Andrews, 332, 536
 v. Barry, 284
 v. Jackson, 202, 302, 306, 309, 313, 326
 v. Jacques, 1037, 1008, 1700
 v. Manners, 970, 1390, 1391, 1416, 1424, 1446
 v. Stayhorn, 1037
Hogan's Heirs v. Welcker, 281, 531
Hoge v. Hall, 1803
 v. Hoge, 1423, 1424, 1699, 1701, 1703
 v. Hollister, 1450
Hogell v. Lindell, 2048
Hogg v. Longstretch, 2136
Hogg, Doe d., v. Taylor, 1308
Hoghton v. Hoghton, 1801
Hogsboom v. Hall, 1872
Hogsett v. Ellis, 2005
Hogle v. Stewart, 883
Hoit v. Russell, 2039
Hoitt v. Webb, 1378, 1412, 1433, 1445, 1700, 1707

Hoke v. Henderson, 2324, 2320, 2331
Hoker v. Boggs, 646, 647, 1038
Holbrook v. American Ins. Co., 2089, 2116
 v. Bitton, 2015
 v. Chamberlin, 122, 1224, 2013
 v. Dickenson, 2120
 v. Finney, 702, 703, 705, 700, 785, 805, 817, 820, 1492, 1910, 2357
 v. Nichol, 2300
Holcomb v. Holcomb, 2149, 2155
Holcombe v. Lake, 401, 423
Holcraft v. King, 2200
Holden v. Cox, 2272
 v. New York & Erie Bank, 1760
 v. Pike, 810, 2097, 2153
 v. Pinney, 1444, 1449
 v. State, 1003
Holder v. Coates, 56, 57
 v. Taylor, 2102
Holderby v. Spafforth, 1832
Holderness v. Carmarthen, 24, 435
Holdfast v. Marten, 311, 312
 v. Morten, 202
Holdrich v. Holdrich, 018, 944, 905
Holding v. Holding, 878
Holdridge v. Gillespie, 1708, 1905, 1996, 2055, 2108
Holdship v. Patterson, 254, 273, 500, 1074, 1675
Hole v. Ritterhouse, 517
 v. Thomas, 570
Holford v. Dunnett, 1067
 v. Hatch, 1073
Holfield v. Robinson, 1687
 v. White, 1245
Holland v. Barnes, 1033
 v. Bonis, 1540
 v. Citizens' Sav. Bank, 2095, 2137, 2160, 2162
 v. Craft, 445, 460, 2101
 v. Fuller, 780, 1964
 v. Hodgson, 103, 120, 122, 125, 126, 127
 v. Hoyt, 1041
 v. Mayor, 070
Hollbrook v. Chamberlin, 1018
Hollenbeck v. McDonald, 28, 983, 2221, 2242
Holley v. Glover, 785
 v. Hawley, 1807, 1899,
 v. Metcalf, 1334
Hollida v. Shoop, 1041, 1642, 1652, 1654
Holliday v. Camsell, 1246
 v. Cromwell, 2205, 2366,
 v. Marshall, 1091
 v. Overton, 228
Hollifield v. Stell, 415, 419
Holliman v. Smith, 1445, 1465
Hollings v. Mead, 2344
Hollingsworth v. Floyd, 2177
 v. Stennett, 1200, 1270, 1271, 1278, 1284, 1290
 v. Trueblood, 075
Hollis's Case, 1783
Hollis v. Burns, 1327, 1328, 1320, 1330, 1340
 v. Pool, 1253, 1264, 1350, 1354, 1355
Hollister v. Shaw, 1830
Hollocher v. Hollöcher, 1700
Holloman v. Holloman, 800, 864
Holloway v. Brinkley, 1230
 v. Holloway, 1380, 1402
 v. Sherman, 1518
Hollowell v. Simondson, 040
Holly v. Brown, 208, 1138, 1293, 1296
 v. Holly, 2251, 2259
Holman v. Bailey, 2127, 2128
 v. Creagmiles, 1093
 v. Holman, 849
 v. Loynes, 76
Holmes' Case, 617
Holmes v. Best, 1804, 1895
 v. Blogg, 1031
 v. Bridgman, 479
 v. Charleston Mutual Fire Ins. Co., 1701

- Holmes v. Cleveland, 2303
v. Coghill, 487, 1820, 1825, 1840
v. Crowell, 2302
v. Day, 1307, 1320, 1336, 1343
v. Field, 271, 289, 596, 636, 662, 664, 751,
757, 758, 795, 802, 1093
v. Fisher, 2033
v. Frogh, 2052
v. Gardner, 2107
v. Goring, 2242
v. Grant, 2039, 2040, 2042, 2044, 2052,
2053, 2054
v. Holmes, 1973, 1979
v. Johnson, 522
v. Kring, 837
v. McGee, 714, 725
v. McGinty, 2105, 2107
v. McMaster, 993
v. Mead, 1548
v. Old Colony R. Co., 1241, 1243
v. Pattison, 337
v. Remson, 367, 720, 2057, 2288
v. Seeley, 2218
v. Seely, 1023
v. Shepard, 1151
v. Tallada, 1430
v. Tremper, 105, 108, 124, 144
v. Turner's Falls Lumber Co., 2158,
2160
v. Williams, 340
Holridge v. Gillespie, 1769
Holroy v. Marshall, 2017
Holsman v. Abrams, 1315, 1317
v. Boiling Spring Co., 2225
Holsmans v. De Grey, 2262
Holt v. Creamer, 2030
v. Holt, 1090
v. Rees, 1028
v. Sargent, 2206
Holt, Doe d., v. Harrocks, 607
Holthaus v. Hornbostle, 1402
Holzderber v. Forrestal, 996
Home v. Home, 926
Home Life Ins. Co. v. Sherman, 1127, 1167,
1168, 1170, 1172, 2258
Homeopathic Mut. Life Ins. Co. v. Marshall,
2136
Home Protection of Northern Alabama v.
Caldwell, 631
Homer v. Den ex d. Leeds, 1001
v. Homer, 1589, 1622, 1665, 1690
v. Shelton, 351
Homes v. Burt, 1425
Homestead Cases, 1380, 1512, 1513, 1517
Homestead Assoc. v. Enslow, 1450, 1467
Hon v. Hon, 1652
Hone v. Van Schaick, 1980
v. Woolsey, 1795
Honore v. Bakewell, 2006, 2007, 2008
v. Hutchings, 2043, 2054
v. Lamar Ins. Co., 2113, 2117
Honywood v. Honywood, 559, 560, 561
Honzik v. Delagise, 123
Hoonberry v. Harding, 297, 298, 336, 499, 1560,
1700, 1712
Hood v. Hartshorn, 1051
v. Hood, 76, 662, 771, 919
v. Mathis, 1213
v. Oglander, 1627, 1633
Hoofnagle v. Anderson, 2304
Hook v. Mowre, 1626
Hooker v. Hooker, 104, 816, 886
v. New Haven & N. Co., 2327
Hooks v. Lee, 645
Hooper v. Cummings, 1849, 1850, 1851, 1855,
1857, 1972
v. Dwinell, 996, 1283
v. Farnsworth, 1014, 1015
v. Henry, 2301
v. Hooper, 865, 868
v. Robinson, 631
v. Wilson, 2063
Hoopes v. Bailey, 2044
v. Garver, 2295
Hooton v. Holt, 997, 1283, 1286, 1305
Hoots v. Graham, 731, 733, 734, 735, 739, 741,
834
Hoover v. Landes, 941
v. Samaritan Society, 1828, 1829, 1830
v. United States, 1035
Hope v. Cason, 1291
v. Johnson, 1605
v. Rusha, 415, 418
v. Stone, 2009
Hope ex d. Brown v. Taylor, 306, 309
Hopewell v. Ackland, 307
Hopkins v. Carey, 1579
v. Dumas, 1649
v. Frye, 671, 781
v. Garrard, 2006
v. Gilman, 1086
v. Helmore, 2255
v. Hopkins, 1551, 1552, 1557, 1558, 1564,
1782
v. Myall, 1831
v. Robinson, 2295
v. Stevenson, 2088
v. Threlkeld, 456, 464
v. Toll, 1981
v. Ward, 1744, 2147
v. Wolley, 2170, 2180
v. Wooley, 2154
Hopkinson v. Dumas, 761, 763, 781, 788, 827,
831, 1580, 1622, 1646
Hopper v. Childs, 1211
v. Cummings, 1861
v. Dwinell, 1304
v. Hopper, 868, 869
v. Parkinson, 1497
Hopper, Den ex d., v. Demarest, 598, 603, 604,
614
Hoppock v. Ramsey, 810
Horn v. Baker, 125
v. Cole, 2302
v. Indianapolis Nat. Bk., 2073, 2074, 2171,
2172, 2185
v. Jones, 2149, 2151, 2152, 2171
v. Keteltas, 1702, 2045, 2048
v. Taylor, 2222
v. Tufts, 1425, 1444
Hornbeck v. Westbrook, 266, 2356, 2361
Hornberger v. Hornberger, 1686
Hornbrook v. Lucas, 2273
Hornby v. Houlditch, 2263
v. McCullough, 2241
Horne v. Howell, 1900
v. Lyeth, 1609
Horner v. Den ex d. Leeds, 1003
v. Dipple, 2343
v. Horner, 753
v. Swann, 1844
v. Watson, 91, 92, 2233, 2237
v. Zimmerman, 2156
Hornsey v. Casey, 935
Horser v. Hoag, 2280
Horse v. Horsey, 1308
Horsley v. Chaloner, 325
Horstman v. Gerger, 2147
v. Gerker, 2110
Horton v. Cook, 435
v. Cooley, 2201
v. Horton, 288
v. McCoy, 94, 95
v. N. Y. Cent. R. R. Co., 1138, 1139,
1157
v. Sledge, 207, 2316
Horwitz v. Davis, 2266
v. Norris, 1828
Horwood v. West, 147, 1612
Hosea v. Jacobs, 1682
Hosford v. Ballard, 2262
v. Merwin, 1975
v. Nichols, 367, 720, 920, 2057, 2058, 2288
v. Wright, 730

- Hosier, Doe ex d., *v.* Hall, 1773
 Hoskin *v.* Woodward, 132
 Hoskins *v.* Litchfield, 1407, 1408, 1493, 1494, 1495, 1506
 v. Rhodes, 1230, 1231, 2254
 Hosmer *v.* Carter, 2015
 v. Wallace, 2306, 2307, 2308
 Hosser's Succession, 2282
 Hoston *v.* Seeley, 839
 Hot *v.* Master, 1814
 Hotchkiss *v.* Clifton Air Cure, 2161
 v. Elting, 1808
 Hotham *v.* East India Co., 1855
 Hotley *v.* Scott, 1040
 Houble *v.* Volkening, 2131
 Houck *v.* Ritter, 652, 670
 v. Yates, 68
 Hougau *v.* Milwaukee & St. P. R. Co., 2230
 Hough *v.* Bailey, 2027, 2034, 2095
 v. Birge, 1276
 v. City F. Ins. Co., 2113
 v. Osborne, 2106, 2111, 2147
 Houghtaling *v.* Houghtaling, 2213
 Houghton, *Ex parte*, 1173
 Houghton *v.* Chicago R. Co., 69
 v. Hapgood, 679, 680, 689
 v. Houghton, 961, 962, 1957
 v. Kendall, 234
 v. Lee, 1503, 1697
 v. Mfgs. Ins. Co., 2115
 House *v.* Burr, 2262, 2263, 2264
 v. Hoose, 96, 127, 510, 511, 802, 803, 818, 1646
 v. Jackson, 711, 712, 761, 779, 780, 815
 v. Palmer, 211
 Houser *v.* Lamont, 2039
 Houston *v.* Brown, 587, 588, 670
 v. Farris, 1159, 1212, 1220
 v. Hughes, 288, 289, 1594, 1711
 v. Lafee, 2226
 v. Laffes, 2212
 v. McCluney, 1893
 v. Newsome, 1393
 v. Nowland, 1750, 1794
 v. Smith, 711, 712, 759, 760, 761
 v. Spruance, 1855
 v. Winter, 1394
 Houston, etc., *R. Co. v.* Winter, 1445
 Houts *v.* Showalter, 46
 Houx *v.* Seat, 144
 Hovell *v.* Barnes, 1605
 Hovenden *v.* Annesley, 601, 1615, 1785
 v. Knott, 2172
 Hovey *v.* Chase, 986, 1886
 v. Hill, 2109
 v. Hobson, 986, 987, 1034, 2345
 How *v.* Broom, 1173
 v. Kennett, 1301, 1306
 v. Stevens, 39
 v. Viguers, 1996
 v. Whitfield, 1818
 Howard *v.* Aiken, 1782
 v. Ames, 2163
 v. Carpenter, 993, 1350, 1354, 1355
 v. Carusi, 1627
 v. Cavendish, 776, 778, 859
 v. Chase, 2125
 v. Davis, 2163
 v. Dill, 2273
 v. Donohue, 1897
 v. Doolittle, 1054, 1175, 1197
 v. Fessenden, 141, 2021
 v. Ellis, 1103, 1184
 v. First Parish of North Bridgewater, 31, 32, 35, 36, 38, 40, 83
 v. Francis, 936
 v. Gresham, 2129
 v. Handy, 2149
 v. Harris, 2051, 2068
 v. Henderson, 297, 298, 1560
 v. Hillbreth, 2095
 v. Hoey, 1199
 v. Hopkins, 1872
 v. Houghton, 2077
 v. Howard, 2128
 v. Logan, 1461
 v. Merriam, 1137, 1252, 1263, 1266, 1269, 1271, 1284, 1293, 1294, 1322
 v. Miner, 1865, 1866
 v. Moale, 468
 v. Norfolk, 372, 1212, 1226
 v. Priest, 786, 824, 825, 1957, 1960, 1963
 v. Reedy, 2296
 v. Rhodes, 1600
 v. Robinson, 1998
 v. Runsen, 2270
 Howard *v.* Terry, 1223, 1259, 1282, 1290, 1292
 v. Wemsley, 1311
 Howard Co. *v.* Kyte, 1184
 Howard College *v.* Amory, 1719
 Howard Fire Ins. Co. *v.* Bruner, 2116
 v. Chase, 1667, 1668
 Howard Ins. Co. *v.* Halsey, 1777, 2022, 2120, 2154, 2179, 2180
 Howe, Matter of, 1355
 Howe *v.* Adams, 1452, 1483, 1514, 1515
 v. Batchelder, 51, 53, 55
 v. Burr, 1320
 v. Howe, 986, 1032
 v. Jackson, 787
 v. Lemon, 2072, 2176
 v. Lewis, 2128, 2129
 v. Russell, 2037
 v. Scannett, 1025
 v. Starkweather, 42, 817
 v. Stevens, 31, 32, 36, 38
 v. Wilder, 2134
 Howell *v.* Barnes, 1811
 v. City of Buffalo, 2335
 v. Earp, 225
 v. George, 1486
 v. Harvey, 1244
 v. Howell, 1277, 1646
 v. McCork, 2225
 v. McCrie, 1490
 v. Price, 1994, 2010, 2082
 v. Ripley, 1027
 v. Schenck, 45, 47, 1028, 1209
 v. Wolfort, 485
 Howell, Den ex d., *v.* Ashmore, 1220
 Howell, Den ex d., *v.* Howell, 1293, 1294, 1295, 1296, 1297
 Howeth *v.* Anderson, 1181
 Howey *v.* Goings, 661, 662
 Howland *v.* Coffin, 1071, 1072, 1074, 1075, 1077, 1118
 v. Howland, 2
 v. Shurtleff, 2093, 2095, 2146
 Howton *v.* Frearson, 2220
 Hoxie *v.* Carr, 825
 v. Ells, 1985
 v. Hoxie, 1614
 Hoxsie *v.* Ellis, 717, 731, 732
 Hoxton *v.* Archer, 403, 404
 Hoy *v.* Bramhall, 2153, 2166
 v. Bramhall, 2068, 2069
 v. Gronoble, 1245, 1247
 v. Holt, 1069, 1098
 v. Sterrett, 2233, 2292
 Hoyer *v.* Swan, 211, 908
 Hoyle *v.* Cazabat, 2128
 v. Jones, 325
 v. Plattsburgh & M. R. Co., 98, 112, 113, 2018, 2019, 2021
 v. Stowe, 1026, 1031, 1925
 Hoysradt *v.* Holland, 2150
 Hoyt *v.* Bradley, 2032
 v. Davis, 892
 v. Hillon, 2335
 v. Home, 1519
 v. Howe, 1386, 1442, 1501, 1502, 1504, 1518
 v. Jaques, 1816, 1832
 v. Kimball, 261, 1567, 1873

- Hoyt *v.* Martense, 2016
 Hubbard *v.* Bagshaw, 105
 v. Burrell, 1623, 1765
 v. Chenango Bank, 233
 v. Coolidge, 1758
 v. Cummings, 2011
 v. Elmer, 1832
 v. Goodwin, 218
 v. Harrison, 2106, 2111
 v. Hubbard, 936, 1154, 1860, 1868, 1980,
 2031, 2033
 v. Jarrell, 1758
 v. Knous, 902
 v. Morton, 829
 v. Ricart, 1980
 v. Savage, 2029, 2030
 v. Shaw, 545, 1223, 2090
 v. Smith, 1277
 v. Town, 2223
 Hubbell *v.* Broadwell, 909
 v. Canady, 1386, 1407, 1408, 1431, 1441
 v. East Cambridge Five Cent Savings
 Bank, 106, 109, 122, 132
 v. Medbury, 1621, 1781
 v. Moulson, 800, 1993, 2085, 2184, 2185
 v. Sibley, 2147, 2175
 Hubby *v.* Nubby, 2125
 Hube *v.* Hube, 516
 Huber's Appeal, 1655
 Huber *v.* Huber, 648
 v. Reiley, 2324
 Huckabee *v.* Billingsley, 1712, 1722, 1760, 1778,
 1801
 Huckins *v.* Straw, 2063
 Huddleston *v.* Lazenby, 216
 Hudnall *v.* Burkle, 719
 Hudnit *v.* Nash, 2148
 Hudson *v.* Coppard, 1184
 v. Dismukes, 199
 v. Poindexter, 2633
 v. Porter, 1205
 v. Putney, 2180
 v. Revett, 2339, 2340
 v. Steere, 711, 776
 v. Treat, 1945
 v. Wheeler, 1263, 1269, 1293
 Hudspoth *v.* Harrison, 1430
 Huebsch *v.* Scheel, 520, 810
 Huebschmann *v.* McHenry, 61
 Huerstel *v.* Lorillard,
 Huff *v.* Earl, 1620
 v. Farwell, 2155
 v. McAuley, 54, 55, 2214, 2240, 2313
 Huffell *v.* Armistead, 1311, 1327, 1330, 1342,
 1343
 Huffman *v.* McDaniel, 1003
 v. Starks, 1010, 1013
 Hufman *v.* Starks, 2259
 Huger *v.* Dibble, 1301, 1303, 1315
 Huggins *v.* Hall, 2148
 Hugh *v.* Birge, 1202
 Hughes *v.* Blackwell, 2095
 v. Boyd, 271
 v. Brown, 1660
 v. Carne, 1985, 1986
 v. Chatham, 1273, 1288, 1289
 v. Devlin, 1980
 v. Edwards, 1860, 1863, 1995, 2000, 2014,
 2027, 2037, 2042, 2046, 2048, 2049, 2078,
 2094, 2095, 2146, 2168, 2174
 v. Graves, 2155, 2299
 v. Holliday, 1508
 v. Hughes, 1908
 v. Kearney, 852, 2008
 v. Lane, 909
 v. Palmer, 1058, 1138
 v. Parker, 999
 v. Patterson, 2149
 v. Providence, 2206
 v. Robotham, 1165
 v. Shaw, 795
 v. Sheaff, 2043, 2044, 2053
 Hughes *v.* Vanstone, 1152
 v. Watson, 905, 908
 v. Watt, 1159, 1502
 v. Wood, 1066, 1245
 v. Worley, 2030, 2140
 Hughes, Den. ex. d., *v.* Shaw, 914
 Hughlett *v.* Harris, 573, 574, 577
 v. Hughlett, 1735
 Hugley *v.* Gregg, 764
 Huguein *v.* Baseley, 1801
 Hugunin *v.* Cochrane, 832
 v. Dewey, 1481
 Hukill *v.* Myers, 1151
 Hulburt *v.* Emerson, 405
 Hulett *v.* Inlow, 1024, 1919, 1941, 1945, 1951
 v. Nugent, 1310
 Hulick *v.* Scovill, 2347
 Hulings *v.* Guthie, 2120
 Hull *v.* Hull, 662, 1359
 v. Culver, 488
 Hull, Doe d., *v.* Greenhill, 1579
 Hull, Doe d., *v.* Wood, 1080, 1265, 1306, 1320,
 1325
 Hullenbeck *v.* McDonald, 225
 Hulme *v.* Tenant, 1373, 2012
 Hulseman *v.* Griffiths, 2268
 Hulsey *v.* Hulsey, 661
 Hultain *v.* Munigle, 1274
 Humas *v.* Scruggs, 931
 Humberston *v.* Humberston, 1693
 Humble *v.* Bowman, 337
 v. Langston, 1073
 Hume *v.* Beale, 1661
 v. Gossett, 1407, 1503
 v. Horn, 645
 v. Tenant, 1836
 v. Taylor, 1044
 Humes *v.* Scruggs, 792, 853, 915
 v. Providence Washington Ins. Co., 631
 Hummer *v.* Schott, 2008
 Humphrey *v.* Brown, 1018
 v. Phinney, 823, 841, 843
 v. Wait, 1197
 Humphreys *v.* Brogden, 2231, 2232, 2233, 2234
 v. Frank, 1317
 v. Harrison, 576
 v. Hurd, 1999, 2063, 2094
 v. Newman, 2121
 Humphries *v.* Brogden, 64, 92, 93, 94, 199
 v. Humphries, 539, 540, 1256, 1261, 1275,
 1281, 1324
 v. Hoffman, 2296, 2298
 v. Rogden, 66
 v. Smith, 1323
 Humphries, Den. d., *v.* Humphries, 1303
 Hungerford *v.* Anderson, 308
 Hungunin *v.* Cochrane, 832
 Hunnewell *v.* Taylor, 1981, 1982
 Hunsucker *v.* Smith, 801
 Hunt *v.* Acre, 733, 736, 2146
 v. Adams, 1701
 v. Allgood, 336
 v. Amidon, 1074, 1101
 v. Bailey, 1131, 1133, 1315, 1316, 1348
 v. Bass, 1756, 1766, 1767
 v. Bay State Iron Co., 96, 97, 116, 141,
 142
 v. Benson, 825
 v. Browne, 1185
 v. Coison, 1289
 v. Comstock, 981, 1284
 v. Cope, 1174
 v. Crawford, 1756
 v. Danforth, 1075
 v. Ellison, 2175
 v. Frazier, 2331
 v. Hunt, 2, 806, 808, 809, 810, 1464, 1580,
 2016, 2091, 2094, 2095, 2096, 2097,
 2102, 2321, 2363
 v. Johnson, 647, 2315, 2358
 v. Matthews, 795
 v. Maynard, 2184

Hunt v. McConnell, 2155
v. Morton, 1131, 1135, 1254, 1255, 1319
 1337
v. Moore, 1646
v. Mullanphy, 105, 108, 112, 116, 122, 135,
 138, 144, 145
v. Rousmanier, 1804, 1830, 1840, 1843
v. Stiles, 2157
v. Thompson, 662, 771, 920, 1072, 1115,
 1717, 1757, 2257
v. Watkins, 47, 509, 510, 511, 537, 539
v. Wing, 1245
v. Wolfe, 1132
v. Wright, 1858, 1972, 1973
Hunter, Matter of, 1486
Hunter v. Bilyen, 1649
v. Chrisman, 2298
v. Dennis, 2170
v. Fisher, 1757
v. Galliers, 1141
v. Jones, 1158, 1208, 1209
v. Macklaw, 2149
v. Martin, 1963
v. Osterhoudt, 1156, 1861, 1868
v. Parker, 1042
v. Potts, 368, 719, 753, 2057, 2288
v. Silvers, 1052
v. Stembridge, 1629, 1631
v. Watson, 292
v. Whitfield, 2272
v. Whitworth, 592, 593, 620, 623
Huntington v. Allen, 2298
v. Asher, 2212, 2214
v. Legroes, 1947
v. Russell, 121, 549, 553, 564, 1153
v. Smith, 2104
Huntzinger v. Philadelphia Coal Co., 42
Hurd v. Cass, 585, 588, 670, 679, 1514
v. Coleman, 2174
v. Curtis, 1069, 1070
v. Cushing, 475, 477, 478, 481, 521
v. Grant, 861, 864, 867, 870
v. Miller, 2271
v. Robinson, 2027, 2029
v. Whitsett, 1315, 1316, 1327, 1329, 1331
Hurdle v. Outlaw, 2
Hurlbert v. Post, 992, 1169
Hurlburt v. Emerson, 414, 415
Hurlbut v. Post, 1128
Hurleman v. Hazlett, 708
Hurley v. Bannan, 2050
v. Estes, 1994
Hurly v. Barned, 2048
Hurn v. Keller, 2333
v. Soper, 2349
Huron College v. Wheeler, 2109
Hurrell, Doe d., v. Burrell, 309
Hurst v. Bell, 2020
v. McNeil, 1298, 1558, 1559
v. Rodney, 1075, 1117, 2262, 2263, 2264
v. Wilson, 2099
Hurt v. Fisher, 76
Huss v. Stephens, 214, 672
Hussey v. Jewett, 1031
Husted's Appeal, 840, 841
Huston v. Curl, 1947
v. Markley, 1594, 1963
v. Neil, 824
v. Seeley, 733, 735
v. Springer, 1891
v. Wickersham, 520
Hutchings v. Carleton, 809
v. Dixon, 645, 653
v. Heywood, 298, 299, 1558, 1579, 1746
v. Hutchings, 759
v. Kimmell, 596, 751, 756
v. Lee, 1616
v. Lowe, 2308
Hutchins v. Byrnes, 2013
v. Carleton, 2103, 2111
v. King, 54, 55, 2015, 2022, 2080
v. Masterson, 103, 107, 116, 117, 135, 2080

Hutchins v. Shaw, 129
v. State, 817
v. State Bank, 42, 43, 1835
Hutchinson, Re, 1591, 1824
Hutchinson's Case, 641
Hutchinson v. Brown, 1033
v. Chase, 1969
v. Copestake, 2246
v. Dearing, 2064
v. Ford, 2020
v. Kay, 109, 120
v. Lloyd, 1714
v. Lord, 1714, 1724
v. Potter, 1274
v. Tindall, 1592
Hutchinson's Case v. Bradley's Case, 641
Hutchman v. Waltam, 1993
Huth v. Carondelet, 1029, 1158
Huttemeier v. Albros, 2241
Hutton v. Benkard, 1807
v. Duey, 1561
v. Moore, 2007
Huxford v. Milligan, 397
Huxtep v. Brooman, 307
Huyck v. Andrews, 2211, 2215
Huyler v. Atwood, 2070, 2072
Huyser v. Chase, 1283, 1327, 1329, 1335, 1336
Hyatt v. Griffiths, 1316
v. James, 2059
v. Pugsley, 2297
v. Spearman, 1496, 1504
v. Wood, 1285, 1351, 1356
Hyde v. Barney, 686
v. Cookson, 62
v. Goodnow, 2056
v. Hyde, 1464
v. Hyden, 1648, 1700
v. Olds, 1794
v. Skinner, 1009
v. Stone, 1246, 1904, 1905, 1969
v. Warren, 2159
v. Woods, 74, 254, 274
Hydraulic Works Co. v. Orr, 199
Hyman v. Devereaux, 2159, 2160
v. Devereux, 2105, 2107
v. Kelly, 1099
Hyndman v. Hyndman, 2055, 2163, 2168
Hynes v. McDermott, 596
v. Redington, 1721

I.

Iaeger v. Bossieux, 836, 838, 839, 861, 862, 882,
 891, 909
Ibbetson v. Beckwith, 203
Iddings v. Bruen, 1769
v. Nagle, 1205, 1207
Ide v. Harwood, 3
v. Ide, 319, 322, 415, 416
Idle v. Cook, 372, 408
Iggulden v. May, 1008, 1009, 1098
Iglehart v. Crane, 2183
Iken v. Olenick, 1378, 1387, 1388, 1390, 1445
Ilderton v. Ilderton, 751
Iles v. Martin, 1703
Illingworth v. Miltonberger, 1151
Illinois & Mich. Canal Co. v. Chicago, 197
Illinois Cent. R. Co. v. Thompson, 2261
Illinois Midland R. Co. v. People, 1019
Illinois F. Ins. Co. v. Station, 2114
Illinois R. Co. v. Indiana A. R. Co., 2361
Imboden v. Hunter, 1770
Imlay v. Huntingdon, 1373, 1562, 1608, 1694
Imperial Fire Co. v. Dunham, 2113
Importers & Traders' Ins. Co. v. Christie, 1143
Inches v. Leonard, 2093, 2094, 2146
Indiana Ins. Co. v. Coquillard, 2116
*Indianapolis Manufacturers & Carpenters'
 Union v. Cleveland C. C. R. Co.*,
 1111, 1121, 1122, 1141
Ingalls v. Morgan, 2154, 2179, 2180

Ingals *v.* Plamondon, 2235
 Inge *v.* Boardman, 936
 Ingersoll *v.* Ingersoll, 665
 v. Sargeant, 2253
 v. Sargent, 2262
 v. Sawyer, 2169
 v. Sergeant, 59, 251, 1071, 2253
 Ingham *v.* White, 646
 Inglebright *v.* Hammond, 1209, 1698
 Inglehart *v.* Arminger, 2007
 v. Crain, 2153
 v. Crane, 2180
 Inglis *v.* Trustees of Sailors' Snug Harbor, 1591
 Ingraham *v.* Baldwin, 986, 987, 1148, 1213, 1309, 2345
 v. Drennell, 2248
 v. Edwards, 1041
 v. Fraley, 1593
 v. Hutchinson, 2223
 v. Kirkpatrick, 1795
 v. Wheeler, 1795
 Ingram *v.* Little, 2339
 v. Morris, 778
 Inhabitants of Cheshire *v.* Inhabitants of Shutesbury, 2021
 Inhabitants of Reading *v.* Inhabitants of Weston, 2046, 2047
 Inhabitants of Sudbury *v.* Inhabitants of Stow, 202
 v. Jones, 61, 62, 63
 Inhabitants of West Roxbury *v.* Stoddard, 70, 71
 Inhabitants of Windham *v.* Portland, 737
 Inman *v.* Jackson, 335, 1810,
 Innes *v.* Crawford, 1925,
 Innis *v.* Campbell, 522
In re Commercial Bulletin Co., 2263
In re Fowler, 2260
In re Frith, 1974
In re Rensselaer & S. R. Co., 2237
In re Locke, 2253
In re Roper, 1836
 Insurance Co. *v.* Addicks, 2068
 v. Scott, 1201
 International Life Assoc. Co. *v.* Commissioners of Texas, 1554
 International Life Ins. Co. *v.* Scales, 2123
 Inwood *v.* Twine, 1022
 Ireland *v.* Nicholls, 1058, 1155, 1156
 v. Woolman, 2153
 Ireson *v.* Wenn, 1250
 Ironsides *v.* Ironsides, 633
 Irvin's Appeal, 291
 Irvin *v.* Armistead, 711
 v. Greever, 682, 699, 1640
 v. Wood, 1199, 1202
 Irvine *v.* Dunham, 1659
 v. Hanlin, 1894, 1895
 v. Irvine, 2301
 v. Marshall, 1585, 1639, 1652, 1661
 v. Scott, 1304
 v. Sullivan, 1628
 Irving *v.* Richardson, 2089
 Irwins *v.* Irwins, 865
 Irwin's Appeal, 1734
 Irwin *v.* Bank of United States, 59, 251
 v. Covode, 479, 494, 495, 561, 811, 812
 v. Cox, 1336, 1337
 v. Dixon, 572
 v. Dunwoody, 414
 v. Ivers, 778, 1610, 1638, 1641, 1696, 1697, 1699
 v. Lewis, 1499
 Isaac *v.* Clarke, 1213
 Isaacs *v.* Gearheart, 1309
 Isenhart *v.* Brown, 936
 Isham *v.* Bennington Iron Co., 2013, 2342, 2366
 v. Delaware & L. R. Co., 1792
 v. Iron Co., 42
 Isherwood *v.* Oldknow, 1040
 Isom *v.* First National Bank, 1777

Israel *v.* Israel, 1894
 Ist *v.* Morgan, 1292
 Ivas, *Re*, 2266
 Ive *v.* King, 1884
 Iverson *v.* Shorter, 1511
 Ives, *Re*, 1114
 Ives *v.* Ashley, 1776
 v. Davenport, 1831, 1832
 v. Ives, 1282, 1356
 v. Mills, 1461, 1490
 v. Sawyer, 1349, 2346
 v. Williams, 1131, 1317
 Ivey *v.* Lalland, 2056
 Ivie *v.* Ivie, 491
 Ivimey *v.* Stocker, 2226, 2229, 2244
 Ivory *v.* Burns, 1592, 1797
 Izard *v.* Bodine, 1894
 Izon *v.* Gordon, 1343
 v. Gorton, 1083, 1177, 1179, 1200, 1254, 2270

J.

Jack *v.* Dougherty, 2348, 2349
 v. Nabor, 136
 Jackling, Denn d. *v.* Cartwright, 1334
 Jackman *v.* Hallock, 2007
 v. Ringland, 1647
 Jacks *v.* Dyer, 718, 733, 735, 739
 Jackson *v.* Adams, 215
 v. Aldrich, 1269, 1284, 1285, 1293
 v. Allen, 1058, 1861, 1862, 1868, 2364
 v. Andrews, 564, 2322, 2331
 v. Ashburner, 991, 993
 v. Babcock, 338, 2213
 v. Bain, 2272
 v. Ball, 535
 v. Bateman, 1613
 v. Bard, 2353
 v. Beach, 236
 v. Berner, 2206, 2297
 v. Billinger, 415
 v. Birner, 2297
 v. Blodget, 2107
 v. Blodgett, 2111
 v. Bowen, 2029, 2303
 v. Bradt, 973, 1255, 1261, 1269, 1271, 1278, 1293, 1320
 v. Brown, 2014, 2016
 v. Brownson, 555, 557, 558, 2000
 v. Brush, 1625
 v. Bryan, 1256, 1271, 1280, 1299, 1319, 1337
 v. Bull, 340, 342, 343
 v. Burtis, 1813
 v. Cairnes, 1364
 v. Carswell, 1999
 v. Carry, 1556, 1559
 v. Catlin, 1543
 v. Cator, 564
 v. Churchill, 865, 866, 867, 868, 915, 916, 917, 918
 v. Chrysler, 1868
 v. Clark, 1755
 v. Cleveland, 1646
 v. Coleman, 1815
 v. Collins, 1144, 1154
 v. Cooley, 1314
 v. Coombs, 1023
 v. Crafts, 2131
 v. Creighton, 1380
 v. Crysler, 1861
 v. Cuerder, 1149
 v. Davis, 1149, 1217, 1348
 v. Deese, 1980
 v. Delacroix, 1001
 v. Delancey, 2065
 v. Delancy, 202, 307, 311, 1149
 v. Dewitt, 829, 2074, 2182
 v. Dillon, 2318, 2348
 v. Dobbin, 1223

Jackson *v.* Dominick, 2060
v. Dubois, 2077
v. Dunsbagh, 236, 237, 830, 1569, 2318,
 2319, 2320
v. Dysling, 2247
v. Eddy, 1128, 1168, 1169
v. Edwards, 726, 746, 747, 886, 887, 893,
 1808, 1809
v. Ellis, 1273
v. Estey, 2335
v. Farmers' Mutual Fire Insurance Com-
 pany, 720, 1092
v. Feller, 1648, 1653
v. Ferris, 1730, 1810, 1814, 1843
v. Fitzsimmons, 217
v. French, 1270
v. Gardner, 1160
v. Garnsey, 202
v. Given, 1663
v. Graham, 202
v. Groat, 255
v. Harder, 1976
v. Harris, 332, 340, 342, 343
v. Harrison, 1060, 1061, 1123, 1138, 1150,
 1154, 1155, 1204
v. Harsen, 970, 990, 1108
v. Hartwell, 1540, 1555
v. Hathaway, 89
v. Hendricks, 359
v. Henry, 2159
v. Hinman, 1222
v. Hixon, 865, 878
v. Hobbhouse, 252, 257
v. Hodges, 652
v. Holloway, 1368
v. Howe, 207, 209
v. Hubble, 2322, 2323
v. Hughes, 1266, 1306, 1313, 1337
v. Hull, 2077
v. Ingraham, 18, 195, 196
v. Jackson, 1633, 1640, 1884
v. Jansen, 1810
v. Johnson, 693
v. Joy, 212, 2295
v. King, 1034, 2345
v. Kipp, 764, 780, 1060
v. Kniffen, 234
v. Lawrence, 2168, 2170
v. Leonard, 2299
v. Littell, 2301
v. Lodge, 2045, 2050
v. Losee, 2152
v. Lunn, 216, 2014, 2347
v. Massachusetts Mut. Fire Ins. Co.,
 2115, 2116, 2118
v. McCall, 517
v. McConnell, 1024, 1940
v. McKenny, 237, 2319, 2320, 2358
v. McLeod, 1310, 1355
v. Mancius, 1142
v. Martin, 340, 342
v. Matsdorf, 1640, 1647, 1740, 1764, 1777
v. Mayo, 1031
v. Mersereau, 2099
v. Merrill, 305, 307, 309, 312, 331, 335, 340,
 341, 342, 1770
v. Meyers, 281, 285, 477, 521, 522
v. Miller, 1271, 1290
v. Moore, 1723
v. Morse, 1614, 1635, 1638, 1641, 1648
v. Mowrey, 2260
v. Newton, 211
v. Neeley, 2359
v. Newcastle, 2248
v. Odell, 1109, 1168
v. O'Donaghy, 874
v. Parker, 202, 975, 2295
v. Parkhurst, 1346, 1347, 1350
v. Patterson, 1133, 1135, 1316
v. Pesked, 553
v. Phillips, 1685
v. Phipps, 1016, 2034

Jackson *v.* Pierce, 1261, 1713, 1742
v. Pixley, 517
v. Porter, 2296
v. Post, 2364
v. Price, 517
v. Richards, 2045
v. Robbins, 317, 319, 337, 338
v. Robins, 1815
v. Rogers, 209, 1145, 1266, 1273, 1280,
 1286
v. Rounesville, 30, 31, 32, 33, 36, 83
v. Rowland, 1149
v. Salmon, 1134, 1254, 1315, 1318, 1334
v. Sample, 1287
v. Schaubert, 1605, 1663
v. Schoonmaker, 210, 2338, 2355
v. Schultz, 245, 267
v. Scissam, 1223
v. Sebring, 2316
v. Sellick, 605
v. Sharp, 212, 2295
v. Shauber, 2094
v. Sheldon, 2353
v. Shelton, 1423, 1424, 1505
v. Shepard, 2335
v. Schultz, 263
v. Silvernail, 255, 1204
v. Slyck, 1707
v. Smith, 1898
v. Spear, 1217
v. Sprague, 2357
v. Staats, 322, 340
v. Stackhouse, 2129
v. Stautts, 237
v. Stephens, 2295
v. Sternbergh, 1615
v. Stevens, 1643, 1940, 1952
v. Stoats, 2319
v. Swart, 237
v. Thomas, 2296
v. Tibbits, 1897, 1917
v. Todd, 2343
v. Topping, 266, 555, 564, 565, 1139, 1859,
 1862
v. Torrence, 1949
v. Trullinger, 2211
v. Van Zandt, 227, 228, 401, 471
v. Veeder, 1807
v. Vincent, 970, 1140
v. Walker, 1747
v. Walsh, 1768
v. Warren, 1098, 2076, 2157
v. Waters, 18, 2297
v. Welden, 1149
v. Wells, 533
v. Westerfield, 267
v. Wheat, 2295, 2296, 2297
v. Whedon, 1148, 1213
v. Whitbeck, 1915
v. Willard, 1995, 1997, 2000, 2107
v. Williard, 2103, 2104
v. Wilsey, 1269, 1293, 1299, 1319, 1344
v. Winne, 752
v. Wood, 517, 2094, 2174, 2318
v. Woodman, 209
 Jackson *d.* Henderson *v.* Davenport, 1843
 Jackson *d.* Van Vechten *v.* Sill, 2047
 Jackson *ex d.* Allen *v.* Florence, 2318
 Jackson *ex d.* Anderson *v.* McLeod, 1350
 Jackson *ex d.* Ballou *v.* Campbell, 2101
 Jackson *ex d.* Barclay *v.* Blodgett, 2099
ex d. Hopkins, 2097
 Jackson *ex d.* Bartolmew *v.* Hughes, 1307
 Jackson *ex d.* Bauers *v.* Crafts, 1869
 Jackson *ex d.* Bayard *v.* Blodget, 2101
 Jackson *ex d.* Beekman *v.* Sellick, 600, 602, 603,
 612, 613, 806
 Jackson *ex d.* Benson *v.* Matsdorff, 830
 Jackson *ex d.* Benton *v.* Langhhead, 1076, 1269
 Jackson *ex d.* Blanchard *v.* Allen, 1155, 1156
 Jackson *ex d.* Flecker *v.* Whitford, 1213, 1223
 Jackson *ex d.* Logert *v.* Schaubert, 1806, 1810

- Jackson ex d. Bradstreet *v.* Huntington, 211,
212
Jackson ex d. Bratt *v.* Tibbitts, 1913, 1914, 1916
Jackson ex d. Brayton *v.* Burchin, 985, 986
Jackson ex d. Brouck *v.* Cryslar, 1861
Jackson ex d. Brown *v.* Hinman, 1148
Jackson ex d. Browne *v.* Hinman, 1148
Jackson ex d. Bush *v.* Coleman, 338
Jackson ex d. Cadwallader *v.* Walsh, 2163
Jackson ex d. Caldwell *v.* King, 986
Jackson ex d. Campbell *v.* Holloway, 1025
Jackson ex d. Church *v.* Brownson, 543, 544, 806
v. Miller, 1256, 1344, 1807
Jackson ex d. Clark *v.* O'Donaghy, 717, 718,
834
Jackson ex d. Clows *v.* Vanderheyden, 718,
733, 736, 739, 1215
Jackson ex d. Colden *v.* Brownell, 1238
Jackson ex d. Colton *v.* Harper, 1213, 1220,
1222, 1223
Jackson ex d. Cortlandt *v.* Parkhurst, 1354
Jackson ex d. Culverhouse *v.* Beach, 1657
Jackson ex d. Curtis *v.* Bronson, 2100, 2101,
2111
Jackson ex d. Davy *v.* De Walts, 1223
Jackson ex d. Dunbar *v.* Todd, 1031
Jackson ex d. Erwin *v.* Moore, 514, 1588, 1590,
1923
Jackson ex d. Gansevoort *v.* Lunn, 1656, 1657
Jackson ex d. Gillespy *v.* Woolsey, 517
Jackson ex d. Gouch *v.* Wood, 501
Jackson ex d. Gratz *v.* Catlin, 1544
Jackson ex d. Hammond *v.* Veeder, 1823
Jackson ex d. Hardenburgh *v.* Schoonmaker,
489, 514, 630
Jackson ex d. Harris *v.* Harris, 536
Jackson ex d. Haverly *v.* French, 1309
Jackson ex d. Herrick *v.* Babcock, 302, 306, 311,
1815
Jackson ex d. Hopkins *v.* Leek, 2318
Jackson ex d. Houseman *v.* Sebring, 2316,
2318
Jackson ex d. Hudson *v.* Alexander, 2318,
2360
Jackson ex d. Hull *v.* Babcock, 2212
Jackson ex d. Hunt *v.* Luquiere, 535
Jackson ex d. Jadwin *v.* Joy, 518
Jackson ex d. Jones *v.* Striker, 518
Jackson ex d. King *v.* Burts, 1843
Jackson ex d. Limerick *v.* Voorhis, 2095
Jackson ex d. Livingston *v.* Bryan, 1146, 1269
v. Delancy, 2084, 2085, 2104
v. Kipp, 1155
v. Krisselbrack, 993
Jackson ex d. Locksell *v.* Wheeler, 1146, 1150,
1269
Jackson ex d. Loucks *v.* Churchill, 940, 944,
945, 946, 955, 965
Jackson ex d. Ludlow *v.* Meyers, 531, 532,
1556, 1557, 1559, 1566
Jackson ex d. Mackey *v.* Salter, 2075, 2095
Jackson ex d. Marriott *v.* Gumaer, 2345
Jackson ex d. Martin *v.* Pratt, 2094
Jackson ex d. McCrackin *v.* Wright, 829
Jackson ex d. McCrae *v.* Mancius, 489, 497, 501,
514, 515, 576, 744
v. Dunlap, 1016
Jackson ex d. Merritt *v.* Gumaer, 986
Jackson ex d. Murphy *v.* Van Hoesen, 496, 499,
502
Jackson ex d. Newkirk *v.* Embler, 533
Jackson ex d. Norton *v.* Sheldon, 1156
v. Willard, 2101, 2111
Jackson ex d. Ostrander *v.* Rowan, 1283,
1298
Jackson ex d. Pearson *v.* Housel, 2, 305, 307,
308, 309, 310
Jackson ex d. Phillips *v.* Aldrich, 1296
Jackson ex d. Pintard *v.* Bodle, 1019
Jackson ex d. Randall *v.* Davis, 2132
Jackson ex d. Rosevelt *v.* Stackhouse, 2132
Jackson ex d. Ruggles *v.* Martin, 341
Jackson ex d. Russell *v.* Rowland, 1148, 1220,
1348
Jackson ex d. Sagoharie *v.* Dobbin, 1213
Jackson ex d. Salisbury *v.* Fish, 2318
Jackson ex d. Saunders *v.* Caldwell, 2318
Jackson ex d. Schaick *v.* Davis, 1150
v. Vincent, 483
Jackson ex d. Schuyler *v.* Corliss, 1056, 1105,
1113
Jackson ex d. Seelye *v.* Morse, 1356, 1635
Jackson ex d. Shaw *v.* Spear, 1160
Jackson ex d. Sitzer *v.* Waltermire, 712
Jackson ex d. Smith *v.* Adams, 672, 673, 1657
v. Stewart, 1213, 1268, 1272
Jackson ex d. Stansbury *v.* Farmer, 1356
Jackson ex d. Stevens *v.* Silvernail, 1104, 1113
v. Stevens, 1074, 1930
Jackson ex d. Stewart *v.* Kingsley, 1283
Jackson ex d. Stoutenburg *v.* Murray, 518
Jackson ex d. Sufferin *v.* McConnell, 1024, 1930,
1931, 1933, 1945
Jackson ex d. Swartwout *v.* Johnson, 489, 513,
517, 589, 590, 592, 593, 598, 602, 603,
604, 605, 607, 608, 612, 614, 621, 622,
623, 624, 629, 630, 602, 2291
Jackson ex d. Ten Eyck *v.* Richards, 488, 1016
Jackson ex d. Totten *v.* Spell, 718, 733, 734, 736,
739, 741
Jackson ex d. Trowbridge *v.* Dunsbagh, 1566,
2084, 2120, 2358
Jackson ex d. Van Allen *v.* Rogers, 1270
Jackson ex d. Van Cortlandt *v.* Parkhurst, 1270,
1271, 1355
Jackson ex d. Van Denburg *v.* Bradt, 1270, 1271
Jackson ex d. Van Rensselaer *v.* Andrew, 565
v. Collins, 488, 1146, 1148
Jackson ex d. Van Schaick *v.* Davis, 1108
v. Vincent, 1140, 1144, 1146, 1149
Jackson ex d. Viely *v.* Guerdin, 1273
Jackson ex d. Wadworth *v.* Wendell, 501
Jackson ex d. Wallace *v.* Carpenter, 985, 986,
1030, 1031
Jackson ex d. Walsh *v.* Colden, 2120
Jackson ex d. Webber *v.* Harsen, 981, 2314
Jackson ex d. Weidman *v.* Hubble, 1074
Jackson ex d. Weldon *v.* Harrison, 1104, 1107,
1155
Jackson ex d. Wells *v.* Wells, 536
Jackson ex d. Whitbeck *v.* Deyo, 1282
Jackson ex d. White *v.* Cary, 1557
Jackson ex d. Whittick *v.* Deigo, 1309
Jackson ex d. Williams *v.* Miller, 1108, 1113,
1148, 1348, 1586, 1638, 1645, 1666
Jackson ex d. Wills *v.* Stiles, 1148, 1213, 1218
Jackson ex d. Winthrop *v.* Ingraham, 2276
Jackson ex d. Wood *v.* Salmon, 1135, 1307
v. Swart, 1063, 2316, 2319, 2320, 2362
Jacob *v.* Rice, 634
v. State, 706
Jacobs *v.* Allard, 2225
v. Miller, 1919, 1932
v. Turpin, 2155
Jacomb *v.* Harwood, 1021
Jacoway *v.* Gault, 2037, 2364
v. McGarragh, 718, 737, 838
Jacques *v.* Edgell, 1766
v. Ennis, 630, 949, 652
v. M. E. Church, 2012
v. Short, 1075, 2262, 2359
Jacquith *v.* Hudson, 1872
Jaffe *v.* Harteau, 1054, 1066, 1110, 1126, 1175
v. Skae, 2257
Jaggers *v.* Estes, 282
Jacques *v.* Millar, 999
Jamaica *v.* Hart, 1139
Jamaica Pond Aqueduct Corp. *v.* Chandler,
283, 969, 2211, 2245
James' Claim, 416
James *v.* Allen, 1638, 1683
v. Bion, 2169
v. Cowing, 1703
v. Crawford, 2304

- James *v.* Dean, 1204, 1708
v. Dubois, Den ex d., 401, 448, 450, 475
v. Field, 801
v. Finney, 994
v. Frearson, 1733
v. Fulcro, 1697, 1699
v. Fuste, 2140
v. Hubbard, 2154
v. Jacques, 2177
v. Johnson, 809, 2096, 2109, 2110, 2121
v. Johnston, 2042
v. Mayrant, 1375
v. Mooray, 520
v. Morey, 692, 803, 808, 809, 810, 811, 1047,
 1163, 1164, 1579, 1580, 2095, 2096,
 2097, 2107, 2110, 2121
v. Patterson, 1215, 1284
v. Rice, 2002
v. Roberts, 2060
v. Rowan, 763
v. Thomas, 2057
v. Worcester, 2086
Jameson *v.* Smith, 1605, 1806, 1810
Jamieson *v.* Bruce, 1997, 1998, 2076
Jamison *v.* Glasscock, 1577, 1620, 1644, 1766,
 1769, 1707
v. Graham, 1922
Janet *v.* Janes, 883
v. Jenkins, 2223, 2224
v. Throckmorton, 1783
Janeson *v.* Janeson, 2302
Jansey *v.* McCahill, 1044
January *v.* January, 1517
v. Martin, 1758
Jaques *v.* Gould, 1181, 2251, 2259
v. Methodist Episcopal Church, 1373
v. Miller, 1017
v. Weeks, 2031, 2120, 2168
Jarboe *v.* Maulry, 999
Jardain *v.* Savings Fund Assoc., 1428
Jarechi *v.* Philharmonic Society, 109, 121, 135,
 138, 139
Jarmon *v.* Wiswall, 2166
Jarratt *v.* McDaniel, 2020
v. Steele, 29
Jarstadt *v.* Smith, 2241
Jarvis *v.* Brooks, 130, 824
v. Dutcher, 2002, 2003, 2015, 2120
v. Moe, 1391, 1392, 1457, 1465, 1504, 1576
v. Prentice, 1576
v. Woodruff, 2174, 2175
v. Wyatt, 439
Jason *v.* Eyres, 2168
Jasper *v.* Maxwell, 1577
Jaycox *v.* Collins, 670
Jecko *v.* Taussig, 228
Jee *v.* Audley, 407
Jefferson *v.* Coleman, 2151
Jefferson Branch Bank *v.* Skelly, 1516
Jefferson Ins. Co. *v.* Cotheal, 2115
Jefferson Medical College Case, 2254
Jefford *v.* Ringgold, 1031
Jeffrey *v.* Honywood, 324, 325
v. Neale, 1102
Jeffries *v.* Whittick, Doe d., 1309
v. Williams, 94
Jeliott *v.* Rhode, 1323
Jencks *v.* Alexander, 779, 1658, 1843
Jeneson *v.* Jeneson, 2151
v. Graves, 1612
Jenki is *v.* Clement, 304, 305, 306, 309, 335
v. Compton, 1821
v. Continental Ins. Co., 2137, 2138, 2172
v. Eldridge, 992, 1616, 1644, 2046, 2048,
 2049
v. Fahey, 21, 640, 1981, 1986
v. Freyer, 1980, 2154
v. Frink, 1619, 1622, 1738
v. Gething, 120, 126
v. Green, 2083
v. Harrison, 1485
v. Holt, 897, 964
Jenkins *v.* Hopkins, 1093
v. Jenkins, 282, 721, 756, 769, 799, 1060,
 1061, 2256
v. Jones, 2161
v. Kemishe, 1626
v. McCurdy, 100
v. Pye, 1639
v. Redding, 1288
v. Smith, 2148
v. Stetson, 2031, 2033
v. Volz, 1425
v. Walter, 1719
v. Young, 1553, 1556, 1557
Jenks *v.* Backhouse, 1885, 1968
v. Central Ins. Co., 2073
v. Ward, 729, 1092, 1093
Jenne *v.* Marble, 647, 648
Jenner *v.* Clegg, 2252
v. Morgan, 1172
v. Turner, 270
Jenners *v.* Howard, 1032, 1033
Jenness *v.* Robinson, 1921
Jennings *v.* Alexander, 1107, 1124, 1132
v. Bragg, 1034
v. Conboy, 1807, 1808, 1809
v. Jennings, 2154
v. McComb, 995, 996, 998, 1262, 1284,
 1305
v. Smith, 75
v. Teague, 1842
v. Ward, 2051
Jennison *v.* Hapgood, 301, 814, 817, 1455, 2163
v. Walker, 2218, 2228, 2245, 2247
Jennor *v.* Hardie, 1816
Jenny *v.* Andrews, 1821, 1825
v. Jenny, 728, 794, 893, 913, 1576
Jepson *v.* Patrick, 1718
Jerman *v.* Orchard, 2358
Jerome *v.* McCarter, 2149
Jerritt *v.* Weare, 210
Jervaise *v.* Clark, 1037
Jervis *v.* Berridge, 554
v. Bruton, 442, 443
Jervoise *v.* Northumberland, 1693
Jeslyn *v.* Wyman, 2128
Jessen *v.* Swelgert, 1197, 1198
Jesser *v.* Gifford, 553
Jessup *v.* Bridge, 2018
Jesus College *v.* Bloom, 577
Jeter *v.* Fellowes, 368, 2058, 2289
v. Hewitt, 1516
v. Penn, 1237, 1239
Jew *v.* Wood, 1148
Jewell's Estate, 504, 509
Jewell *v.* Warner, 252, 396, 401, 402, 447, 470
Jewett *v.* Bailey, 2043
v. Berry, 1051
v. Brock, 1451
v. Burroughs, 234
v. Davis, 591
v. Draper, 2068, 2069, 2070
v. Hussey, 2298
v. Jewett, 2246, 2247
v. Keenholts, 47
v. Miller, 1766, 1767, 1768, 1770
v. Ricker, 2361
v. Siddons, 976
Jewett's Trustees *v.* Perrette, 1981
Jiggetts *v.* Davis, 416, 447, 472
v. Jiggetts, 794, 795, 913, 914
Jillson *v.* Wilcox, 405, 416
Joar *v.* Hodeg, 299
Jobe *v.* O'Brien, 2181
Jochen *v.* Tibbells, 1219
Joel *v.* Mills, 1677
Joest *v.* Williams, 1033
John & Cherry St., *Re*, 2327, 2328
Johns *v.* Church, 2027, 2028, 2029
v. Johns, 42, 45, 817
v. Reardon, 882, 900, 2122
Johnson's Appeal, 2282
Johnson's Petition, 278, 279

- Johnson *v.* Baker, 2354
v. Bantock, 2323
v. Bartlett, 2102
v. Bates, 2263, 2264
v. Bean, 210
v. Beasley, 2358
v. Beauchamp, 1276
v. Bennett, 75, 76
v. Blydenburgh, 2016
v. Boyles, 2349
v. Bradley, 666
v. Branch, 2354
v. Brown, 2148
v. Burford, 1947
v. Candage, 2074, 2075, 2013
v. Carter, 1023, 1352, 2212
v. Carpenter, 2109
v. Clark, 2051
v. Collins, 1005
v. Connecticut Bank, 1746
v. Cornet, 2103, 2111
v. Crowley, 2071
v. Cummings, 669
v. Cummins, 588, 678, 679, 1361, 2012
v. Cushing, 1825
v. Delony, 1502, 1690
v. Dixon, 1202
v. Donnell, 2142, 2144
v. Dougherty, 1622
v. Elking, 1427
v. Elkins, 1430
v. Elliot, 858
v. Elwood, 2336
v. Fleet, 1574, 1582, 1583, 1611, 1612
v. Fritz, 656, 678, 679, 684, 695
v. Futch, 2258
v. Gallagher, 2013
v. Gaylord, 1521
v. Gurley, 1138, 1150
v. Hannahan, 1351, 1357
v. Harmon, 2174
v. Hart, 195, 236, 1933, 1939, 2107
v. Harris, 1909, 1919
v. Harrison, 1451
v. Hines, 432, 2250
v. Hollifield, 1686, 1687
v. Hoffman, 1231
v. Hosford, 2074, 2171
v. Houston, 1999, 2078
v. Johnson, 297, 328, 411, 420, 422, 541,
542, 543, 545, 546, 552, 556, 557, 558,
575, 715, 757, 758, 899, 958, 1254, 1256,
1259, 1262, 1275, 1281, 1294, 1305, 1320,
1548, 1551, 1639, 1652, 2331
v. Jones, 1923, 1928
v. Jordan, 2207, 2224
v. Kerman, 307, 310, 312
v. Kessler, 1425, 1426
v. Leman, 1751
v. Leonards, 799, 2076, 2100
v. May, 1424, 1425
v. McIntosh, 14, 196, 197
v. McGrew, 2004
v. Miller, 791, 892, 1240, 2066, 2087
v. Monell, 2068, 2069, 2150
v. Morse, 731, 734, 848, 851
v. Morton, 331, 333
v. Moore, 741
v. Moser, 1420
v. Mosier, 1435
v. Muzzy, 1063
v. Nash, 2299
v. Neil, 847, 851, 852
v. Neill, 856
v. Nyce, 730
v. Oppenheim, 2223
v. Packer, 1030
v. Parcels, 831
v. Perley, 807, 841
v. Phoenix Life Ins. Co., 999
v. Plume, 760, 763
v. Quarles, 1646
- Johnson *v.* Rankin, 2325
v. Rayner, 2021
v. Rice, 2176, 2184
v. Richardson, 21, 976, 1424, 1425
v. Rogers, 646
v. Ronald, 1590
v. Shank, 1184
v. Sherman, 1108, 1109, 1117, 2050, 2129,
2264, 2265
v. Shields, 731, 733, 736, 739
v. Skillman, 2213
v. Smith, 504, 1120, 2045
v. Stagg, 2036, 2121, 2365
v. State, 755
v. Stewart, 1274
v. Stillings, 647
v. Sundry Articles of Mdse., 1456
v. Swains, 1904
v. Tatlinger, 135
v. Taylor, 1408, 1472, 1486
v. Thomas, 874, 875
v. Thompson, 2071
v. Thwatt, 1625
v. Thweatt, 1777
v. United States, 2306
v. Watson, 688
v. Watts, 1349
v. White, 2081, 2187
v. Whiton, 234
v. Williams, 2153, 2178, 2180
v. Wilson, 1977
v. Wiseman, 131, 133
v. Zink, 2150
- Johnson's Exrs. *v.* Wiseman's Exrs., 112, 113,
115, 121, 127, 128, 136
- Johnston *v.* Bates, 1159, 2263, 2265
v. Bush, 1466
v. Donovan, 2151
v. Eason, 1756
v. Gray, 1996, 1997, 2050, 2051
v. Gwathmey, 1777
v. Hargrove, 1154
v. Harmon, 2158
v. Hastie, 1194, 1195
v. Humphrey, 1782
v. Johnston, 647
v. Martin, 1384
v. Morrow, 2021
v. Riddle, 2065
v. Turner, 1407, 1410, 1411
v. Van Dyke, 725, 842, 844, 893
v. Zane's Trustees, 247, 254, 1748
- Johnstone *v.* Huddleston, 1162, 1254, 1308,
1343
v. Hull, 1185
- Johnstown Cheese Mfg. Co. *v.* Veghte, 2226
- Johnstown Iron Co. *v.* Cambria Iron Co., 88,
2189
- Jones' Appeal, 595, 1732, 1734
Jones, Ex parte, 456
Jones's Will, 249
Jones v. Andover, 2104
v. Bacon, 318, 1814
v. Barclay, 1955
v. Barmbelt, 533
v. Barter, 588, 1058, 1138
v. Bennett, 2285
v. Berkshire, 2038
v. Bird, 2232
v. Blumenstein, 1456
v. Bragg, 888, 890
v. Brandon, 1513, 1516
v. Brewer, 716, 718, 737, 739, 835, 849, 851,
854, 860, 861
v. Bright, 1200
v. Britton, 1451
v. Brown, 645, 655, 678, 683
v. Bush, 1574
v. Butler, 1031
v. Cable, 1882
v. Caldwell, 76
v. Candage, 2148

- Jones v. Carter, 1862
 v. Chandler, 1932, 1952
 v. Chapelle, 565
 v. Chappell, 549
 v. Chesapeake, etc., R. Co., 1869
 v. Chiles, 210
 v. Clark, 1149, 2065
 v. Clerk, 1294
 v. Clifton, 647
 v. Cohen, 1904, 1905
 v. Conde, 2009, 2158
 v. Crane, 1969
 v. Crittenden, 1517
 v. Crow, 2242
 v. Davies, 592, 624, 633, 670
 v. Davis, 2243
 v. Detroit Chair Co., 106, 122, 132, 133, 134, 1164
 v. Devore, 891
 v. Dexter, 1620, 1622
 v. Doe, 1857, 1860
 v. Dougherty, 1703, 1794
 v. Fenno, 2045
 v. Fleming, 769
 v. Flint, 49, 50, 51, 52, 54
 v. Fritchey, 1033
 v. Gardner, 729, 730, 1092, 1093, 1094
 v. Gerock, 720, 869, 877
 v. Goff, 1485
 v. Gibbons, 2109, 2110
 v. Gillman, 2156
 v. Green, 1872
 v. Gregg, 2038
 v. Guaranty & I. Co., 2023
 v. Guedrin, 2254
 v. Gundrin, 1925
 v. Habersham, 257, 1657, 1659
 v. Harraden, 1967
 v. Harridan, 1896
 v. Harris, 1373
 v. Hart, 1499
 v. Hill, 2258
 v. Hockman, 2296, 2297
 v. Hughes, 815, 820, 826, 888
 v. Hunt, 504
 v. Hunter, 757
 v. Hurst, 1806
 v. Hutchinson, 1276, 2261
 v. Jones, 236, 345, 445, 577, 751, 757, 759, 769, 850, 853, 856, 957, 959, 1259, 1269, 1277, 1282, 1290, 1754, 1768, 1822, 2005, 2025, 2334, 2349, 2353
 v. Doe d. Jones, 1261, 1275
 v. Jones' Exrs., 340
 v. Lackland, 2252, 2259
 v. Lapham, 2002, 2150
 v. Lewis, 1664, 1725, 1728
 v. Lipton, 2270
 v. Lloyd, 1690
 v. Lock, 1739
 v. Maffett, 1788
 v. Manley, 733, 736, 739, 838
 v. Massey, 1894, 1895
 v. Morgan, 446
 v. Marcey, 997
 v. Mills, 1308, 1311, 1331, 1336, 1337, 1341, 1342
 v. Morgan, 421, 425, 443, 1693
 v. McDougal, 1676
 v. McKee, 1701
 v. McMasters, 1657, 2014
 v. Myrick, 2155, 2180
 v. Neil, 865
 v. Nixon, 1314
 v. Oberclaim, 648
 v. Patterson, 870, 1364
 v. Percival, 2205, 2208
 v. Perry, 2324, 2329, 2331, 2332, 2333
 v. Phelps, 2124, 2125
 v. Porter, 211, 2297, 2298
 v. Potter, 1920, 1933
 v. Powell, 880, 898, 918, 944, 952, 954
- Jones v. Price, 1818
 v. Read, 2235
 v. Redder, 1623
 v. Reddick, 758
 v. Reed, 1060, 1151, 1154, 1155
 v. Rice, 1817
 v. Richardson, 2020
 v. Roberts, 794
 v. Robin, 2194
 v. Roe, 1571, 1572, 1849
 v. Salter, 270
 v. Say, 300, 1606
 v. Say and Seal, 1560
 v. Shay, 1264, 1278, 1280
 v. Sherrard, 509, 511, 519, 746, 2182
 v. Slubey, 1691
 v. Smith, 1773, 1776, 2110
 v. Stanton, 1990
 v. Statham, 2049
 v. Steinberg, 2166
 v. Tapling, 2246
 v. Timmons, 46
 v. Tipton, 1276, 2261
 v. Todd, 908
 v. Towne, 33, 36, 39, 40
 v. Trawick, 2047
 v. Verney, 1039
 v. Wagner, 91, 92, 2233, 2237
 v. Walker, 1869
 v. Webster, 2271
 v. Weed, 2157
 v. Whinnipeack Bank, 2101
 v. Whitehead, 566
 v. Williams, 2093
 v. Willis, 1319, 1324, 1327, 1329
 v. Wilson, 1690
 v. Winwood, 1844
 v. Wood, 1837
 v. Yoakam, 1488
 v. Zoller, 769
- Jones' Admr. v. Smith, 984
 Jones' Assignee v. Clifton, 1825
 Jones, *Ex parte*, v. Stiles, 1533
 Jongsma v. Jongsma, 202, 307
 Joer v. Hodges, 1553
 Jooss v. Fey, 1941
 Jordan v. Cheney, 2095, 2108, 2148
 v. Clark, 771
 v. Corey, 2346
 v. Forlong, 811
 v. Godman, 1449, 1450, 1455, 1461, 1469, 1478
 v. Holkman, 271
 v. Mead, 1262
 v. Money, 1701
 v. Peak, 1488, 1490
 v. Pollock, 2354
 v. Roache, 321, 402, 423, 447, 448, 470
 v. Savage, 932, 955
 v. Smith, 2133
 v. Staples, 1233
 v. Stevens, 2319
 v. Stickland, 1411
 v. Wilker, 1025
- Jorden v. Jorden, 2260
 Jordon v. Attwood, 2208, 2209
 Joseph v. United States, 290
 Joslin v. Rhoades, 1815
 Joslyn v. Joslyn, 1904
 v. Farlin, 2101
 v. Wyman, 2127, 2134, 2140
 Josselyn v. Edwards, 2150
 v. McCabe, 122, 123, 142, 145
 Jourdan v. Jourdan, 2346
 Journeay v. Brackley, 1108, 1114, 1115
 v. Gibson, 904
 Joy v. Campbell, 1733
 v. McKay, 1293
 Joyce v. J. I. Case Threshing Mach. Co., 1400
 Joyner v. Conyers, 493
 v. Speed, 713, 723, 737, 742, 806
 v. Statham, 2035

Judd *v.* Arnold, 1018, 1041
v. Bushnell, 1847, 1850
v. Fairs, 1319
v. Lawrence, 672, 673
v. Mosely, 1643
v. Seekins, 810, 2097
Judson *v.* Dada, 2072
v. Gibbons, 1788
Julian *v.* Boston, C. F. & N. B. R. Co., 884
v. Woodsmall, 71, 72
Juliand *v.* Rathbone, 1795
Jumel *v.* Jumel, 2178, 2179, 2180
Junction R. Co. *v.* Harris, 590, 665, 1363, 1369
Justice *v.* Lowe, 1141
Juzaux *v.* Toulmin, 1716, 1717, 1728, 1735

K.

Kabley *v.* Worcester Gas Light Co., 992, 1000, 1001
Kade *v.* Lauber, 759, 772, 821
Kahn *v.* Gumberts, 1623
v. Lovez, 1196
Kain *v.* Fisher, 723, 724, 821
v. Hoxie, 1073, 1119, 1121, 1129
Kaiser *v.* Seaton, 1503
Kalis *v.* Seaton, 1197, 1198
Kalshumer *v.* Upton, 2137, 2171
Kamena *v.* Huelbig, 2100
Kampf *v.* Jones, 322, 324, 1692
Kane *v.* Bloodgood, 1615, 1781
v. Goot, 75, 1549, 1680, 1681, 1798
v. Mink, 1280, 1285
v. Sanger, 1093
v. Vanderburgh, 572
Kane County *v.* Herrington, 924
Kansas City Elevator Co. *v.* N. P. Ry. Co., 1140, 1154
v. Union Pac. R. Co., 1139, 1155
Kansas City Land Co. *v.* Hill, 2162
Kansas City, S. & M. R. *v.* Weaver, 493
Karnes *v.* Lloyd, 1998, 2077
Kashaw *v.* Kashaw, 616
Kaster *v.* McWilliams, 1420, 1433, 1459
Kastor *v.* Newhouse, 1191, 1201, 1202
Kauffelt *v.* Bower, 2004, 2005
Kaufman *v.* Crawford, 1716
v. Myers, 2254
v. Peacock, 818
Kavanagh *v.* Gudge, 1138
Kavish, *Ex parte*, 1432
Kay *v.* Jones, 905
v. Scates, 415, 417, 418, 421, 500, 1603, 1607, 1655, 1673, 1674, 1694
v. Whittaker, 1848, 2149
Kean *v.* Connelly, 1894
v. Hoeffcker, 2279, 2288
Kearly *v.* Duncan, 136
Kearney *v.* Kearney, 534, 563
v. Macomb, 1754, 2044
v. McComb, 2053
v. Taylor, 1774, 2333
Kearney's Executors *v.* Kearney, 506, 513
Kearsley *v.* Woodcock, 1677
Keates *v.* Cadogan, 1110
Keating *v.* Congdon, 1249, 1250
Keating Implement & Machine Co. *v.* Marshall Elec. L. & P. Co., 45
Keaton *v.* Cobb, 1774, 1766
v. Terry, 1989
v. Thomasson's Lessee, 1285
Keats *v.* Hugo, 2223, 2224
v. Rector, 2172
Keay *v.* Goodman, 1120, 1126, 1347, 1350, 1352
v. Goodwin, 1976, 2074
Kebble *v.* Thompson, 1608, 1733, 1735
Keckelely *v.* Keckelely, 802
Keeble *v.* Cummings, 1032
Keech *v.* Hall, 1169, 2074
v. Sanford, 1623
Keech d. Warne *v.* Hall, 1279

Keegan *v.* Cox, 2011
v. Grahty, 2283
Keeler *v.* Talwell, 908
v. Davis, 1139
v. Eastman, 555, 556
v. Fassett, 1023
v. Keeler, 121
v. Tatnell, 909
Keely *v.* Harrison, 774
v. O'Connor, 976, 1201
Keemler *v.* Ferguson, 2349
Keen *v.* Hartman, 924
Keenan *v.* Keenan, 217
Keene *v.* Munn, 2154, 2179, 2180
Keene d. Byron *v.* Deardon, 1743
Keepers, etc., Harrow School *v.* Alderton, 572
Keiffer *v.* Barney, 1399, 1402
v. Starn, 2024
Keir *v.* Peterson, 83, 84, 88, 494, 561, 983
Keisel *v.* Earnest, 136, 1905
Keith *v.* Horner, 2004, 2007
v. Hyndman, 1388
v. Reynolds, 2357
v. Swan, 1028
v. Trapier, 841
Kellam *v.* Janson, 1355, 1357
Kelland *v.* Fulford, 77, 95
Keller *v.* Auble, 1090
v. Keller, 1642
v. Klopfer, 1290
v. Michael, 890, 927
v. McMichael, 888
Kelleran *v.* Brown, 2039, 2043
Kellersberger *v.* Kopp, 1426
Kellett *v.* Kellett, 306
Kelley *v.* Babcock, 1630
v. Ball, 936
v. Canary, 1946
v. Jenness, 1646
v. Mayor, 1194
v. Meins, 317, 1815
v. Todd, 1205, 1206
v. Whitmore, 1452
Kellogg *v.* Dickinson, 31, 32, 37, 38, 40
v. Hale, 298, 1560
Kellogg *v.* Ames, 2130
v. Blair, 305, 306, 308, 311, 312, 337
v. Frazier, 2027
v. Griswold, 1242
v. Groves, 1309
v. Kellogg, 1282
v. Loomis, 2364
v. Rand, 2154
v. Robinson, 1074
v. Rockwell, 2085, 2087, 2184, 2185
Kellum *v.* Smith, 1586, 1635, 1645, 2050
Kelly *v.* Baker, 1387, 1392, 1392 1436, 1446
v. Bryan, 2047, 2052
v. Dutch Church, 1245
v. Harrison, 893
v. Johnson, 1612, 1615, 1646
v. Kelly, 366, 2138
v. Love's Admr's., 1684
v. Medlin, 1900
v. Mills, 2120
v. Nichols, 1686, 1729
v. Patterson, 1264, 1310, 1316
v. Roberts, 2072
v. Seward, 2301
v. Stimson, 916, 934, 955, 965
v. Strange, 890
v. Thompson, 2039, 2053
v. Weston, 1232
v. Whitney, 2134
Kelsey *v.* Dunlap, 2364
v. Durkee, 123
v. Hardy, 2279
v. King, 5, 121
Kemble Coal Co., *v.* Scott, 1002
Kemp *v.* Cassart, 650
v. Derrett, 1302, 1312, 1328, 1339
v. Holland, 933

- Kemp *v.* Porter, 1794
 v. Sober, 1185
 Kemper *v.* Hughes, 2365
 Kempner *v.* Comer, 1489
 Kendall *v.* Carland, 978
 v. Clark, 1501, 1502, 1518, 1519
 v. Eyre, 416, 447, 472
 v. Gleason, 1802
 v. Granger, 1638, 1685
 v. Honey, 874
 v. Lawrence, 985, 1030, 2343
 v. Mann, 1643, 1646
 v. Moore, 1136, 1304, 1417
 v. Neebuhr, 2179, 2180
 v. Treadwell, 2144
 Kender *v.* Milward, 1649
 Kenegy *v.* Elliott, 58, 2253
 Kenley *v.* Hudelson, 1399, 1402, 1451
 v. Kenley, 883
 Kena *v.* Nugent, 1267
 Kennard *v.* Brough, 135
 v. Harvey, 2272
 Kennedy, *In re*, 1510
 Kennedy *v.* Brown, 2070, 2072
 v. Fury, 1706, 1744
 v. Johnston, 941
 v. Kennedy, 444, 761, 780, 788, 1402, 1621,
 1075
 v. Mills, 916, 933, 935, 954
 v. Nedrow, 749, 919, 936, 956, 964
 v. Nunan, 1637, 1746
 v. Price, 1646
 v. Reames, 2272
 v. Robinson, 54
 v. Stacey, 1450, 1467, 1475, 1478
 v. Taylor, 1652
 Kennerly *v.* Burgess, 2187
 v. Missouri Ins. Co., 714, 721, 850
 Kennett *v.* Plummer, 1999
 v. Plummer, 2062, 2063
 Kenniston *v.* Leighton, 1538
 Kennon *v.* McRoberts, 307, 321, 334
 v. Wright, 2272
 Kenrick *v.* Beaucherck, 299, 1606, 1609
 Kent *v.* Agard, 2050
 v. Beaty, 1454
 v. Dunham, 1604
 v. Hartpoole, 694
 v. Lasley, 2043, 2048
 v. Morrison, 1815, 1816
 v. Plumb, 1777
 v. Waite, 2218
 v. Watson, 2301
 v. Welch, 1989
 v. Well, 492
 v. Welsh, 2362
 Kensington *v.* Bouverie, 509
 v. Dollond, 1371
 Kentucky River Nav. Co., *v.* Commonwealth,
 1139, 1146
 Kentzinger's Estate, 662
 Kenyon *v.* Nichols, 2242
 Keefe *v.* Milwaukee & St. P. R. Co., 198
 Keogh *v.* Daniel, 122, 129, 146, 1158
 Kepple's Case, 348
 Keppell *v.* Bailey, 1070, 1074, 1078
 Kern *v.* Myll, 1045
 Kernochan *v.* New York Ins. Co., 2118
 Kernochan *v.* N. Y. Bowery Fire Ins. Co., 2117
 Kerr *v.* Clark, 981, 1013, 1284, 1322, 1341
 v. Connell, 54
 v. Day, 1078
 v. Freeman, 2321, 2322
 v. Gilmore, 2046
 v. Kingbury, 131, 1188, 1189
 v. Kitchen, 1777
 v. Merchants' Exchange Co., 1015, 1016,
 1176, 1180
 v. Moon's Devises, 368
 v. Moon, 720, 2057, 2058, 2288, 2289
 v. Read, 1690
 v. White, 1777
 Kerrians *v.* Perple, 1273, 1287, 1288, 1289
 Kershaw *v.* Kelsey, 672, 673
 v. Thompson, 2145, 2156
 Kessler *v.* Draub, 1403, 1454, 1459
 Kester *v.* Stark, 1983
 Ketchem *v.* Crippen, 2136
 v. Jauncy, 2141
 Ketchum *v.* Evertson, 729
 v. Shaw, 715, 802, 803, 806, 926
 v. Walsworth, 1920, 1930, 1931, 1932, 1940,
 1951
 Keteltas *v.* Coleman, 1152
 Ketsey's Case, 1030
 Kettlewell *v.* Watson, 832, 2008
 Key *v.* Davis, 986
 v. Jennings, 2310
 Keyes *v.* Bump's Admr., 2030
 v. Carlton, 1091, 1792, 1798
 v. Dearborn, 1003
 v. Keyes, 751
 v. Powell, 988
 v. Rines, 1500, 1503
 v. Scanlon, 892, 1407
 v. Wood, 2103, 2105, 2106, 2108
 Keyner *v.* Summer, 2209
 Keys *v.* Goldsborough, 403
 Keyser's Appeal, 501
 Keyser *v.* Evans, 1915
 v. Hitz, 2066
 v. Mitchell, 500, 1748
 v. Nicholas, 500
 v. Philadelphia, 970
 Keyte *v.* Perry, 669
 Kezer *v.* Clifford, 2079
 Kibbey *v.* Jones, 1513, 1516
 Kibbie *v.* Williams, 633, 1364, 1366
 Kibbler *v.* Miller, 1821
 Kibby *v.* Chitwood's Admr., 2332
 Kidd *v.* Dennison, 555, 556, 561, 1227
 v. McCormick, 1091
 v. Treple, 1093, 1999, 2015, 2063
 Kiddal *v.* Trimbell, 865
 Kidder *v.* Blaisdell, 864
 v. Rexford, 1922
 Kidwell *v.* Brumagin, 1652
 v. Kidwell, 2251, 2257, 2258
 Kieffer *v.* Imhof, 2211
 Kiersted *v.* Orange R. Co., 2271
 Kieth *v.* Paulk, 2257
 Kilborn *v.* Robbins, 805, 806, 809, 2153, 2178
 Kilburn *v.* Mullen, 596
 Kile *v.* Biebner, 122
 Kilgour *v.* Ashcom, 2236
 v. Crawford, 1983, 1986
 Kilkenney Gas Co. *v.* Somerville, 1139
 Killeran *v.* Brown, 2049
 Killinger *v.* Ridenhouser, 794, 796, 913
 Kilmer *v.* Smith, 2330, 2331
 Kilmore *v.* Howlett, 54, 56
 Kilpatrick *v.* Henson, 2079
 v. Kilpatrick, 2006
 Kilpin *v.* Kilpin, 1647
 Kilsley *v.* Ames, 2160
 Kimball *v.* First Parish of Rowley, 32
 v. Ives, 1782
 v. Kimball, 764
 v. Lewiston, 2187
 v. Lockwood, 1118, 2065
 v. Lohmars, 2298
 v. Master Grand Lodge of Masons, 110
 v. Morton, 1699, 1738
 v. Myers, 2027, 2031
 v. Pike, 1121, 2251
 v. Redding, 1714, 1717, 1718, 1719, 1721,
 1729
 v. Rowland, 1061, 1344, 1345
 v. Sattley, 2020
 v. Second Parish of Rowland, 32, 37, 38,
 39
 v. Stormer, 2298
 v. Sumner, 1921, 2251, 2257, 2258
 Kimber *v.* Barber, 1621

- Kimbrel *v.* Willis, 1403, 1404
 Kimmell *v.* Benna, 2301
 v. Willard, 2073
 Kimpton *v.* Ballaymy, 2199
 v. Walfer, 1099
 v. Walker, 1067, 1069, 1098, 2362
 Kincaid's Appeal, 35, 36, 38, 39, 40, 41
 Kinchelve *v.* Tracowell, 2298
 Kincks *v.* Stubbin, 768
 Kindberg *v.* Freeman, 2152
 King *v.* Ackerman, 305, 795, 1823
 v. Anderson, 2251, 2252, 2257, 2258
 v. Aldborough, 1107, 1111, 1118, 1123
 v. Baldwin, 2136
 v. Barnes, 532
 v. Bellord, 1827
 v. Bill, 1662
 v. Boys, 1554
 v. Burchall, 250, 252, 266
 v. Castle, 260
 v. Cole, 341, 342
 v. Connolly, 1274
 v. Cotton, 795
 v. Deedham, 2331
 v. Dodd, 1242
 v. Donnelly, 1599, 1788
 v. Dunsford, 811
 v. Duntz, 1755
 v. Fowler, 1267
 v. George, 2
 v. Gunnison, 890
 v. Howard, 1980
 v. Husatonic R. Co., 2258
 v. Inhabitants Bosworth, 1273
 v. Inhabitants of Herstmonceux, 1302
 v. Insurance Co., 2080
 v. Johnson, 129, 139, 140, 141
 v. Jones, 1077
 v. Kelstern, 1273, 1288
 v. Kenan, 1625
 v. Kerr, 730
 v. King, 314, 315, 505, 748, 749, 792, 802,
 915, 2357
 v. Langrville, 1273
 v. Large, 268
 v. Lawson, 1294
 v. Leach, 1885
 v. Little, 2252, 2257, 2259
 v. Longnor, 1044
 v. Lucas, 1562
 v. McCauley, 1383, 1519
 v. McVickar, 2120
 v. Melling, 421, 422
 v. Merchants' Exchange Co., 2148
 v. Milkridge, 1273
 v. Minister, 1273
 v. Mitchell, 1591, 1592, 1637
 v. Morford, 1292
 v. Morris, 511
 v. Murray, 1144, 2254
 v. Newman, 2043, 2168
 v. New York Cent. & H. R. Co., 1194,
 1195
 v. Nutall, 517
 v. Oakley, 1022
 v. Otley, 123
 v. Paddock, 2346
 v. Parker, 1796, 1886
 v. Paterson & H. R. R. Co., 43
 v. Pedly, 1202
 v. Portis, 2119
 v. Rea, 294, 296, 2301
 v. Reed, 1988
 v. Reynolds, 1055
 v. Rundle, 1637
 v. Shrivess, 307
 v. State Mut. F. Ins. Co., 2113, 2114,
 2117, 2118
 v. Stetson, 766, 829
 v. Stock, 1272
 v. Talbot, 695, 1664, 1721
 v. Topping, McClell. & Y., 250
 v. Utey, 439
 v. Weeks, 824
 v. Welborn, 1383, 1392, 1417, 1418, 1438
 v. Wilcomb, 61, 119
 v. Withers, 1572
 v. Woodruff, 1316
 v. Yarborough, 2293
 King of Spain *v.* Machado, 753, 755
 Kingdom *v.* Bridges, 1647
 v. Briggs, 779
 v. Nodde, 2362
 Kingham *v.* Lee, 1364
 Kingman *v.* Graham, 2302
 v. Higgins, 1464
 v. Pierce, 2173
 v. Sparrow, 779, 822
 Kingsbury *v.* Buckner, 2073, 2172
 v. Burnside, 1589, 1592, 1690
 v. Collins, 538, 1205, 1206, 1254
 v. Westfall, 1175
 Kingsland *v.* Clark, 1127, 1129, 1167, 1170, 2268
 v. Rapelye, 421, 423, 426
 v. Ruckman, 1026
 Kingsley *v.* Holbrook, 51, 53, 55, 2354
 v. Kingsley, 1399, 1426, 1432
 v. Smith, 588, 651, 670, 671, 681
 Kingsman *v.* Loomis, 2303
 v. Rouse, 2176
 Kingsmill *v.* Millard, 1215
 Kingston Building Association *v.* Rainsford,
 1046
 v. Lorton, 1630
 Kinloch *v.* P'On, 1757, 1764
 Kinn *v.* Smith, 2102
 Kinna *v.* Smith, 1995, 2085, 2104, 2105, 2147
 Kinnard *v.* Thompson, 1794
 Kinnear *v.* Lowell, 1094, 2178
 Kinnen *v.* Maxwell, 2011
 v. Slattery, 1898, 1900, 1915
 Kinney *v.* Watts, 1082, 1245
 Kinnier *v.* Rogers, 1807
 Kinsell *v.* Billings, 127
 v. Daggett, 2295
 Kinsey *v.* Lardner, 315
 v. Minnick, 1335, 1342, 1343
 Kinsler *v.* McCants, 787
 Kinsley *v.* Ames, 1350, 1354
 v. Abbott, 1885
 Kinsloving *v.* Pierce, 930
 Kinsmen *v.* Green, 1017
 Kinter *v.* Jenks, 1593, 1632
 Kintz *v.* Long, 485, 2334
 Kipp *v.* Kipp, 1920
 Kirby *v.* Boylston Market Assn., 1202
 v. Chetwood's Admr, 2323
 v. Dalton, 804, 852
 v. Moody, 1947
 v. Potter, 43
 v. Reese, 2170
 v. Vantreace, 781
 v. Webb, 1649
 Kirk *v.* Dean, 928
 v. Houston Direct Navigation Co., 1947
 v. King, 2303
 v. Talhaferre, 1211
 v. Webb, 1700
 Kirkaldie *v.* Larrabee, 1467
 Kirkham *v.* Booth, 1715
 v. Boston, 2004, 2007
 v. Dupont, 2171
 v. Jarvis, 1168
 v. Sharp, 2220
 v. Smith, 446
 Kirkland *v.* Cox, 289, 335, 1796
 Kirkman *v.* Bank of America, 2177
 Kirkpatrick *v.* Caldwell, 2120
 v. Mathiot, 1921
 v. Peshine, 268
 Kirkwood *v.* Doman, 1952, 1953
 v. Thompson, 2086
 Kirtland *v.* Pounsett, 1292
 Kirwan *v.* Latour, 105, 126, 135

- Kisler *v.* Kisler, 1611, 1635
 Kisting *v.* Shaw, 1735
 Kissan *v.* Barclay, 122
 Kister *v.* Reiser, 283
 Kittell *v.* Burgwin, 1378, 1397, 1398, 1461
 Kitchen *v.* Bedford, 1592
 v. Pridgen, 1260, 1269, 1280, 1293, 1302, 1306, 1524, 1333, 1334
 Kites *v.* Church, 1890, 1894, 2249
 Kitner *v.* Ege, 1083
 Kitterlin *v.* Milwaukee Mechanics' Mutual Insurance Co., 1470, 1479
 Kittle *v.* St. John, 1160
 v. Van Dyck, 766, 1492
 Kittridge *v.* Locks & Canals Merrimack, 1996
 v. Woods, 46, 78, 79, 103, 106, 135, 567
 Kitzmiller *v.* Van Renselaer, 907, 911
 Klapp's Assignees *v.* Shirk, 1795
 Kleeman *v.* Frisbee, 2106
 Klenck *v.* Knoble, 1446
 Klein *v.* Isaacs, 2071
 v. McNamara, 2045, 2312
 Klinck *v.* Keckelely, 766
 v. Keckey, 926
 v. Price, 2001, 2046
 Kline's Estate, 960
 Kline *v.* Beebe, 600, 603, 612, 614, 985, 1031
 v. Cline, 960, 961
 v. Jacobs, 1083, 1292, 1905
 v. McLain, 1196
 v. Moulton, 1020
 v. Ragland, 1932
 Klock *v.* Walter, 2045
 Klopfer *v.* Keller, 1090
 Klotenbrock *v.* Cracraft, 641, 642, 666
 Klumpe *v.* Baker, 2300
 Klutts *v.* Klutts, 799
 Knabe *v.* Fernot, 1019
 Knachbull *v.* Hallett, 1621
 Knapp *v.* Brown, 1211
 v. Hungerford, 1983
 v. Maltby, 2339
 v. Marlboro, 1080
 v. Smith, 1035
 Knappen *v.* Freeman, 1046
 Knarr *v.* Conway, 2081
 Knatchbull *v.* Hallett, 1761
 Knecht *v.* Mitchell, 996
 Kneeland *v.* Moore, 805
 v. Schmidt, 1161
 Kneil *v.* Egleston, 646
 Knickerbocker *v.* Seymour, 820, 821, 913
 Knickerbocker Life Ins. Co. *v.* Nelson, 2069
 v. Patterson, 2263
 Knight *v.* Barber, 817
 v. Bell, 1371
 v. Bennett, 1322
 v. Bowyer, 76
 v. Buckley, 1254
 v. Crockford, 998, 1043
 v. Duplessis, 673
 v. Dyer, 2042
 v. Gould, 1888
 v. Indiana Coal & Iron Co., 88, 1251, 1263, 1280, 1293
 v. Knight, 346, 347, 1627, 1632, 2073
 v. Majoribanks, 2086
 v. Manils, 764
 v. Mann, 766
 v. Mosely, 561
 v. Pursell, 2236
 Knight, Doe d., *v.* Nepean, 522
 Knight, Doe d., *v.* Quigley, 1068, 1278, 1283
 Knipe *v.* Palmer, 1034
 Knobb *v.* Lindsay, 1758
 Knoll's Case, 562
 Kuott *v.* Lawton, Doe d., 312
 v. Receivers of Morris Canal Co., 1036
 Knouff *v.* Thompson, 2302
 Knowlden *v.* Leavitt, 292
 Knowles *v.* Carpenter, 811, 2098
 Knowles *v.* Hull, 1354, 1355
 v. Lawton, 810, 2151, 2155
 v. Rablin, 2171
 Knowlton *v.* Bradley, 1714, 1715, 1718, 1719, 1721, 1724, 1728
 v. Redenbaugh, 671
 v. Walker, 2094, 2095, 2168, 2175
 Knox *v.* Easton, 1997, 1998, 2065, 2077, 2078
 v. Flack, 2343
 v. Galligan, 2108, 2147
 v. Gye, 76, 1614
 v. Hester, 2269
 v. Hexter, 1085
 v. Hunt, 2273
 v. Hydrick, 56
 v. Knox, 1627, 1685
 v. Marshall, 1234, 1909
 v. McFarran, 1690
 v. Silloway, 492
 Koch *v.* Briggs, 2140
 Koehler *v.* Black River Falls Iron Co., 76
 Koenig's Appeal, 1787
 Koenig *v.* Craft, 534
 v. Haddix, 2234
 Koester *v.* Burke, 1777
 Kohl *v.* United States, 197
 Kohler *v.* Knapp, 2251, 2259
 Kohlheim *v.* Harrison, 2175
 Koltenbrock *v.* Cracraft, 516, 517
 Konigsmacher *v.* Kimmel, 1733
 Konvalinka *v.* Schlegel, 918, 944, 945
 Koplit *v.* Gustavis, 1135, 1136, 1264
 Kopmeir *v.* O'Neil, 2158
 Kopp *v.* Gunther, 1792
 Korn *v.* Cutler, 289, 349
 Kornegay *v.* Collier, 2251, 2257
 Korns *v.* Shaffer, 1770, 2163
 Kortright *v.* Cady, 688, 799, 2062, 2085, 2105, 2129, 2131
 Koser, *Ex parte*, 198
 Kramer *v.* Cleveland & P. R. Co., 2328
 v. Cook, 1052, 1082, 1126, 1175
 v. Knauff, 2217
 v. Rebham, 2156
 v. Trustees of F. & M. Bank of Steubenville, 2141
 Kratmeyer *v.* Brink, 1290
 Krause's Appeal, 975
 Krause *v.* Beitel, 885
 Keigler *v.* Day, 664
 Krentz *v.* McKnight, 1154
 Kresin *v.* Man, 1419, 1439
 Krevet *v.* Meyer, 1057, 1356
 Kreutz *v.* McKnight, 1153
 Kriger *v.* Day, 663
 Krister *v.* Miller, 1160
 Krogan *v.* Kinney, 219
 Kronsok *v.* Shontz, 2012, 2013
 Krouse *v.* Ross, 122
 Krouskop *v.* Shontz, 896
 Krueger *v.* Farrant, 198, 200, 1197
 v. Pierce, 1483, 1484, 1500
 Kruse *v.* Scripps, 2024, 2112
 Krutz *v.* Fisher, 1621, 1643
 Kubler *v.* United States, 1936
 Kuevan *v.* Specker, 1481
 Kwigler *v.* United States, 1316
 Kuhlman *v.* Hecht, 2217
 Kuhlmann *v.* Meier, 145
 Kuhn *v.* Newman, 1655, 1674, 1742
 Kuhns *v.* Banks, 2107
 Kulinger *v.* Redinaur, 728
 Kull *v.* Kull, 221, 222
 Kunkle *v.* Franklin, 1517
 v. Wolfersberger, 2040, 2066
 Kuntz *v.* Kinney, 1483, 1514, 1515
 Kunzie *v.* Wixon, 1309, 1350
 Kurtz *v.* Sponable, 2105, 2106
 Kurz *v.* Brusck, 1384, 1386, 1387, 1416, 1420, 1436, 1442, 1476
 Kutch *v.* Holley, 1455
 Kutter *v.* Smith, 129, 146, 1204

Kutz' Appeal, 1781
 Kyger *v.* Ryley, 1999, 2078
 Kyle *v.* Barnett, 1715
 v. Kavanagh, 2322
 v. Kyle, 875
 v. Roberts, 1030
 Kyne *v.* Kyne, 943, 955
 Kynner *v.* Kynner, 2177
 Kyte *v.* Commercial U. Assr. Co., 631, 632
 v. Keller, 1184, 1233, 1234

L.

L'Amoureux *v.* Van Rensselaer, 1798
 Labare *v.* Colby, 2012
 Laberee *v.* Carleton, 1852, 1863, 1867
 Laberge *v.* Chauvin, 2105
 La Blanc, *Re*, 1762
 Lacey, *Ex parte*, 1621, 1770, 1771, 1772
 Lachland *v.* Downing, 411, 1447
 Lacon *v.* Allen, 2002
 v. Davenport, 1997, 1998
 v. Higgins, 753
 Laconia Savings Bank *v.* Rollins, 1502
 Lacustrine Fertilizer Co. *v.* Lake Guano &
 Fertilizer Co., 4, 51, 143
 Lacy *v.* Anderson, 953, 957
 v. Clements, 1407, 1411, 1425
 Ladd *v.* Abel, 48
 v. Dudley, 1512
 v. Harvey, 470
 v. Jackson, 1723
 v. King, 1699
 v. Ladd, 1810, 1828, 1829, 1831
 v. Perley, 1979
 v. Riggle, 1141
 v. Wiggin, 2101
 Lade *v.* Holford, 1743
 Ladley *v.* Creighton, 1047
 Ladue *v.* Detroit & M. R. Co., 2104, 2105
 v. Railroad Co., 2099
 Lady *v.* Madison's Case
 Laffan *v.* Naglee, 259, 1076, 1067
 La Farge *v.* Mansfield, 979
 La Farge Ins. Co. *v.* Bell, 2154
 Lafayette, etc., R. Co. *v.* Geiger, 2328
 Laffite *v.* Lawton, 646
 Laffin *v.* Griffiths, 113
 Lafrombois *v.* Jackson, 2291
 Lagow *v.* Badolett, 1764, 2008
 Laguerrenne *v.* Dougherty, 1132, 1135, 1135, 1317
 Lahy *v.* Holland, 1722, 1723
 Laidlaw *v.* Organ, 1110
 Laidler *v.* Young, 402, 415, 447, 456, 466, 467
 v. Young's Lessee, 414, 464
 Laidley *v.* Kline, 839
 Laight *v.* Pell, 2158
 Laing *v.* Barlowe, 306
 v. Byrne, 2072
 v. Fidgeon, 1200
 v. Harbour, 202
 Lair *v.* Hunsicker, 1505
 Laird *v.* Hedges, 2056
 Lake *v.* Campbell, 1044, 1046
 v. De Lambert, 1658
 v. Dowd, 2001, 2038
 v. Freer, 1690
 v. Gaines, 2272
 v. Gray, 2364
 v. Thomas, 2004
 Lakeview *v.* Rosehill Cemetery, 4
 Lakin *v.* Lakin, 774, 887, 894, 920, 921
 Lallande *v.* Wentz, 1902
 Lamar *v.* Miles, 122
 v. McNamee, 1163
 Lamb *v.* Burbank, 1006
 v. Danforth, 1908
 v. Davenport, 2308
 v. Fames, 1828
 v. Jeffery, 2172
 v. Lamb, 697

Lamb *v.* Lathrop, 1865
 v. Montague, 2074, 2075, 2137, 2173
 v. Pierce, 1047
 v. Richards, 2137, 2170
 v. Scott, 707, 718, 720, 731, 733, 736, 739,
 860
 v. Turner, 2359
 v. Wogan, 1463
 Lamb, Estate of, 1477
 Lambe *v.* Eames, 346, 1084
 Lambert *v.* Blumenthal, 1982
 v. Borden, 1317
 v. Kinnery, 1502, 1519
 v. Morris, 2252
 v. Paine, 201, 203, 1823
 v. Warner, 742
 Lambert's Lessee *v.* Paines, 202, 204, 305, 312
 Lambertons *v.* Stouffer, 1207, 2255
 Lambertville National Bk. *v.* McCready Bag &
 P. Co. (N. J.), 2147, 2148, 2172
 Lambson, *Re*, 1401
 Lamkin *v.* Knapp, 771
 Lammer *v.* Missen, 2293
 Lammott *v.* Gist, 1163
 Lamont *v.* Cheshire, 2152
 Lampel's Case, 900
 Lampert *v.* Hydell, 1677, 1678
 Lampert's Case, 1250, 1570
 Lamphere *v.* Lowe, 122
 Lamplough *v.* Lamplough, 1538, 1648
 Lampman *v.* Milks, 20, 2211, 2216, 2224, 2232,
 2236, 2241
 Lamprey *v.* Nudd, 2204
 Lamson *v.* Clarkson, 1219
 v. Drake, 2074, 2169, 2173
 Lanahan *v.* Sears, 1502, 2038
 Lancashire *v.* Mason, 2251, 2257
 Lancaster *v.* Detaford, 999
 v. Dolan, 1375, 1560, 1583, 1673, 1674,
 1675, 1799
 v. Lancaster, 748
 v. Seay, 1983
 v. Thornton, 1605, 1811
 v. Washington Life Ins. Co., 523
 Lancaster Bank *v.* Myley, 286, 1963
 Lancaster County Bank *v.* Stauffer, 589, 590,
 616, 635, 636, 637, 1363, 1364
 Lance *v.* Gorman, 2170
 Lanchester *v.* Eve, 117
 Land Co. *v.* Gas Co., 1474, 1476
 Lander Contract, *In re*, 1097
 Landers *v.* Beauchamp, 1335
 Landes *v.* Brent, 2015
 Landon *v.* Burke, 2144
 v. Hooper, 2086
 v. Platt, 1186
 v. Watson, 1149
 Landsberger *v.* Magnetic Tel. Co. 1247
 Landsell *v.* Gower, Doe d., 1309
 Lane *v.* Baker, 1403
 v. Bobyns, 1901
 v. Cowper, 1030, 1031
 v. Debenham, 1663
 v. Dickerson, 2052
 v. Dighton, 1623, 1649, 1760, 1761
 v. Dorman, 2324, 2332, 2333
 v. Erskine, 2149
 v. Ewing, 1593, 1702, 1739
 v. Gould, 210, 212
 v. Hitchcock, 2186, 2187
 v. Husband, 1793
 v. King, 45, 47, 688, 1206, 2065
 v. Lane, 249, 1614
 v. Ludlow, 2009
 v. Mutual F. Ins. Co., 2116
 v. Osment, 1141, 1150
 v. Shears, 799, 2039
 v. Tyler, 1960, 1963
 v. Wick, 1516
 Lanfair *v.* Lanfair, 2015, 2031, 2040, 2041
 Lang *v.* Barnes, 1933, 1952
 v. Hitchcock, 634, 635

- Lang *v.* Ropke, 1682
v. Warring, 736, 824, 1961
v. Wilbraham, 1682
- Lang's Heir *v.* Waring, 1957, 1959, 1960, 1963
- Langdale, *Ex parte*, 1241, 1242
- Langdon *v.* Buell, 2090, 2101, 2107
v. Ingram's Guardian, 259, 261, 263
v. Keith, 2105, 2107
v. Mayor, 2294
v. Paul, 2187
v. Poor, 2335
v. Potter, 1913
v. Stevens, 850
v. Strong, 671
- Langeley *v.* Hammond, 2216
- Langford *v.* Eyrie, 1831
v. Frey, 985
v. Gascoyne, 1733
v. Selmer, 2301
v. Selmes, 1109, 1121
- Langley *v.* Furlong, 503
v. Hammond, 2211
v. Ross, 1138
v. Vaughn, 2024
- Langston *v.* Horton, 2017
v. Norton, 2044
- Langworthy *v.* Heeb, 831
- Lanier *v.* Booth, 2242
v. Driver, 1795
v. Hill, 1221
- Lanigan *v.* Kille, 1190
- Lankford *v.* Green, 2270
- Lanphere *v.* Lowe, 126
- Lansing *v.* Goelet, 1996, 2144, 2146, 2157
v. Pine, 1163
v. Smith, 2304
v. Stone, 568, 1181, 1183
v. Van Alstyne, 2268
v. Wiswall, 2218, 2241
- Lantshery *v.* Collier, 1811
- Lapham *v.* Norton, 135, 139, 1290
- Lapice *v.* Gereandeanu, 720
- Lapish *v.* Bangor Bank, 99
- Lapman *v.* Milks, 2241
- Lappen *v.* Hill, 2071
- Lapsley *v.* Lapsley, 411, 414
- Large's Case, 259, 263, 1687, 1858
- Large *v.* Van Downen, 2031, 2134
- Larkins' Estate, 1449
- Larkin *v.* Ames, 2360
v. Avery, 1913, 1299, 1307, 1319, 1337
- Larne *v.* Farren Hotel Co., 1202
- Larned *v.* Bridge, 318, 319
v. Hudson, 1257, 1258, 1261, 1270, 1274, 1278, 1280, 1344
- Larney *v.* Mooney, 1166
- Laroe *v.* Douglass, 1734
- Larrabee *v.* Eambert, 1258, 1272, 1285
v. Lumbert, 1277
v. Tucker, 2286
v. Van Aylstyne, 880, 917, 918, 938, 942, 944, 952
- Larreau *v.* Davignon, 1657
- Larrowe *v.* Beam, 841
- Larson *v.* Reynolds, 1409, 1450, 1473, 1475, 1478, 1479, 1485, 1489, 1493, 1523
- Larwell *v.* Stevens, 2296
- Lary *v.* Dunham, 730
- Lasala *v.* Holbrook, 92, 2231, 2232, 2233, 2234
- Lasere *v.* Rochereau, 2149
- Lash *v.* Lash, 1954
- Lasher *v.* Lasher, 708, 917, 918, 942
- Lassell *v.* Reed, 78, 79, 103, 106
- Lassells *v.* Cornwallis, 1825, 1840
- Lassen *v.* Vance, 766, 1492, 1497, 1591
- Latch *v.* Bright, 1047
- Latham *v.* Atwood, 53
v. Blakely, 104
v. Henderson, 1646
v. Lawrence, 1770
- Lathrop *v.* Arnold, 1901, 1902
v. Atwood, 2025, 2026
- Lathrop *v.* Bampton, 1739, 1740, 1759, 1760
v. Blake, 113
v. Cewis, 983, 2249, 2257, 2272
v. Commercial Bank, 118, 458
v. Foster, 807, 835, 868, 896, 900, 909
v. Rogers, 1236
v. Scotia Bank, 224
v. Singer, 1403
v. Smalley, 1715, 1721, 1722
- Latimer *v.* Elgin, 719
- Latimore *v.* Moore, 2087
- La Touche *v.* Earl of Lucan, 1793
- Latouche *v.* Duusamp, 2139
- Latrobe *v.* Tiernan, 1731, 1732, 1734
- Lauchner *v.* Rex, 46
- Laud *v.* Parker, 2297
- Laughlin *v.* Fream, 901
v. Wright, 1392, 1416, 1418
- Laughter's Case, 1863, 1869
- Laughter *v.* Humphrey, 2253
- Laughman *v.* Thompson, 890
- Laughran *v.* Smith, 996, 998, 1043, 1134, 1135, 1300, 1322, 1327
- Lauriat *v.* Stratton, 2172
- Laurie, *Re*, 2266
- Lausman *v.* Drahos, 989, 1214, 1222
- Lautz *v.* Buckingham, 2059
- Lavender *v.* Abbott, 2004
v. Lee, 1825
- Lavery *v.* Egan, 291
- Lavery *v.* Woodward, 2251, 2258
- Law's Estate, *Re*, 1720
- Law *v.* Butler, 1468, 1473, 1474, 1479, 1480
v. McDonald, 2226
v. Paterson, 1915
- Lawes *v.* Lumpkin, 1165
- Lawney's Trustees *v.* St. Louis, 1134
- Lawrence *v.* Bartlett, 645
v. Brown, 716, 718, 737, 740, 780, 863
v. Burrell, 1166
v. Cooke, 1689
v. Cornell, 2176
v. Dale, 1770
v. Davis, 1795
v. Fox, 2072
v. French, 1128, 1168, 1174
v. Heister, 903
v. Kemp, 109, 111, 121, 123, 139
v. Knapp, 2099, 2104, 2106
v. Knight, 1159
v. Lawrence, 415, 465, 965
v. Mayor of Savannah, 1157
v. Miller, 714, 716, 738, 838, 893, 1149, 1220
v. Obee, 2245
v. Shipman, 1193, 1194
v. Smith, 55
v. St. Mark's Ins. Co., 1224
v. Stratton, 2055, 2103, 2134
v. Tayloa, 1042
v. Taylor, 1041
v. Towle, 2069
v. Tucker, 2023
v. Wardell, 1246
- Fawry *v.* Tilleny, 2206
- Lawson *v.* Cunningham, 1259
v. Lovejoy, 985
v. Morten, 781, 789, 841, 842, 857
- Lawther *v.* Corill, 698
- Lawton *v.* Adams, 1904
v. Buckingham, 2349
v. Ford, 1782
v. Giles, 199
v. Lawton, 123, 124, 128, 129
v. Rivers, 2217, 2218, 2219, 2220, 2221
v. Salmon, 107, 128, 130, 137
v. Savage, 1294
- Lawyer *v.* Cipperly, 34
v. Slingerhand, 1450, 1473
- Lay *v.* Gibbons, 1758
- Laylin *v.* Knox, 2172
- Layman *v.* Shultz, 2012

- Layman *v.* Throp, 1309, 1348
 Layne *v.* Pardee, 1456
 Layson *v.* Grange, 1454, 1495, 1496
 Layton *v.* Butler, 864, 867, 874, 875, 876
 v. Field, 1270
 Lazarus *v.* Commonwealth Ins. Co., 631
 Lazear *v.* Porter, 806, 890, 927
 Lazell *v.* Lazell, 1392, 1417, 1418, 1461
 v. Pinnick, 1033
 Lea *v.* Hernandez, 1281, 1294
 v. Netherton, 1150
 Leach *v.* Duvall, 794
 v. Leach, 585, 588, 670, 711, 761, 776
 v. Pillsbury, 1456
 Leck *v.* Richmond Co., 1804
 Leadbeater *v.* Roth, 1106, 1168
 Leader *v.* Homewood, 115, 145, 1186
 Leak *v.* Gay, 1380
 Leake *v.* Watson, 1661, 1668
 Lean, Doe d., *v.* Lean,
 'Lea *v.* Leggett, 253, 260, 272, 1056, 1113
 Learned *v.* Cutler, 90
 v. Foster, 2151
 v. Fritch, 1253
 Leary *v.* Pattison, 1151
 v. Meier, 1338
 Leathers *v.* Furr, 2246
 v. Gray, 439, 440
 Leavitt *v.* Beirne, 273, 1739, 1747
 v. Bevine, 254
 v. Fletcher, 1068, 1083, 1099, 1100, 1106,
 1175, 1183, 1200
 v. Lamprey, 733, 736, 739, 798, 867, 874,
 875
 v. Leavitt, 1257, 1260, 1299, 1319, 1322,
 1335, 1338, 2316
 v. Pell, 1828, 1829, 1832
 v. Pratt, 2130
 v. Wooster, 307, 340, 342
 Leaycraft *v.* Hedden, 1373, 1562
 Lebanon Mutual Fire Ins. Co. *v.* Erb, 631
 Le Beau *v.* Glaze, 2129
 Le Breton *v.* Nouchet, 775
 Lebnard *v.* White, 89
 Lecatt *v.* Merchants' Ins. Co. 643
 Lechmere *v.* Carlyle, 1784
 v. Lavie, 347, 1627, 1630, 1632
 Lecompte *v.* Wash, 894
 Ledbetter *v.* Cash, 1079
 v. Cash, 1975, 1986
 v. Quick, 2272
 Ledwich, *Inter se*, 1599
 Ledyard *v.* Butler, 1997, 2063)
 v. Chapin, 2129, 2134
 v. Phillips, 47
 v. Ten Eyck, 2294
 Lee *v.* Adkins, 2363
 v. Baumgardener, 84, 88, 89
 v. Browder, 1633, 1645, 1648
 v. Evans, 1996, 2045, 2050
 v. Fletcher, 2034, 2056, 2061
 v. Fox, 1090
 v. Harrison, 1677
 v. Jeddo Coal Co., 2336
 v. Kilburn, 2044
 v. Kingsbury, 1413, 1480, 1488, 1504, 2158
 v. Kirby, 1697
 v. Lee, 1020, 1716
 v. Lindell, 725, 785, 786, 886, 887
 v. McElvy, 411, 413, 415
 v. Miller, 1443
 v. Moseley, 1395, 1458
 v. Muggeridge, 1836
 v. Payne, 1122
 v. Risdon, 119, 127, 145, 1186
 v. Selleck, 2056
 v. Smith, 976, 2288
 v. Stanley, 1456
 v. Stiger, 2068
 v. Stigner, 2069
 v. Stone, 2140
 v. Summers, 1282
 v. Turne, 1902
 v. Woodworth, 2024
 v. Zabriskie, 1920
 Leech *v.* Leach, 759
 Leed *v.* Beene, 1782
 Leeds *v.* Cheetham, 1098, 1179, 1181
 v. Gifford, 2066
 v. Wakefield, 1830
 Leefe, Matter of, 221, 645
 Lees *v.* Nuttall, 1617, 1644, 1645, 1708, 1771
 Le Farge F. Ins. Co. *v.* Bell, 2197, 2180
 Lefever *v.* Lefever, 918, 944
 v. Witmer, 1366, 1377
 Leffingwell *v.* Elliott, 1095
 v. Warren, 1516
 Leffler *v.* Armstrong, 1755
 Legard *v.* Hodgers, 1665, 1690
 Legge *v.* Legge, 495
 v. Strudwick, 1300, 1307, 1313, 1314, 1321,
 1322
 Leggett *v.* Bullock, 2126
 v. Dubois, 218, 1635, 1680
 v. Hunter, 1599, 1798
 v. Hyde, 1241, 1243
 v. McClelland, 670
 v. New Jersey Mfg. & Bkg. Co., 2342
 v. Perkins, 299, 1374, 1559, 1606
 v. Steele, 842
 Le Gierce *v.* Green, 2263
 Lehigh Valley R. Co. *v.* McFarlan, 2292
 Legro *v.* Lord, 1480, 1481
 Lehman *v.* Bryan, 1457
 v. Lewis, 1635
 v. McQueen, 2109
 v. Tallahassee Mfg. Co., 2065
 Leiby *v.* Wilson, 1211
 Leicester, Doe d., *v.* Briggs, 1560, 1574, 1607
 Leiderkranz Society *v.* Beck, 863
 Leigh *v.* Balcarres, 1040
 v. Barry, 1732
 v. Dickeson, 1891
 v. Hammer's Case, 750
 v. Harrison, 1678
 v. Loyd, 2159
 v. Shepherd, 1927
 v. Smith, 1784, 1785
 Leighton *v.* Preston, 1998, 2079
 v. Shapely, 2129
 v. Theed, 1267
 Leishman *v.* White, 1128, 1167, 1173, 1174
 Leitch *v.* Boyington, 2251, 2257, 2258
 v. Little, 1889
 Leitensdorfer *v.* Delphy, 284
 Leith *v.* Irvine, 2051
 Lekeux *v.* Nash, 1074, 2265
 Leland *v.* Adams, 307, 309, 312
 v. Garrett, 63
 v. Gassett, 62, 119, 2213
 v. Loring, 2157
 Le la Zerge *v.* Korn, 1246
 Lemar *v.* Miles, 126
 Lemmond *v.* Peoples, 1637
 Lemon *v.* Graham, 284
 v. Hayden, 2206
 v. Lemon, 965
 Lempet's Case, 885
 Lench *v.* Lench, 1623, 1642, 1644, 1700, 1761
 Lenfers *v.* Henke, 561, 811, 812, 847, 851, 852,
 853
 Lenihan *v.* Hamann, 2152
 Lenman *v.* Lewis, 1633
 Lennox *v.* Reed, 1999, 2149, 2151
 Lent *v.* Howard, 1798
 Lentz *v.* Lentz, 1882
 Leonard *v.* American Bapt. Home Mission
 Soc., 1809
 v. Bell, 1603, 1680
 v. Burgess, 2251
 v. Burr, 1798
 v. Countess of Sussex, 1609
 v. Diamond, 1604, 1753
 v. Henderson, 1139, 1151

- Leonard *v.* Leonard, 849, 850, 1899, 2299
v. Pitney, 1268, 1272
v. Scarborough, 1246, 1905
v. Steele, 942, 946, 949
v. Stickney, 135, 136, 137
v. Storer, 1085, 1199, 1201
 Leonis *v.* Lazzarovich, 2331
 Leppitt *v.* Hopkins, 536
 Lesesne *v.* Witte, 1593
 Leshey *v.* Gardner, 1697, 1698
 Lesley *v.* Randolph, 1254, 1271, 1300, 1303, 1308,
 1315, 1320, 1325, 1328, 1335, 1336, 1338,
 1339
 Leslie *v.* Pounds, 1196
 Lessley *v.* Phipps, 1499, 1512, 1513, 1517
 Lester *v.* Garland, 1005, 1748
v. Hardesty, 2262
 Lestrade *v.* Barth, 2331
 Letchford *v.* Cary, 1442, 1499
 Letheullier *v.* Tracey, 370, 373
 Le Toureau *v.* Smith, 1338
 Levering *v.* Heighe, 954, 956
 Levett *v.* Bickford, 1138, 1139, 1154
v. United States, 1036
 Levi *v.* Brooks, 1194
 Levicks *v.* Walker, 1506
 Levins *v.* Sleator, 670, 771, 920
 Levitzki *v.* Canning, 1166, 1168
 Levy *v.* Brush, 1559
v. Dyess, 1068, 1098, 1099, 1105, 1181,
 1183
v. Lane, 2080
v. Levy, 1603
v. Twiname, 2272
 Lewes *v.* Lewes, 260, 272, 273, 1677
v. Ridge, 1849
 Lewin *v.* Atkinson, 1984
v. Mody, 2358
 Lewis *v.* Baird, 1786, 2366
v. Beall, 2320
v. Branthwaite, 988
v. Chisholm, 1166
v. City of St. Louis, 1140, 1151
v. Clark, 1896
v. Cox, 903, 927
v. Day, 2068
v. De Forrest, 2022, 2027
v. Hawkins, 1585, 1736, 1782
v. James, 842, 844
v. Jones, 80, 566, 567, 1184
v. Lewis, 730, 933, 941, 1617
v. Lyman, 79, 1184, 1238, 1239
v. Maddocks, 1761
v. Malone, 2272
v. McNatt, 51, 983, 1209
v. Merserve, 764
v. Mobely, 522
v. Naugh, 2073, 2170
v. O. N. P. Co., 1188
v. Palmer, 339
v. Payn, 1129, 1166, 1174
v. Rickey, 240
v. Simon, 1949
v. Smith, 917, 918, 925, 935, 936, 941, 942,
 944, 946
v. Wilkins, 2251, 2254
 Lewis, Doe d., *v.* Reed, 1306
 Lewis, Doe d., *v.* Rees, 1215
 Lewis ex d. Ormond *v.* Waters, 424
 Lewis' Heirs *v.* Ringo, 975
 Lewiston *v.* Proctor, 2206
 Lexington Life F. & M. Ins. Co. *v.* Page, 1737,
 1738
 Leyman *v.* Abeel, 2191, 2200
 L'Hussier *v.* Zallee, 1066
 Libby *v.* Clark, 228
v. Hopkins, 1762
v. Staples, 998, 1043
v. Tolford, 1066, 1191, 1201
 Iddard *v.* Liddard, 1630
 Lidderdale *v.* Robinson, 2177
 Liebschultz *v.* Moore, 1164
 Liefie *v.* Salingstone, 319, 487
 Lienow *v.* Ellis, 1118
 Lies *v.* De Diablar, 1450, 1463, 1467, 1471, 1473
 Life Ins. Co. *v.* Cole, 2359
 Liford's Case, 60, 442, 443
 Liggins *v.* Inge, 2243, 2246, 2247
 Light *v.* Light, 949
v. Scott, 1791, 1792
 Lightfoot *v.* Wallis, 2060
 Lightgow *v.* Cavenagh, 342
 Ligon *v.* Spencer, 741
 Like *v.* McKinstry, 996, 1205
 Liles *v.* Fleming, 955, 963
 Lilford's Case, 55
 Lilley *v.* Fifty Associates, 1157, 2254
 Lillianskyoldt *v.* Goss, 1884
 Lillibridge *v.* Adie, 417
 Lillie *v.* Dunbar, 54
 Lilly *v.* Palmer, 810, 2070, 2130, 2178
 Lime Rock Bank *v.* Phettletplace, 786, 825
 Lime Rock Nat. Bk. *v.* Mowry, 2096
 Linch *v.* Broad, 1896
 Lincoln *v.* Buckmaster, 1034
v. Edgecomb, 211, 2298
v. Emerson, 2091
v. French, 1800
v. Hapgood, 1456
v. Lincoln, 2, 310, 315, 660
v. Newcastle, 1693
v. Wright, 2049
 Lincoln & K. Bank *v.* Drummond, 1861
 Linden *v.* Graham, 740
v. Hepburn, 1112
 Lindley *v.* Groff, 1882
v. Kelley, 1231, 1232
 Linde *v.* Belisario, 595
 Lindsay *v.* Limbert, 1115
v. McCormack, 305, 306, 335, 336, 340,
 342
v. Murphy, 1457
 Lindsey *v.* Bates, 2099
v. Delano, 2175
v. Leighton, 1045
v. Lindsey, 1956
v. Miller, 2304
v. Platner, 1612, 1615
 Lindsley *v.* Coates, 118, 458
 Line *v.* Stephenson, 1080
 Lines *v.* Darden, 1561, 1654
 Lingen *v.* Lingen, 368
 Lingenfelter *v.* Ritchey, 1700
 Link *v.* Edmonson, 780, 885
 Linkenhoker's Heirs *v.* Detrick, 1506
 Linker *v.* Benson, 1897, 1915
v. Smith, 795
 Linn *v.* Alexander, 425
v. Ross, 1083, 1098, 1126, 1175, 1177
 Linn Co. Bank *v.* Hopkins, 1439, 1440
 Linnell *v.* Lyford, 2168
 Linsley *v.* Tibbals, 999, 1002
 Linton *v.* Wilson, 578
 Linville *v.* Savage, 2008
 Linzee *v.* Mixer, 267, 268
 Lion *v.* Burtiss, 447, 471
 Lippen *v.* Eldred, 310
 Lippett *v.* Hopkins, 321, 332
 Lippitt *v.* Huston, 448
 Lipsky *v.* Borgmann, 61, 63
 Liptrot *v.* Holmes, 1597, 1796
 Lisburne *v.* Davies, 1215, 1306
 Lishy *v.* Perry, 1481
 Lisle, Goodright d., *v.* Pullin, 424
 Lisloff *v.* Hart, 1642, 1643
 List *v.* Rodney, 407
 Litchfield *v.* Cudworth, 634, 636, 637
v. McComber, 1517
v. White, 1713, 1714, 1723, 1728
 Lithgow *v.* Kavenagh, 333, 340, 402, 414, 415,
 447, 466, 591, 2346
v. Moody, 1285, 1310
 Litscombe, Doe d., *v.* Yates, 265
 Littell & Smith Mfg. Co. *v.* Miller, 1949

- Litterer *v.* Berry, 2064
 Little *v.* Bennett, 1631
v. Birdwell, 1858
v. Dodge
v. Duncan, 1031
v. Libby, 210, 211, 212, 973, 980, 1149
v. Palister, 1253, 1266
v. Pearson, 1276, 1292, 2270, 2271
v. Snedecor
 Littlefield *v.* Brooks, 1456
v. Nichols, 2124
 Littleton *v.* Littleton, 727, 728, 794, 796, 912
 Littlewort *v.* Davis, 2045
 Litton *v.* Baldwin, 1375
 Lively *v.* Ball, 1213
v. Paschal, 907, 939
 Livermore *v.* Aldrich, 1648
 Livingston *v.* County of St. Clair, 2293
v. Ketcham, 547
v. Livingston, 647, 648, 962, 1640, 1647
v. Miller, 2258
v. Moingona Coal Co., 2238
v. Murray, 1754, 1820
v. Potts, 1162
v. Peru Iron Co., 2297
v. Reynolds, 546, 554, 556, 1223, 1229
v. Sticksles, 250, 255, 266, 1143
v. Story, 1994
v. Tanner, 1317, 1344, 1348, 1350, 1354, 1355, 1356
v. Tenbrock, 2199, 2201
v. Tompkins, 1146, 1872
 Livingston, Jackson ex d. *v.* Bryan, 1146, 1269
v. Krisselbrack, 993
 Ller *v.* Routh, 2295
 Llewellyn *v.* Mackworth, 1782, 1783, 1785
 Lloyd *v.* Barton, 267, 270
v. Carter, 1648, 1649, 1696
v. Conover, 785, 786, 787
v. Cozens, 1122, 1123, 1298, 1300, 1308, 1314, 1315, 1335, 1336
v. Chrispe, 1143, 1163
v. Gordon, 1915, 1976
v. Hart, 95
v. Holly, 1847, 1850
v. Lloyd, 202, 271, 307, 1637, 1680, 1858
v. Lynch, 1588, 1590, 1650, 1653, 1882, 1990
v. Malone, 862
v. Read, 1646, 1647
v. Spillet, 1537, 1538, 1611, 1637
v. Tomkies, 1166
 Lloyd, Doe d., *v.* Passingham, 1556, 1558, 1559, 1583, 1655
 Loach *v.* Farnum, 1044
 Loader *v.* Kemp, 1086
 Loague *v.* Memphis, 2260, 2261
 Loan Association *v.* Watson, 1384
 Lobdell *v.* Hall, 2240
v. Hayes, 731, 782, 828, 831, 893
v. Lobdell, 1697
v. Simpson, 2238
 Lobenthal *v.* Raleigh, 1816, 2167
 Lochenour *v.* Lochenour, 1647
 Lock *v.* Fulford, 2153, 2178
v. Lock, 518
v. Turze, 1092, 1190, 1245
 Locke *v.* Alexander, 1923
v. Barbour, 323, 500
v. Caldwell, 2175
v. Coleman, 1017, 1047
v. Frasher, 1281
v. Homer, 805, 2068, 2069
v. Matthews, 1293, 1295
v. Palmer, 2055
v. Rowell, 1461
v. White, 2301
 Lockey *v.* Lockey, 1615
 Lockhardt *v.* Hardy, 2181
 Lockhart *v.* Wyatt, 1600, 1794
 Lockitt's Admr. *v.* James, 914
 Lockwood *v.* Lockwood, 106, 981, 1254, 1255, 1264, 1300, 1322
v. Marsh, 2137
v. Nelson, 1794
v. Sturdevant, 810, 2096, 2098
v. Thunder Bay Co., 2271
 Lockwood, Doe d., *v.* Clark, 1076
 Lockyer *v.* Savage, 1677
v. Sinclair, 594
 Lodge *v.* Patterson, 1914, 1915
v. Simonton, 1756, 1759
 Loeb *v.* McMahon, 976, 1408
 Lofland *v.* Emory, 1319
 Lofft *v.* Dennis, 1177, 1179, 2270
 Lofsky *v.* Maujr, 2066
 Loftis *v.* Glass, 76
 Loftus' Case, 1024
 Logan *v.* Bell, 1829
v. Green, 1165
v. Herron, 1125, 1131, 1271, 1300, 1308, 1310, 1315, 1335, 1336, 1337
v. McGill, 588
v. Phillips, 898
v. Simmons, 659, 794, 795
v. Smither, 2107, 2151, 2166
v. Walker, 1646
v. Walton, 722
 Logue *v.* Bateman, 1821, 1822
 Logwood *v.* Hussey, 2044
 Lomax *v.* Bird, 2169
v. Gendele, 1883
 Lombard *v.* Kinzie, 776, 1014
 Lombrat *v.* Kinzie, 844
 Lomers *v.* Johnston, 1046
 Londendyck *v.* Anderson, 2245
 London *v.* London, 794
v. Richmond, 2265
 London Chartered Bank of Australia *v.* Lempriere, 1826
 Londonberry *v.* Chester, 596, 751
 Long *v.* Barnes, 1940
v. Blackall, 2280
v. Cason, 1782, 1785
v. Fitzsimmons, 563, 1083, 1202, 1228
v. Graeber, 664
v. Green, 1207, 1231
v. Kinney, 646, 895, 1938
v. Millar, 999, 1043
v. Moler, 1004
v. Mostyn, 1479
v. Wade, 2065
v. Whidden, 1032
v. White, 1371
v. Woods, 1138
 Longbottom *v.* Berry, 105, 125, 127, 132, 133
 Longfellow *v.* Longfellow, 1160, 1213, 1218, 1220
v. Quimbly, 1901
 Longford *v.* Eyre, 1831
 Longley *v.* Longley, 1637
 Longuet *v.* Scawen, 2010
 Longstretch *v.* Pennock, 2266
 Longstaff *v.* Meago, 132
 Longwith *v.* Butler, 59, 2160
 Loomer *v.* Dawson, 1000
v. Wheelwright, 811, 2011, 2099
 Loomis *v.* Bedell, 1166
v. Brush, 648
v. Gerson, 1504
v. Lincoln, 2272
v. Marshall, 1239, 1240, 1241, 1242, 1243, 1244
v. Pingree, 2355
v. Riley, 2152
v. Spencer, 2345
v. Wilbur, 545, 546, 554
 Lord *v.* Carbon Iron Co., 198
v. Crowell, 2083
v. Ferguson, 1617
v. Folmer, 2354
v. Lord, 936, 940, 955, 957, 1418
v. Morris, 2095

- Lord *v.* Parker, 646, 1514
 v. Ramsey, 2338
 v. Wardle, 60
 Lord de la Warre's Case, 277
 Lord, Doe d., *v.* Cragge, 1265, 1320, 1324
 Lord Hollis' Case, 1783
 Lore *v.* Pierson, 2261
 Lorentz *v.* Lorentz, 1647
 Lorieux *v.* Keller, 1521
 Lorimer *v.* Lewis, 1035
 Loring *v.* Bacon, 64, 65, 507, 1891
 v. Blake, 1682
 v. Cooke, 2139
 v. Elliott, 1637
 v. Loring, 1631
 v. Manufacturers Ins. Co., 2119
 v. Marsh, 1662, 1814, 1842
 v. Melendy, 1225
 v. Palmer, 1691, 1705
 v. Salisbury, 1749
 v. Steineman, 522, 523
 v. Stuart, 1949
 Lorman *v.* Benson, 68, 69, 70, 194
 Losee *v.* Buchanan, 198
 v. Morey, 1697
 Losey *v.* Simpson, 2365
 Lothrop *v.* Clewis, 2274
 v. Thayer, 1277
 v. Wightman, 1964
 Lott *v.* Thompson, 234
 v. Wyckoff, 370, 390
 v. Wyckoff, 415, 447, 471
 Lottman *v.* Barnett, 1194, 1196
 Loubat *v.* Nourse, 786, 824, 825, 1960, 1963
 Loucks, Jackson ex d., *v.* Churchill, 940, 944,
 945, 946, 955, 965
 Loud *v.* Lane, 809, 1810
 v. Loud, 896, 897
 Loudon *v.* Warfield, 574
 Loughborough's Ex. *v.* Loughborough's De-
 visees, 75
 Loughbridge *v.* Harris,
 Loughmiller *v.* Harris, 1763
 Loughran *v.* Ross, 115, 131, 146, 147, 1189, 1224
 v. Smith, 1017
 Louisville C. & C. R. Co. *v.* Letson, 1540
 Louisville R. Co. *v.* Covington, 2245
 Louke *v.* Woods, 2206
 Lounsbery *v.* Snyder, 1013, 1128, 1169, 1322,
 1323
 Lounsbury *v.* Purdy, 1559, 1613, 1615
 Loupe *v.* Wood, 1054
 Louri *v.* Coulter, 50
 Louthier *v.* Corroll, 1017
 Lovaller *v.* Menard, 1973
 Lovat *v.* Lord Ranelegh, 1841
 v. Ranelegh, 1157, 1158
 Love *v.* Buchanan, 1648
 v. Dennis, 1213
 v. Edmonston, 1140, 1259, 1269, 1290
 v. Gates, 1349
 v. Howard, 1102
 v. Law, 1315, 1316, 2272
 v. Mining Co., 2001
 v. Robertson, 1947
 Love, Den ex d., *v.* Edmonston, 1282, 1297,
 1309
 Loveacres *v.* Blight, 302, 338, 344, 1594
 Loveday *v.* Winter, 1040
 Lovelace's Case, 1044
 Lovelace *v.* Webb, 2065
 Lovell *v.* Briggs, 1766
 v. Leland, 2157
 Lover *v.* Bessenger, 1479
 Loveridge *v.* Cooper, 2124
 Lovering *v.* Lovering, 1080, 1082
 v. Worthington, 323, 1682
 Lovett *v.* Gillender, 249
 v. Lovett, 780, 788, 815, 820, 826
 Lovington *v.* County of St. Clair, 2293, 2294
 Low *v.* Burton, 490
 v. Burrow, 788, 820, 821
 Low *v.* Griffith, 988
 v. Henry, 2054
 v. Holmes, 1894
 v. Mumford, 1901
 v. Peno, 2016
 v. Smart, 2137
 Lowe's Case, 184
 Lowe *v.* Brooks, 1729, 1882
 v. Cloud, 265
 v. Grinnan, 2161
 v. London & N. W. R. R. Co., 1331,
 1332
 v. Miller, 1234, 1247, 1884, 1904, 2213
 Lowell's Appellant, 1886, 1919
 Lowell *v.* Daniels, 924, 2345
 v. Middlesex Ins. Co., 2008
 v. Shannon, 1419
 Lowell Meeting House *v.* Lowell, 64
 Lowenstein *v.* Chappel, 1247
 Lowndes *v.* Chrisolm, 2088, 2090
 Lowrey *v.* Byers, 2136, 2150
 v. Fulton, 1599
 Lowry *v.* Bradley, 1456
 v. Fisher, 792, 914
 v. Steele, 607, 608, 609, 615, 654, 693,
 1372
 v. Tew, 1269
 Lowther *v.* Corill, 1042
 v. Lowther, 1758
 Loyd *v.* Read, 1634
 Lozo *v.* Sutherland, 1425, 1426
 Lucas *v.* Brooks, 1214, 1274
 v. Cobbs, 1349
 v. Commerford, 1083
 v. Dorrien, 2002
 v. Harris, 2104, 2106
 v. Lockhardt, 1593, 1627, 1629, 1630, 1631
 v. Lucas, 588, 648
 v. Peters, 1989
 v. Rickerich, 1363, 1368, 1369
 v. Sawyer, 709, 721, 725, 893
 v. Wasson, 1246
 Luce *v.* Stubbs, 835, 868, 869
 Lucena *v.* Crauford, 631, 1668
 Luch's Appeal, 2003, 2004
 Lucier *v.* Marsales, 2258
 Lucius Hart Manf. Co., *Re*, 2266
 Luckett *v.* Townshend, 2055
 v. White, 1870
 Lucy *v.* Levingstone, 1869
 Lud *v.* Hoff, 1919, 1931, 1934
 Ludlam *v.* Ludlam, 217
 Ludlow *v.* Cooper, 786, 1960
 v. Hudson R. Co., 2232
 Ludlow, Jackson ex d., *v.* Meyers, 531, 532,
 1556, 1557, 1559, 1566
 v. New York & H. R. R. Co., 272,
 1058, 1840, 1860, 1863, 1867, 1868
 Lufkin *v.* Curtis, 591, 900
 v. Preston, 2250
 Luhrs *v.* Eimer, 221, 775
 Luigart *v.* Ripley, 965
 Luige *v.* Duchesi, 1739
 Lull *v.* Matthews, 1998
 Lumb *v.* Jerkins, 660, 672
 v. Milnes, 1371, 1372
 Lumis *v.* Reily, 1911
 Lumley *v.* Hodgson, 1120
 Lumley, Doe d., *v.* Scarborough, 1845
 Lummus *v.* Mitchell, 340
 Lunay *v.* Vantyne, 2282
 Lund *v.* Lund, 688, 1992, 2039, 2054
 v. Parker, 212
 Lundberg *v.* Sharvey, 1438
 Lunham *v.* Blundell, 1720
 Lunling *v.* Brady, 2151
 Lunn *v.* Gage, 1085, 1086
 v. Thornton, 2020
 Lunsford *v.* Turner, 1148, 1169, 1170, 1219, 1348
 Lunt *v.* Lunt, 2111
 Luntz *v.* Greve, 669
 Lupton *v.* Lupton, 2181

Lurch's Appeal, 2004
 Lush v. Wilkinson, 1626
 Lusher v. Banbong, 373
 Lusk v. McNamar, 1763
 v. Smith, 749
 Lute v. Reilly, 1502, 1519
 Luther v. Arnold, 1922, 1924
 v. Borden, 1516
 v. Winnisimmet Co., 2230
 Luttrell's Case, 2222, 2247
 Lycoming v. Union, 1517
 Lycoming F. Ins. Co. v. Jackson, 2114
 Lyddall v. Weston, 85
 Lyde v. Russell, 130, 145, 146, 1187, 1224
 Lydston v. Powell, 2159
 Lyford v. Thurston, 1622, 1746
 v. Ross, 799
 Lykes v. Schwarz, 1132
 Lyle v. Burke, 1592, 1786, 1788
 v. Richards, 401, 462
 v. Palmer, 123
 Lylerly v. Wheeler, 2355
 Lyles v. Diggle's Lessee, 533
 v. Lyles, 1895, 2260
 Lyman v. Cessford, 1626
 v. Fiske, 1456
 v. Gedney, 2096
 v. Hale, 50, 57
 v. Hollester, 744
 v. Lyman, 2155, 2180
 v. Seames, 2358
 v. United Ins. Co., 1649
 Lynch v. Baldwin, 1166
 v. Clarke, 217
 v. Clements, 1590
 v. Onondaga Salt Co., 1098
 v. Pace, 1401
 v. Utica Ins. Co., 2036, 2123
 Lynd v. Menzies, 34
 Lynde v. Hough, 1104, 1111, 1112, 1113, 1118,
 1141, 1867
 v. O'Donnell, 2154
 v. Rowe, 133, 2065
 v. Russell, 104
 Lyne's Exrs., 1376
 Lynn's Appeal, 494, 544, 553, 555, 558, 561
 Lyon v. Adde, 252
 v. Cunningham, 1027, 1258, 1269, 1271,
 1289, 1290, 1292, 1305
 v. Ilwaine, 1580
 v. Kain, 908
 v. La Mastern, 1213
 v. Lyon, 1776
 v. McIlvane, 810, 2039, 2058, 2130
 v. Marsh, 305, 317
 v. Marclay, 1782
 v. Robbins, 2075, 2172
 Lyons v. Adde, 2262
 Lysaght v. Edwards, 434
 Lysle v. Williams, 1005
 Lyster v. Kirkpatrick, 1884, 1888
 Lytle v. Arkansas, 2306, 2307, 2308

M.

Maberly v. Strod, 315
 Mabie v. Hatingter, 2133
 Mably v. Stainback, 201, 202
 Mabone v. Williams, 2087
 Kabury v. Rutz, 1466
 Macaulay v. Porter, 2052
 Macdonnell v. McKay, 54
 Macdonough v. Elam, 1488, 1502
 Mace v. Ramsey, 1247
 Macey v. Shurmer, 1629
 Machell v. Clarke, 455
 Macher v. Foundling Hospital, 1871
 Machette v. Wanless, 2027
 Machill v. Clark, 387
 Machir v. May, 1723
 Mack v. Burt, 1133

Mack v. Grover, 2149
 v. Patchin, 1082, 1091, 1190, 1245, 1248
 v. Roch, 585
 Mackason's Appeal, 1748
 Mackay v. Bloodgood, 501
 v. Macreth, 975, 1306
 Mackey v. Collins, 730
 v. Dillon, 2102
 v. Proctor, 597, 608, 615, 692, 703
 Mackie v. Smith, 106
 Mackinnon v. Stewart, 1793
 Mackintosh v. Trotter, 145
 Macleay, *Re*, 258, 261, 262, 263
 Macklot v. Dubreuil, 2295
 Macknet v. Macknet, 938, 948
 Mackreth v. Symmons, 832, 2008, 2009
 Mackubin v. Whatcroft, 1059, 1060, 1139
 Macnab v. Whitbread, 1627, 1629
 Macnamara v. Jones, 347, 1632
 Macomber v. Cambridge Mut. F. Ins. Co.,
 2116
 v. Godfrey, 2228
 v. Parker, 2020
 Macreth v. Symmons, 2004, 2124
 Macy v. Combs, 1243, 1244
 Madden v. Madden, 1489
 Maddison v. Chapman, 918, 944
 Maddocks v. Jellison, 740
 v. White, 1184
 Maddon v. White, 1301, 1306
 Maddox v. Dent, 76
 v. Maddox, 270, 1858
 v. Simmons, 1032
 v. White, 1104, 1107, 1228
 Madigan v. McCarthy, 2021
 v. Welsh, 730
 Madison Avenue Baptist Church v. Baptist
 Church on Oliver Street, 35, 2295
 Madison & J. R. Co. v. Whiteneck, 2125
 Madison, etc., Plank Road Co. v. Watertown
 Plank Road Co., 2014, 2016
 Madland v. Benland, 2336
 Madox v. Humphries, 2254
 Maedar v. City of Carondelet, 1082
 Magaw v. Cannon, 1284, 1308, 1321, 1323
 v. Lambert, 1098, 1160, 1166, 1179, 1182
 Magdalene Hospital v. Knott, 1019
 Magee v. Leggett, 2177
 v. Magee, 210, 211, 1492, 1497, 1498, 2295,
 2297
 v. O'Neill, 265
 v. Mellon, 923
 v. Young, 714, 721, 725, 769, 850, 882, 893
 Maggart v. Hausbarger, 1000, 1181
 Magill v. De Witt Co. County Sav. Bank,
 2137
 v. Hinsdale, 2065
 Magnay v. Edwards, 1173
 Magniac v. Thompson, 1561
 Magnolia v. Marshall, 69
 Magnusson v. Johnson, 2053
 Magoun v. Lapham, 207
 Magruder v. Peter, 204
 v. State Bank, 2025, 2059
 Maguire v. Maguire, 594, 893
 v. Park, 123
 Magwood v. Johnson, 1562
 Mahagan v. Mead, 2153
 Mahan v. Brown, 2223, 2224
 Mahe v. Reynolds, 1135
 Maher v. Lanfrom, 2060
 v. McConaga, 1462
 Mahew v. Hardesty, 1117
 Mahon v. McGraw, 1621
 v. Smith, 708
 Mahone v. Brown, 83
 Mahoney v. A. & St. L. R. R. Co., 976
 v. Young, 789, 797, 821, 822, 841, 937, 945
 Mahorner v. Harrison, 1653
 Maigly v. Hauer, 1538
 Main v. Feathers, 1075, 1100
 v. Festhers, 2262

- Main *v.* Green, 799, 1139
 v. Schwarzwaelder, 104, 120, 137
 Mainwaring *v.* Giles, 30, 33
 Major *v.* Buckley, 1777
 v. Chadwick, 2226, 2229, 2361
 v. Lansley, 1371, 1562
 Makepeace *v.* Rogers, 1782
 Makin *v.* Watkinson, 1084, 1097
 Malcolm *v.* Allen, 2131
 v. Malcolm, 411, 413, 415
 v. Rogers, 1901, 1927
 Malim *v.* Barker, 1630
 v. Keighley, 347, 1628, 1630, 1632
 Malin *v.* Clout, 804, 962
 v. Malin, 1588, 1653
 Mallalieu *v.* Wickham, 2170
 Mallett *v.* Page, 2134
 Mallinson *v.* Mallinson, 1464
 Mallon *v.* Gates, 1409, 1452, 1524
 Malloney *v.* Horon, 792, 793, 905, 906, 907, 915,
 923, 924
 Mallory *v.* Berry, 1483, 1484
 v. Clark, 1751
 v. Hitchcock, 810, 2097, 2098
 v. Russell, 824
 v. Stodder, 1016
 v. Westshore R. Co., 2070
 Malmsby *v.* Milne, 96
 Malone *v.* Majors, 933, 947
 v. McLaurin, 587, 598, 604, 608, 612, 619,
 686, 688, 692, 693, 703
 v. O'Connor, 1630
 Malpas *v.* Ackland, 1038, 1778
 Maltby's Appeal, 139
 Manahan *v.* Manahan, 2101
 Manchester *v.* Doddridge, 1258, 1269, 1281,
 1282, 1289, 1293, 1294, 1928
 v. Durfee, 416, 405
 Manchester Bond W. Co. *v.* Carr, 1153
 Mandel *v.* McClave, 708, 715, 911, 929
 v. McClure, 726
 Manderbach *v.* Bethany's Orphan Home,
 2216
 Manderschild *v.* Dubuque, 2206
 Mandeville *v.* Solomon, 1990
 v. Welch, 2002
 Mandelbaum *v.* McDonell, 245, 249, 252, 255,
 259, 263, 266, 444, 499
 Manes *v.* Durant, 795
 Manhattan Co. *v.* Evertson, 915
 v. Osgood, 1625
 Manhattan Life Ins. Co. *v.* Crawford, 2069
 Manhattan R. Co. *v.* N. Y. Elevated R. Co.,
 1019
 Manice *v.* Brady, 2249, 2254
 v. Manice, 75, 299, 1606
 v. Millen, 1156
 Manier *v.* Myers, 2223, 2292
 Manifee *v.* Manifee, 847, 861, 866
 Manion *v.* Titsworth, 1781
 Manks *v.* Enloe, 1967
 Manlone *v.* Kornrumpf, 1457
 Manly *v.* Hunt, 1751
 v. Pettel, 1976
 v. Scott, 1034
 v. Slason, 832, 2005, 2006, 2008
 Mann's Appeal, 1362, 1366, 1370, 1376
 Mann *v.* Best, 2160
 v. City of Utica, 1517
 v. Darlington, 1623
 v. Eckford's Exrs., 1101
 v. Edson, 760, 764, 766, 781, 915
 v. Falcon, 2000
 v. Lovejoy, 1264, 1324, 1325
 v. Mann, 964, 1648
 v. Rogers, 1394
 v. Taylor, 1264, 1324, 1325
 v. Young, 2301
 Manners *v.* Phila. Library Co., 1603, 1604, 1681
 Manning's Case, 606, 1250
 Manning *v.* Hayden, 1621, 1644
 v. Labore, 783, 797, 819, 841, 842, 844, 870
 Manning *v.* Manning, 1715, 1716
 v. Markel 2073
 v. Smith 2247, 2361
 v. Wasdale, 2214, 2226, 2227
 Mannolt *v.* Brush, 1979
 Manriquez *v.* Hart, 1415
 Mansell's Estate, 2182
 Mansell *v.* Mansell, 1761
 v. Vaughan, 1817
 Mansfield *v.* Alwood, 1714
 v. Blackburne, 142
 v. Doolin, 1051
 v. Hawkes, 2191
 v. Mansfield, 1804, 1833, 1842, 1843, 1844
 v. McIntyre, 771, 772, 920
 v. Pembroke, 877
 Mansfield, C. & L. M. R. R. Co. *v.* Drinker,
 594
 Manser's Case, 2352
 Mansur *v.* Willard, 1593
 Manson *v.* Phoenix Ins. Co., 2113
 Mansony *v.* U. S. Bank, 1091
 Mansur *v.* Pratt, 2015
 Mantle *v.* Wellington, 1026
 Mantz *v.* Buchanan, 710, 801, 802, 817, 849,
 860
 Manville's Case, 775, 883
 Manwaring *v.* Jenison, 116, 117
 v. Powell, 1932, 2069, 2072
 v. Tabor, 405, 409, 411, 413
 Maples *v.* Medlin, 1764, 1765
 v. Millon, 119, 132
 Mapps *v.* Sharpe, 2104, 2106
 v. Tyler, 1754, 1755
 Marable *v.* Jordan, 589, 1367
 Marble *v.* Lewis, 843, 844
 v. Price, 2298
 Marburg *v.* Cole, 1024, 1919, 1931, 1932, 1942,
 1950, 1951
 Marcy *v.* Marcy, 1915, 2296
 Marden *v.* Chase, 2317, 2318
 v. Jordan, 1253
 Margraf *v.* Muir, 1697
 Margrave *v.* Archbold, 1009
 Mariner *v.* Saunders, 1931, 1934
 Mark *v.* Mark, 1864
 v. Murphy, 744, 891, 922, 2151
 Markel *v.* Evans, 2156
 Markell *v.* Erchelberger, 2133
 Markham *v.* Guerrant, 247, 254, 1748
 v. Howell, 1039, 1804
 v. Merritt, 786, 787, 841, 905
 Mariner *v.* Burton's Admr., 1290
 v. Crocker, 1119
 Markillie *v.* Ragland, 305
 Markland *v.* Crump, 1074, 2251
 Marks *v.* Gartside, 1141
 v. Marks, 1572
 v. Marsh, 1454
 v. Pell, 2095, 2175
 v. Sewall, 1924
 Marlatt *v.* Warwick, 4
 Marlborough *v.* Godolphine, 1812
 Marler *v.* Thomas, 1697
 Marley *v.* Rogers, 1149
 Marmiche *v.* Roumien, 1331
 Marmon *v.* Marmon, 2013
 Marple *v.* Myers, 1165
 v. Scott, 1094
 Marquart *v.* Bradford, 2303
 Marquette R. Co. *v.* Harlow, 2270
 Marquis of Camden, The, *v.* Batterbury, 1301
 Marr *v.* Gilliam, 1915
 v. Lewis, 2164
 Marriot *v.* Marriot, 1738
 Marriott *v.* Abell, 1909
 v. Edwards, 1149
 v. Givens, 1712
 Marryat *v.* Townly, 315
 Marsellis *v.* Thalheimer, 274, 592, 617, 618, 619,
 620, 1980
 Marsh *v.* Austin, 2031, 2032

- Marsh *v.* Butterfield, 1172
v. Hand, 1896
v. Higgins, 671
v. Lee, 2139
v. Marsh, 1465
v. Pidgeway, 2158
v. Pike, 2069, 2072, 2112, 2150, 2166
v. Townner, 2005
- Marshall *v.* Barr, 1450, 1473, 1475
v. Berridge, 999
v. Carson, 1644
v. Christmas, 2008
v. Conrad, 216, 2014
v. Crehore, 1982
v. Crutwell, 1647
v. Davies, 2071, 2089, 2150, 2165, 2166
v. Ferguson, 51, 52
v. Fish, 297
v. Fiske, 149, 1548, 2316, 2364
v. Green, 55, 56
v. Joy, 1621
v. King, 715, 851
v. Lippman, 2262
v. Marshall, 754, 755
v. Moore, 2153
v. Peters, 71, 72
v. Ruddick, 2136
v. Sears, 1481
v. Stephens, 1375, 1562, 1621, 1717
v. Stewart, 2039, 2040, 2055
v. Wood, 2007
- Marshall Co. High School *v.* Evangelical Synod
School, 1856
- Marshall County *v.* Schenck, 1041
- Marsham *v.* Hunter, 2202
- Marston *v.* Bradshaw, 2365
v. Marston, 205, 1850, 2158
- Martien *v.* Norris, 945
- Martin *v.* Baker, 1075
v. Ballou, 1857
v. Beatty, 2017
v. Benoist, 1194, 1196
v. Blanchett, 998
v. Dickson, 2250
v. Dwelly, 1450, 1478, 2011
v. Fridley, 2085
v. Funk, 1587, 1594, 1655
v. Goble, 2222
v. Hughes, 1410, 1509, 1513, 1517
v. Hurlburt & R. Sav. Bk., 1428
v. Jackson, 1781, 1933, 1940
v. Knapp, 1257, 1267, 1278
v. Knowllys, 1969
v. Kirkpatrick, 1513
v. Lincoln, 744
v. Maguire, 1044
v. Margham, 260, 272
v. Martin, 647, 714, 755, 883, 896, 910, 956,
960, 1128, 1168, 1174, 1557, 1773, 2250,
2257, 2268, 2348
v. Mayo, 1031
v. McReynolds, 1885, 2104, 2105, 2107,
2148
v. Mitchell, 1486
v. Morris, 2151
v. Nixon, 2060
v. Noble, 915
v. O'Connor, 1077, 1112, 1122
v. Ogdon, 193
v. Pensacola & G. R. Co., 135
v. Pond, 2142
v. Reynolds, 1886
v. Robinson, 669
v. Robson, 587, 588
v. Rce, 108, 109, 110, 121, 131, 147, 1137,
1187
v. Searcy, 1164
v. Smith, 1323, 1559, 1876, 1878, 1883
v. Stearns, 1159, 1161
v. Sterling, 516
v. Strachan, 454, 459
v. Tenison, 1689
- Martin *v.* Thompson, 47
v. Tobes, 1118
v. Waddell's Lessee, 196
v. Walker, 1396
v. Williams, 1020, 1021
- Martin, Doe d., *v.* Watts, 1299, 1307, 1307, 1308,
1318, 1319, 1320, 1325, 1337
- Martin Clothing Co. *v.* Henly, 1439
- Martin, Heir of Fairfax, *v.* Hunter's Lessees,
673
- Martindale *v.* Price, 1047
- Martineau *v.* McCullum, 2107
v. Steele, 2263
- Martinez *v.* Thompson, 1201
- Martins *v.* Bennett, 795
- Martyn *v.* Knowllys, 1926
- Marvel *v.* Outlip, 1282
- Marvin *v.* Brewster Iron Mining Co., 90, 92, 93,
2232, 2233, 2237
v. Schilling, 2170
v. Smith, 839
v. Trumbull, 1963
- Marvin Safe Co. *v.* Norton, 2056
- Marx *v.* Davis, 2082
v. McGlynn, 216
- Marx Frankel *v.* Marx, 1028
- Maryland Fire Ins. Co. *v.* Dalrymple, 1703,
1705, 1760, 1770
- Maryland Mutual Benevolent Society *v.* Clendenin,
1822
- Maslin *v.* Thomas, 252, 396, 407, 408
- Mason's Estate, 20
- Mason *v.* Ainsworth, 1670
v. Anderson, 2303
v. Bascom, 1169, 1170
v. Daly, 2060, 2061
v. Day, 1091
v. Deese, 645
v. Denison, 1350
v. Fenn, 145, 147, 1188, 1204
v. Finch, 1904
v. Fuller, 720
v. Grant, 2055
v. Haile, 1512, 1517
v. Hill, 72, 2225, 2226
v. Holt, 1357
v. Homer, 720
v. Jones, 1980
v. Lord, 1580
v. Martin, 1768
v. Mason, 907, 1580, 1784
v. M. E. Church, 1555
v. Meyers, 1205
v. Moody, 2036, 2037
v. Morgan, 1361
v. Moyers, 1210
v. Payne, 2153, 2180
v. Philbrook, 2302
v. Pomeroy, 1752
v. Smith, 1173
v. White, 2358
- Mason's Lessee *v.* Sexton, 903
- Massachusetts Hospital Life Insurance Co. *v.*
Wilson, 1119
- Massey *v.* Banner, 1664, 1713, 1714, 1720, 1724,
1728
v. Farmers' Bank, 974, 975
v. Hudson, 322
v. O'Dell, 1782, 1783
v. Papin, 2015, 2080
- Massie *v.* Long, 1026, 2356
v. Watts, 1585, 1643
v. Wilson, 2155
- Massie's Heirs *v.* Long, 1923
- Massot *v.* Moses, 983
- Master *v.* Master, 661
v. Miller, 2338
- Masters *v.* Madison Co. Ins. Co., 239
v. Pollic, 56, 57
- Masterton *v.* Mayor of Brooklyn, 1247
- Mastin *v.* Barnard, 1814
v. Halley, 2364

- Masury *v.* Southworth, 1063, 1070, 1071, 1074,
1078, 1103
Mather *v.* Chapman, 98, 99, 2332
v. Fraser, 103, 120, 125, 126, 133, 1186
v. Kunke, 2254
v. Norton, 1806
Mathews *v.* Aiken, 2126, 2178
v. Bennett, 643, 1781
v. Heyward, 1623
v. Stephenson, 1579
Mathewson *v.* Phoenix Iron Foundry, 752
v. Thompson, 1339
Mathis *v.* Stifflebeam, 1646
Matlack *v.* Roberts, 414, 418, 467
Matlock *v.* Fry, 50
v. Lee, 733, 735, 739
v. Matlock, 786, 824, 1961
Matney *v.* Graham, 837
Mattack *v.* James, 786
Matter of Albany Street, 2324
Bull, 1804
Eddy, 2269
Latham, 1980, 1981
Orr, 1521
Prentiss, 1979
Matterson *v.* Thomas, 2150, 2153
Matthew *v.* James, Baxter, 1033
Matthewman's Case, 2012
Matthews *v.* Duryee, 708, 709, 716, 727, 813,
818, 925, 926, 2164
v. Light, 1620, 1643
v. Mayor, 1029
v. Memphis, 2087, 2088
v. Porter, 2047
v. Puffer, 2345
v. Wallwyn, 1995
v. Ward, 194, 195, 298, 1261, 1294, 1548,
1558, 1713, 1742, 1750, 1800
Matthewson *v.* Smith, 801, 802
Mattice *v.* Lord, 1059
Mattingly *v.* Speak, 2331
Mattis *v.* Robinson, 1160, 1212, 1222, 2258
Mattison *v.* Marks, 2138
Mattock *v.* Hightshue, 2261
v. Stearns, 616, 635, 636, 637, 661, 769,
1364
Mattex *v.* Hightshue, 1291, 1924
v. Weand, 2008
Matts *v.* Hawkins, 1903
Mauck *v.* Mauck, 786
Mauldin *v.* Armistead, 1794, 1885
Maule *v.* Ashmead, 1067, 1080, 2362
v. Stokes, 2254
v. Weaver, 59, 1063
Maull *v.* Wilson, 567
Maund's Case, 1050
Maundrell *v.* Maundrell, 1807, 1816, 1826, 1844,
1845, 1919
Maunsell *v.* Hart, 564
Maury *v.* Mason, 2175
Mausser *v.* Dix, 1740
Maverick *v.* Donaldson, 995
v. Grier, 1718
v. Lewis, 979, 1001, 1127, 1169, 1233
Maxan *v.* Scott, 2012
Maxey *v.* Loyal, 1503, 1517
Maxfield *v.* Hoecker, 2059
v. Patchen, 2055
Maxon *v.* Gray, 716, 734, 735, 741, 848
Maxwell *v.* Bay City Bridge Co., 70
v. McAtee, 72
v. Brooks, 2121
v. Maxwell, 1975
v. Reed, 1506
May *v.* Calder, 735, 1023
v. Duke, 1718
v. Hook, 2344
v. Joyes, 487
v. Le Claire, 1661, 1761, 2322
v. May, 645, 873, 877
v. Parker, 1900, 1901
v. Rawson, 2151
May *v.* Rice, 1027
v. Rumney, 711, 717, 870, 871
v. Slaughter, 1723
v. Taylor, 1707
v. Tillman, 764
Mayberry *v.* Johnson, 1284
v. Brien, 762, 766, 824, 829, 866, 940, 1492
v. Bryan, 783
Mayer *v.* McLure, 354
v. Moller, 1066
v. Mordecai, 1664
Mayers *v.* Paxton, 1383, 1467
Mayfield *v.* Maasden, 1420
Mayham *v.* Combs, 2008
Mayhew *v.* Cricket, 2172
v. Durfee, 1895
Mayho *v.* Buckhurst, 1074
v. Cotton, 1419
Mayn *v.* Mayn, 1384
Maynard *v.* Esher, 2223
v. Hunt, 2128, 2129
v. Maynard, 216, 1016, 1243, 2014, 2035
v. Valentine, 5
Maynes *v.* Moore, 1517
Mayo *v.* Blount, 2357
v. Carrington, 2, 307, 309, 310
v. Cartwright, 2302
v. Fletcher, 2065, 2066, 2077, 2186, 2187
v. Judah, 2051
v. Merrick, 2108
v. Newhioff, 1186
v. Shattuck, 2261
Mayor *v.* Athrop, 2332
v. Colies, 1197
v. Darmon, 2332
v. Elliott, 1555
v. Latton, 1019
v. Mebie, 975, 982, 983, 985
v. Pearl, 2273
v. Wylie, 1020
Mayor of Baltimore *v.* Warren Mfg. Co., 198
Mayor of Hamilton *v.* Hudson, 202, 307
Mayor of Hull *v.* Horner, 2291
Mayor of Kingston *v.* Horner, 518
Mayor of London *v.* Tench, 1040
Mayor of New York *v.* Exchange Fire Ins. Co.,
1189
v. Lord, 5
v. Mabie, 1065, 1080, 1081, 1082
v. Slack, 5
v. Stuyvesant, 1851
Mayor of Philadelphia *v.* Permanent Bridge
Co., 1223
Mayor of Stafford *v.* Till, 1332
Mayor of Thetford *v.* Tyler, 1133, 1317
Mayor, etc., of Colchester *v.* Lowton, 2331, 2342
Mayson *v.* Sexton, 456, 463, 464
Maywood *v.* Johnston, 1375
v. Logan, 1197
Mazyck *v.* Vanderhost, 383
McAdam *v.* Walker, 595
McAfee *v.* Bettis, 929
v. Ferguson, 794
McAlester *v.* Landers, 1166
McAlister *v.* Hovauger, 892
v. Montgomery, 1965
McAllister *v.* Commonwealth, 1719
v. Shaw, 2335
v. Tate, 345
McAlpin *v.* Powell, 1082, 1182
McAlpine *v.* Burnett, 2006
v. Woodruff, 2268
v. Zitzer, 2079
McArthur *v.* Carrie, 872
v. Franklin, 840, 925, 926, 2073, 2173
v. Gordon, 1665, 1724
v. Schenck, 2071
v. Scott, 1682
v. Sears, 1099
McBee, *Ex parte*, 76
McBeth *v.* Trahue, 1923
McBrayer *v.* Cariker, 1578

- McBride's Estate, 650, 652
 McBride *v.* Smyth, 1673, 1675, 1797
 v. Williams, 645
 McBurney *v.* McIntyre, 1104, 1113
 McCabe *v.* Bellows, 802, 840, 873, 879, 926, 927,
 928, 1494, 2074
 v. Grey, 2121
 v. Mazzuchelli, 1421, 1422
 v. Swap, 803, 805, 806, 808, 809
 McCable *v.* Hunter, 501
 McCafferty *v.* Griswold, 1245
 v. McCafferty, 769, 771, 772, 920, 1376
 v. Spuyten Duyvil, 1194, 1195
 McCaffery *v.* Woden, 2020
 McCaffrey *v.* Woodin, 1051, 2017, 2018
 McCain *v.* Pickens, 1794
 McCall *v.* Cawthorn, 2064
 v. Lenox, 2064
 v. Walter, 123
 v. Yard, 2147
 McCall's Lessee *v.* Carpenter, 1973
 McCallam *v.* Carsell, 1783
 v. Carswell, 1781
 McCallister *v.* Brand's Heirs, 945, 947, 948
 v. Willey, 1637
 McCallum *v.* Germantown Water Co., 2238
 McCammon *v.* Wheeler & Wilson Co., 998
 McCampbell *v.* McCambell, 497, 645
 McCandless' Appeal, 1988
 McCandless' Estate, 1781
 McCandless *v.* Warner, 1691
 McCann *v.* Rathbone, 1140, 1266, 1294
 McCanna *v.* Johnston, 1310
 McCants *v.* Bee, 1707, 1708, 1759, 1764, 1766,
 1776
 McCardley *v.* Barricklow, 2242
 McCarron *v.* Cassidy, 2088
 McCartee *v.* Camel, 522, 523
 v. Campbell, 522
 v. Ely, 987
 v. Teller, 899, 929, 933, 951, 953, 954, 957,
 958, 960
 v. Orphans' Asylum Soc., 224, 1541, 1565
 McCarthy's Estate, 94
 McCarthy *v.* Graham, 2167
 v. McCarthy, 1783
 v. Marsh, 217, 221
 v. Van Der Mey, 1520
 McCartney *v.* Bone, 872
 v. Hunt, 1212
 McCarty *v.* Carter, 1211
 v. Kitchenman, 2241
 v. Terry, 221, 1637
 McCaskle *v.* Amaune, 2365
 McCaslin *v.* State, 2081, 2187
 McCaughal *v.* Ryan, 1603
 McCauley's Exrs. *v.* Dismal Swamp Land Co.,
 742
 McCauley *v.* Fulton, 1965
 v. Grimes, 760, 763, 765, 766, 804, 817, 826,
 829, 830
 McCausland's Estate, 751, 752
 McCausland *v.* McCausland, 596
 McCaw *v.* Burk, 959
 McChandles *v.* Engle, 202
 McClafferty *v.* Spuyten Duyvil, 1193
 McClain *v.* Doe d. Malone, 1309
 v. Gregg, 1365
 McClanahan *v.* Henderson, 1708, 1726, 1768
 v. Porter, 731, 791, 841, 844, 874, 891
 McClane *v.* White, 2047
 McClaren *v.* Spaulding, 1127
 McClary *v.* Bixby, 1425, 1451
 McCleary *v.* Edwards, 1166
 v. Ellis, 249, 252, 499
 McClellan *v.* McClellan, 1590, 1592, 1656
 McClenaghan *v.* McClenaghan, 223
 McClenny *v.* Floyd, 1677
 McClintock's Appeal, 56
 McClintock *v.* Criswell, 1211
 McClosky *v.* Miller, 2271
 McClowry *v.* Cloghan's Admr., 1245
 McClung *v.* Ross, 1913, 1914, 1916, 1917, 2295
 McClure's Appeal, 76
 McClure *v.* Douthitt, 328, 333
 v. Harris, 765, 777, 804
 v. McClure, 1271
 v. Melton, 2096
 v. Miller, 659, 995
 McClure's Heirs *v.* Douthitt, 306, 310
 McClurg's Appeal, 665
 McClurg *v.* Phillips, 2038
 McClurkam *v.* Thompson, 2050, 2051
 McClurken *v.* McClurken, 1394
 McClury *v.* Schwartz, 727
 McColl *v.* Fraser, 1762
 McCollough's Appeal, 1858
 McCollough *v.* Gilmore, 259, 306, 331, 333, 348
 McComb *v.* Wallace, 1272
 McCombe *v.* Wight, 522
 McCombs *v.* Becker, 2272
 McConaughy *v.* Baxter, 1420, 1433, 1441, 1442,
 1459
 McConnell *v.* Blood, 109, 120, 126, 132, 133, 134,
 138, 2080
 v. Bowdry's Heirs, 1160, 1216
 v. Brayner, 1700
 v. Hollowbush, 2087
 v. Kibbe, 1979
 v. Martin, 1910
 v. Reed, 1777, 2321, 2322, 2365
 v. Scott, 2141
 v. Smith, 309, 353
 v. Varey, 1978
 v. Wenrich, 663
 McCord *v.* McCord, 1806
 McCormack *v.* Digby, 2106
 v. Sullivan, 367, 368, 720
 McCormic *v.* Leggett, 1031
 McCormick *v.* Bishop, 64, 65, 507
 v. Connell, 1061, 1154
 v. Crogan, 1701
 v. Gorgan, 1616
 v. Grogan, 1644
 v. Hunter, 895
 v. Irwin, 2177
 v. Knox, 2074, 2172
 v. Rusch, 1511
 v. Sullivan, 2057, 2058, 2288, 2289, 2339
 v. Taylor, 847, 861
 v. Young, 2261, 2262
 McCorry *v.* King's Heirs, 489, 513, 516, 586,
 590, 591, 600, 603, 613
 McCoster *v.* Brady, 299, 1595, 1606, 1753, 1788
 McCotter *v.* Lawrence, 2314
 McCoy *v.* Bateman, 2257
 v. Scott, 1021, 2252, 2257, 2259
 McCracken *v.* Hayward, 1512
 v. Harris, 1499
 v. Rogers, 2279
 v. San Francisco, 2342
 McCrackin *v.* Wright, 2322, 2323
 McCrackin, Jackson ex d., *v.* Wright, 829
 McCrae, Jackson ex d., *v.* Mancius, 489, 497,
 501, 514, 515, 516, 744
 McCracken *v.* Hall, 115, 142, 146
 McCraney *v.* Alden, 2060
 v. McCraney, 749, 750, 751, 769, 770, 771,
 862, 920
 McCranklin *v.* McCranklin, 636, 725, 1359
 McCrary *v.* Slaughter, 1241
 McCray *v.* Samuel, 2272
 McCrea, Jackson ex d., *v.* Dunlap, 1016
 v. Purmort, 1700
 McCready *v.* Guardians, 1731
 McCready *v.* Boston & M. R. Co., 2243
 v. Casey, 1648, 1651
 v. Guardians, 1731
 v. McCready, 662, 2365
 v. Marston, 1216
 v. Osborne, 135
 McCreery *v.* Allender, 215, 2014
 v. Shaffer, 1490
 McCrickett *v.* Wilson, 2165, 2167

- McCroan *v.* Pope, 1562
 McCroskey *v.* Walker, 1439, 1440
 McCruder *v.* Peter, 1023
 McCuan *v.* Turrentine, 1411
 McCubbin *v.* Cromwell, 736, 783, 1589, 1598,
 1691, 1734
 McCue *v.* Gallagher, 1646
 McCuffey *v.* Finley, 2147
 McCulloch *v.* Good, 2274
 McCullom *v.* Turpee, 2153, 2180
 McCullough's Appeal, 271
 McCullough *v.* Allen, 917
 v. Anderson, 1821
 v. Cox, 1854
 v. Dobson, 1048
 v. Ford, 1646
 v. Gilmore, 249, 261, 262, 263, 266, 267,
 499
 v. Gliddon, 292
 v. Irvine, 565
 v. Valentine, 687, 699
 McCully *v.* Smith, 836
 McCumber *v.* Gilman, 2185
 McCune *v.* McMichael, 2302
 McCurdy *v.* Canning, 1024, 1920, 1923, 1939,
 1940, 1944, 1951, 1952
 McDaniel *v.* Colvin, 2027
 v. Carroll, 1984
 v. Douglas, 933
 McDearman *v.* McClure, 1906
 McDermott *v.* Burke, 2065, 2173
 McDermont *v.* Burke, 975, 1028
 v. French, 1920, 1938, 1939, 1950
 McDermutt *v.* Strong, 2083
 McDevitt *v.* Lambert, 1330, 1340
 v. Sullivan, 2258
 McDill *v.* McDill, 2352
 McDonald *v.* Badger, 1419, 1947
 v. Black, 2113, 2114, 2117
 v. Crandall, 1381, 1450, 1453, 1460, 1468,
 1469, 1476, 1477, 1478, 1495, 1522
 v. Gayle, 1260, 1313
 v. Heylin, 504, 509
 v. Lindall, 2207
 v. McDonald, 1782, 2151
 v. Sims, 1781
 v. Stewart, 1010, 2259
 v. Walgrove, 338
 v. Whitney, 2154
 McDonel *v.* State, 217
 McDonough *v.* Gilman, 1199
 v. Murdoch, 1676
 v. O'Neil, 1643, 1760, 2045
 v. Squire, 2043
 McDougal *v.* Bradford, 1950
 McDougald *v.* Hepburn, 817
 McDowell *v.* Adams, 2252, 2257, 2259
 v. Brown, 249
 v. Fisher, 2025, 2059
 v. Goldsmith, 1781
 v. Gran, 1842
 v. Hendrix, 2262
 v. Simpson, 523, 981, 997, 1013, 1018,
 1041, 1042, 1254, 1255, 1264, 1284,
 1308, 1314, 1321, 1323, 1338
 McDuff *v.* Beauchamp, 1024, 1942, 1952
 McDugald *v.* Hepburn, 782
 McElderry *v.* Flannagan, 2269
 v. Shipley, 1697, 1699
 McElmoyne *v.* Cohen, 2299
 McElroy *v.* Bixby, 1410, 1414, 1425
 v. McElroy, 1592, 1797
 McFadden *v.* Jenkins, 1587
 v. Vincent, 1034
 McFardin *v.* Rippey, 2268
 McFarlan *v.* Febeger's Heirs, 909, 912
 v. Watson, 1107, 1124
 McFarland *v.* Chase, 1266, 1294
 v. Febeger's Heirs, 911, 924
 v. Fish, 1428
 v. Goodman, 1481
 McFarlane *v.* Febeger's Heirs, 901
- McFarlane *v.* Williams, 999, 1043
 McFerran *v.* Davis, 1794
 McFerrin *v.* White, 2152
 McGan *v.* Marshall, 985, 2104, 2343
 McGangley *v.* Henry, 820
 McGarron *v.* Cassidy, 2053
 McGarvey *v.* Puckett, 1141
 McGary *v.* Hastings, 1166
 McGaughey's Admrs. *v.* Henry, 1815
 McGaughney *v.* Henry, 821
 McGaw *v.* Cannon, 1314, 1338
 McGee *v.* Davie, 2165
 v. Ellis, 1773
 v. Fitzer, 2020
 v. Gibson, 1262, 1272, 1289, 1297, 1329
 v. McGee, 893, 899, 2296
 v. Morgan, 2296, 2297
 v. Rice, 1472, 1486
 v. Roen, 1101
 McGehee *v.* McGehee, 840, 841, 844
 McGill *v.* Ash, 1903
 McGillivray *v.* Evans, 1988
 McGinnis's Appeal, 2138
 McGinnis *v.* Fernandes, 1207
 v. Porter, 1145, 1150
 v. State, 1515
 McGirr *v.* Aaron, 1541, 1599
 McGiven *v.* Wheelock, 811, 2134
 McGlashan *v.* Tallmadge, 1066, 1175
 McGlynn *v.* Butler, 1006
 v. Moore, 1060, 1154, 1156
 McGoon *v.* Ankens, 2303
 v. Scales, 1655, 1656, 1746
 McGovern *v.* Knox, 1646
 McGowan *v.* Baldwin, 1421
 v. McGowan, 778, 1634, 1640, 1651
 v. Smith, 783
 McGowen *v.* Sennett, 1338
 McGrane *v.* Archibald, 1872
 McGrath *v.* City of Boston, 992, 993
 v. Sinclair, 1424, 1425
 McGready *v.* McGready, 2031, 2051
 McCreary *v.* Osborne, 137
 McGregor *v.* Brown, 54, 55, 543, 549, 555, 564,
 566
 v. Comstock, 210, 211, 217, 401, 401, 402,
 2289
 v. Rawle, 1310, 1333
 v. Williams, 2074
 McGuire *v.* Grant, 198, 2231, 2232, 2233, 2234
 v. McGowen, 1635
 v. Miller, 1624
 v. Van Pelt, 1425, 2015, 2160
 McGulich *v.* McAllister, 2274
 McGunnagle *v.* Thornton, 1018
 McHendry *v.* Reilly, 1497, 2005
 McHenry *v.* Carson, 2263
 v. Cooper, 2178
 v. Reilly, 1491
 v. Yokum, 746
 McIlvaine *v.* Harris, 46
 v. Smith, 1747
 McIlvane *v.* Kadel, 985
 v. Smith, 253
 McIntire *v.* Norwich F. Ins. Co., 2116
 v. Patton, 1213
 v. Plaisted, 2118
 v. Shaw, 2038
 McIntosh *v.* Ladd, 728, 795, 914
 McInturf *v.* Woodruff, 1457
 McIntyre *v.* Chappel, 1456
 v. Ramsey, 332, 536
 v. Stedman, 1018
 v. Strong, 1017
 McIver *v.* Cherry, 782, 940, 2148
 v. Eastbrook, 122
 McKay *v.* Mumford, 1131, 1135
 McKeage *v.* Hanover Fire Ins. Co., 105, 108,
 109, 121, 132, 139
 McKean *v.* Brown, 771
 McKee *v.* Brooks, 983
 v. Cottle, 603

- McKee *v.* Cuttle, 693
v. Hicks, 2339
v. Judd, 719, 839
v. McKinley, 1674
v. Pfout, 208, 516, 987
v. Reynolds, 908
v. Straub, 1974, 1977
v. Wilcox, 1422, 1423, 1424, 1452
 McKee's Lessee *v.* Pfout, 666
 McKeilham *v.* Terry, 1511, 1517
 McKelway *v.* Cook, 983
v. Seymour, 1862
 McKenkie's Appeal, 1814
 McKenna *v.* Hammond, 106, 136
 McKennan *v.* Phillips, 1561
 McKenzie *v.* Jones, 404, 447, 470, 600
v. Lampley, 49, 2020
v. Lexington, 1160, 1163
v. Murphy, 1395
 McKeon *v.* Whitney, 1118
 McKercher, *In re*, 1309
 McKey *v.* Welch, 1911
 McKie *v.* Anderson, 1219
 McKildoe's Exr. *v.* Darracott, 1156
 McKillip *v.* McKillip, 1666
 McKim *v.* Mason, 104, 114, 116, 133, 138, 2065
 McKinley *v.* Kuntz, 907
v. Peter, 1925
 McKinn *v.* Mason, 1998
 McKinney *v.* Abbott, 2285
v. Carroll, 1511
v. Kinney, 2298
v. Miller, 2153, 2180
v. Peck, 1131, 1315, 1316
v. Reader, 1160
v. Rhodes, 2355
v. Stewart, 291
v. Stocks, 532
 McKinster *v.* Babcocks, 2022, 2023, 2027
 McKinsty *v.* Conley, 2168
v. Conly, 2051
v. Mervin, 2140
 McKircher *v.* Hawley, 2064, 2066
 McKissack *v.* Bullington, 981
 McKissick *v.* Pickle, 1850
 McKnight *v.* Bell, 1977, 1978
v. Wimer, 1810
 McKowen *v.* McGuire, 1456
 McKune *v.* Montgomery, 1219
 McLachlan *v.* McLachlan, 1863
 McLain *v.* Nelson, 2354
 McLanahan *v.* Wyant, 1978
 McLane *v.* Paschal, 1513
 McLaren *v.* Coombs, 106
v. Hartford F. Ins. Co., 2116
 McLarren *v.* Brewer, 1622
v. Spaulding, 1167
 McLaughlin *v.* Barnum, 1768
v. Cosgrove, 2059
v. Curtis, 2073
v. Curtis, 2172
v. Green, 2079
v. Himsen, 1210
v. Johnson, 96, 103, 105, 107, 2036, 2120
v. Long, 570
v. McLaughlin, 847, 858
v. Nash, 107, 129, 132, 135
v. Shepherd, 2039
 McLaurie *v.* Partlow, 1592, 1691
v. Thomas, 2153
 McLaurin *v.* Wright, 2052
 McLawlin *v.* Salley, 1246
 McLean *v.* Baree, 390
v. Borce, 370
v. Bovee, 47, 339
v. Lafayette Bank, 1770
v. McDonald, 338, 1595
v. Nelson, 1704
v. Ragsdale, 2141
v. Rockey, 1225
v. Spratt, 1154, 1340
v. Sullivan, 1612
 McLean *v.* Swanton, 2289
v. Towle, 2138
 McLearn *v.* McLellan, 2005
 McLeery *v.* McLeery, 798, 819, 820
 McLellan *v.* Jenness, 1904, 1969
v. Turner, 535, 536
 McLemore *v.* Mauson, 729
 McLenan *v.* Sullivan, 1642, 1646
 McLeod *v.* Davis, 1021
v. Evans, 1762
v. McDonnell, 916, 934, 947
 McMahan *v.* Kimball, 711, 783
v. Russell, 2063
v. Stewart, 2070
 McMahill *v.* McMahlil, 1412
 McMahn *v.* McMahn, 1077
 McMahon *v.* Burchell, 1894
v. McGraw, 1643, 2364
v. Russell, 510, 911, 928
v. Williams, 2217
 McManus, *In re*, 2021
v. Campbell, 1421, 1422
v. Carmichael, 69
v. Cooke, 564
v. Crickett, 1195
 McMeheen *v.* Marmar, 1579
 McMeekin *v.* Edmunds, 1768
 McMiken *v.* Board of Directors of University, 60
 McMillan *v.* Anderson, 2324
v. Carson Hill Union Mining Co., 1332
v. Otis, 2084
v. Richards, 1993, 1995, 1999
v. Solomon, 66, 1014, 1015, 1016, 1175, 1176
v. Sprague, 1517
v. Turner, 847
v. Warner, 1455, 1465
 McMillan's Lessee *v.* Robbins, 504, 1141
 McMiller *v.* Mayo, 996
 McMillon *v.* Robins, 744
 McMullan *v.* Warner, 1460, 1461
 McMullen *v.* Riley, 996
 McMurray *v.* Montgomery, 1735
v. Shuck, 1398, 1400
 McMurphy *v.* Campbell, 878
 McMurphy *v.* Minot, 1060, 1117, 1154, 1164, 1998
 McMurty *v.* Brown, 2338
 McNab *v.* Young, 1548, 2315
 McNabb *v.* Bond, 38
 McNair *v.* Funt, 2295
v. Lot, 2095, 2175
v. Picotte, 1129
v. Swartz, 2261, 2270
 McNally *v.* Connolly, 123
 McNamara *v.* Culver, 2044, 2052
v. Seaton, 2296
 McNeal *v.* Emerson, 56
 McNamee *v.* Moreland, 2299
 McNeely *v.* Hart, 1233
 McNees *v.* Swaney, 2168
 McNeil *v.* Ames, 1057, 1072, 1115, 1142
v. Kendall, 1072, 1112, 1115, 1121, 1123, 1139, 2257
 McNeill *v.* Norworthy, 2043
 McNew *v.* Booth, 2174
 McNish *v.* Guerard, 300, 1606, 1662
v. Pope, 1621
 McNulty *v.* Cooper, 1594
 McPherson *v.* Acher, 2242
v. Cox, 1661, 1662
v. Featherston, 2295
v. Hayward, 2175
v. Rollins, 1792
 McQuade *v.* Emmons, 1272, 1287, 1288
 McQueen *v.* Farquhar, 1669, 1670
v. Turner, 1982
 McQuem *v.* Middleton Manuf. Co., 1555
 McQuesten *v.* Morgan, 1061, 1154, 1155
 McQuire *v.* Benoit, 2076
v. Rag, 2038
 McRea *v.* Central National Bank of Troy, 97, 111, 112, 114, 116, 117, 132

- McRea *v.* Farrow, 1840
 McRea's Admrs. *v.* Means, 1593, 1629
 McReynolds *v.* State, 757
 McRimmons *v.* Martin, 2006
 McTaggart *v.* Thompson, 2063
 McTavish *v.* Carroll, 2215, 2245
 McVeigh *v.* Sherwood, 2153
 McVey *v.* McQuality, 1622
 McWhite *v.* Roberts, 711
 McWilliams *v.* Bones, 1382
 v. Martin, 326
 v. Nisly, 249, 255, 259, 261, 263, 267, 272, 1858
 McWinn *v.* Richmonds, 985
 Meacham *v.* Steele, 299, 810, 1606
 Mead *v.* Leffingwell, 2293, 2298
 v. Mead, 925
 v. Orrery, 1667
 v. York, 2134
 v. Randolph, 1677, 2046
 Meade *v.* Thompson, 2272
 Meader *v.* City of Carondelet, 1080, 1081
 v. Meader, 1421
 v. Place, 1403, 1405, 1407, 1462, 1463, 1472
 v. Stone, 1356
 v. White, 2061
 Meador *v.* Meador, 2004
 Meadow *v.* Wise, 2020
 Meads *v.* Lansingh, 1648
 Meahor *v.* Pomeroy, 1285
 Meakings *v.* Cromwell, 1842
 Means *v.* Wells, 208
 Meason's Estate, 42, 44
 Measure *v.* Gee, 424
 Mebane *v.* Mebane, 251, 253, 257
 Mechanics' Bank, Matter of, 1599
 Mechanics' Bank *v.* Williams, 486, 634, 635
 Mechanics' Bank of Alexandria *v.* Seton, 1764
 Mechanics & Traders' Ins. Co. *v.* Scott, 971, 978, 979, 1079
 Mechelen *v.* Wallace, 46
 Mechler *v.* Phoenix Ins. Co., 2114
 Meddock *v.* Williams, 904
 Mede *v.* Hand, 1510
 Medford *v.* Frazier, 1895
 v. Learned, 671
 Medlik *v.* Downing, 1948
 Medley *v.* Elliott, 2110
 v. Medley, 815, 820, 826, 888
 Medmer *v.* Medmer, 1646
 Medsker *v.* Parker, 2153
 Medway *v.* Needham, 753
 Meech *v.* Ensigu, 2166
 v. Estate of Meech, 1451
 v. Fowler, 2355
 Meeds *v.* Wood, 307
 Meehan *v.* Forrester, 2169
 v. Meehan, 664
 Meeker *v.* Claghorn, 2147
 v. Meeker, 1700, 2349
 v. Winthrop Iron Co., 1019
 v. Wright, 646, 1920, 1951, 1952
 Meeks *v.* Bowerman, 1200
 Meeting St. Bap. Soc. *v.* Hail, 1796
 Megehe *v.* Draper, 1514
 Meggison *v.* Moore, 347, 1630, 1632
 Meginnis *v.* Nunamaker, 493
 Mehaffey *v.* Dobbs, 1915
 Meig's Appeal, 104, 112, 115, 120, 126, 135
 Meiggs *v.* Meiggs, 1701
 Meigs *v.* Dimock, 708
 Meily *v.* Wood, 75, 1964
 Meister *v.* Moore, 596, 597, 752
 Melhop *v.* Meinhardt, 123
 Melick *v.* Benedict, 223
 v. Pidcock, 1823
 Melin *v.* Reynolds, 2020
 Melitz's Appeal, 714, 769, 893, 941, 947
 Mell *v.* Mooney, 2025
 Millee's Case, 958
 Mellen *v.* Morrill, 1202
 Melley *v.* Casey, 987
 Mellichamp *v.* Mellichamp, 1425, 1432
 Mellinger *v.* Bausman, 651, 670, 1366
 Melling *v.* Leak, 1261, 1294
 Mellish *v.* Robertson, 2073
 Mellon *v.* Reed, 1978
 Mellor *v.* Watkins, 1312
 Mellus *v.* Snowman, 591, 1365
 Melner *v.* Herewood, 2344
 Melross *v.* Scott, 2006
 Melton *v.* Lambard, 83, 2237
 v. Watkins, 1698, 1701
 Melvin *v.* Proprietor, 2298, 2299
 v. Proprietor of Locks, 211, 212, 590, 591, 901, 911, 1364, 1365, 1366, 1369, 1370
 v. Waddell, 2292
 v. Whiting, 2197
 Memphill *v.* Ross, 2077
 Memphis Freight Co. *v.* Memphis, 2334
 Menagh *v.* Whitwell, 141
 Mendall *v.* Delano, 2246
 Mendelson *v.* Stout, 2267
 Mendenhall *v.* Clinck, 2212, 2213
 v. Mendenhall, 948
 v. Randall, 485
 Meng *v.* Hauser, 2151, 2157
 Meni *v.* Rathbone, 1060, 1140
 Menifee *v.* Menifee, 836
 Meno *v.* Haeffel, 1285, 1317
 Menough's Appeal, 2255
 Menvil's Case, 393, 621, 623, 743
 Meraman's Heirs *v.* Caldwell's Heirs, 630, 641, 642, 665, 1309
 Mercantile Trust Co. *v.* Missouri, 2141
 v. Missouri, K. & Q. R. Co., 2141
 Merced Mining Co. *v.* Boggs, 88
 Mercer's Lessee *v.* Selden, 601, 603, 612, 613, 614
 Mercer *v.* Pittsburg, 2327
 v. Stark, 1697
 Merceron *v.* Dowson, 1072
 Merchant *v.* Errington, 2358
 v. Thomson, 708, 2152
 Merchants' Bank *v.* Clavier, 1285
 v. Thomson, 708, 2152
 Mercier *v.* Chace, 1391, 1411, 1418
 v. Chace, 1417
 v. Hemme, 1622
 v. Missouri, Ft. S. & G. R. Co., 287
 Meredith *v.* Farr, 2281
 v. Heneage, 347, 348, 1627, 1629, 1631, 1632
 v. Holmes, 1503
 Mergher *v.* Strong, 2338
 Meroney *v.* Wright, 1138, 1150
 Merrett *v.* Farmers' Ins. Co., 632
 Merriam *v.* Barton, 2073, 2169
 v. Barton, C. & F. R. Co., 924
 v. Harsen, 1700
 v. Hassam, 1784, 1785
 v. Willis, 1231
 Merrick *v.* Van Santwood, 224
 v. Wallace, 1777, 2122
 Merrifield *v.* City of Worcester, 2224
 v. Cobbergh, 1863, 1867
 v. Lombard, 2228, 2248
 v. Worcester, 4, 101
 Merrill *v.* Agricultural Ins. Co., 2275
 v. Berkshire, 1908, 1923, 1961
 v. Brown, 1541, 1352, 1554
 v. Bullock, 1352
 v. Chase, 2127, 2128, 2131
 v. Emery, 947, 1860, 1863, 1869
 v. Englesby, 1795
 v. Frame, 1080, 1089
 v. Mackman, 996
 v. Shattuck, 772
 v. Sherburne, 2331
 v. Watson, 1777
 Merrills *v.* Swift, 1786, 2027, 2353
 Merriman *v.* Hyde, 2151
 v. Laceyfield, 1411
 v. Moore, 2068, 2071

- Merritt v. Abendroth*, 309, 310
v. Bartholick, 799, 2000, 2100, 2101, 2102, 2104, 2111
v. Brinkerhoff, 71, 2225
v. Brown, 2052
v. Disney, 281, 531
v. Earle, 1099
v. Fisher, 2249, 2253, 2255
v. Harris, 1861, 2124
v. Hosmer, 2182
v. Hughes, 1981
v. Judd, 89, 113, 123, 131, 1186, 1189
v. Phenix, 2151
v. Scott, 514
v. Village of Portchester, 2158
v. Wells, 2148
Merritt, Jackson ex d., v. Gumaer, 986
Merritt's Lessee v. Horn, 598, 603, 612, 613, 614
Merry v. Hallett, 20, 21, 975, 1225
Merryman v. Bourne, 1082
v. Long, 975
Merson v. Blackmore, 331
Mertins v. Jolliffe, 1778
Mervin v. Ballard, 671
Meserve v. Meserve, 847, 851, 852
Messeley's Estate, 60
Messenger v. Armstrong, 1310
Messervey v. Barrelli, 2153
Messonnier v. Kauman, 1795
Mestaer v. Gillespie, 1738
Metcalf v. Cooke, 1375, 1562
v. Farmingham Parish, 329
v. Van Brunt, 1795
Methery v. Walker, 1387
Methodist Church v. Remington, 1670, 1675, 1676, 1679
Metropolitan Bank v. Godfrey, 2027
Metropolitan Bank of St. Louis v. Taylor, 2012
Metteforde's Case, 432
Mettler v. Miller, 603, 612, 613, 652, 686
v. Wiley, 945
Meux v. Jacobs, 2021
Mevey's Appeal, 2153
Mewhof v. Mayo, 1049
Meyer v. Bishop, 2159
v. Eisler, 315
v. Johnston, 98
v. Kinser, 1947
v. Lathrop, 2072
v. Meyer, 1410, 1411, 1412
v. Mohr, 915
Meyers v. Gale, 1366, 1376
v. Schamp, 143
Mhoon v. Drizzle, 1281, 1293
Miall v. Brain, 943
Miami Ex. Co. v. U. S. Bank, 2050, 2091, 2164
Micels v. Miles, 2250
Michaels v. New York Cent. R. Co., 1099
Michel v. Tinsley, 2331
Michigan Air-line R. Co. v. Mellen, 1586, 1622, 1645
Michigan Ins. Co. v. Brown, 2022, 2027
Michigan State Bank v. Hastings, 1867
Michlethwait v. Winter, 83, 84
Michoud v. Girod, 1618, 1707, 1716, 1767, 1769, 1773, 2163
Mick v. Mick, 774
Mickie v. Lawrence, 984, 1001
v. Miles, 984
Mickey v. Wintrobe, 974, 975
Mickle v. Mansfield
v. Miles, 283
Mickles v. Dillaye, 2088, 2151, 2185, 2301
v. Torondsen, 1580, 2130, 2131
Micon v. Ashurst, 2095
Middlesex R. Co. v. Boston & C. R. Co., 1020
Middleton, Re, 2327
Middleton v. Daddswell, 1037
v. Dowsdell, 1038
v. Middleton, 2260, 2261
v. Pritchard, 68, 1014, 2293
Middleton v. Stewart, 657
Middletown Savings Bank v. Dates, 688, 1997, 1998, 2077
Midford v. Hardison, 1899
Midgley v. Richardson, 2238
Midland Counties R. Co. v. Oswin, 95, 307
Mikell v. Mikell, 1713, 1714, 1723, 1728
Mikman v. Ordway, 1058
Milborn v. Fellers, 1582
Mildmay's Case, 454, 499, 675
Mildmay v. Mildmay, 789
Mildred v. Austin, 2170
Miles v. Elkin, 2261
v. Chilton, 883
v. Cook, 1018
v. Fisher, 532, 1676, 1876, 1882, 1883, 1968
v. Gray, 2105, 2106
v. Kaigler, 1023
v. Miles, 496, 539, 541, 542, 543, 545, 546, 563, 575, 1412, 1413, 1522
v. Neave, 1788
Milford v. Holbrook, 1202
v. Worcester, 595, 752
Milhouse v. Patrick, 1217
Millapaugh v. McBride, 2097
Millar v. Turney, 2280
v. Williamson, 479
Millard v. Harris, 278, 279
v. McMullin, 1164, 1897, 2095
v. Willard, 2256
Mill Dam Foundry v. Hovey, 501
Milledge v. Lamar, 780, 788, 815, 820, 826, 885, 888
Millenovich, Estate of, 1020
Miller's Estate, Re, 234, 504, 505
Miller v. Aldrich, 2118, 2119
v. Antle, 1617
v. Auburn, 2213
v. Baker, 119
v. Bates, 522
v. Bear, 2147
v. Beverly, 864, 867, 870
v. Bingham, 1561, 1779
v. Birdsong, 1651
v. Blackburn, 1638
v. Bledsoe, 629, 630, 643
v. Blose, 1648, 1700
v. Bristol, 2206, 2208
v. Brown, 2012
v. Cappee, 2106
v. Cheney, 1205
v. Chittenden, 1556, 1599, 1671, 1975, 2347
v. Craig, 1034
v. Crauford, 726, 731
v. Cresson, 2308
v. Davidson, 1616, 1714, 1746, 1747
v. Davis, 1636
v. Dennett, 1982
v. Douthitt, 331
v. Finegan, 1382, 1385, 1397, 1443, 1519, 1522
v. Finn, 2096, 2137
v. Fulton, 2254
v. Garlock, 2292
v. Goodwin, 897, 2317
v. Havens, 1139, 1146
v. Henshaw, 2365
v. Hoyle, 2099
v. Hughes, 1240, 1243
v. Hull, 1755
v. Jones, 1811
v. Lang, 1149, 1214, 1218
v. Larned, 2106
v. Little, 2309
v. Long Island R. Co., 2248
v. Lynn, 306, 333
v. McBair, 1045
v. McBrier, 1149, 1213, 1221
v. Macomb, 322, 323
v. McCarty, 1421
v. Marx, 1475, 1479, 1503, 1509
v. Miller, 666, 744, 755, 1883, 1896, 1909,

- 1910, 1919, 1920, 1930, 1951, 1967, 1978,
1983, 1988, 2225, 2228
- Miller *v.* Moore, 2001
- v.* Morris, 1181
- v.* Mulin, 1889
- v.* Musselman, 2120
- v.* Myers, 1915
- v.* Platt, 1917, 2291
- v.* Plumb, 103, 104, 105, 128, 135, 137
- v.* Potterfield, 1821
- v.* Ridgely, 1315, 1316
- v.* Shackelford, 210, 591, 744, 1307, 1315,
1319, 2346
- v.* Sharp, 2156
- v.* Schnebly, 1449, 1467
- v.* Shields, 552, 1067, 1152, 1153
- v.* Sparks, 1154
- v.* Stagner, 2250
- v.* State, 51
- v.* Stokely, 2046
- v.* Stump, 777, 781, 782, 804
- v.* Thatcher, 1590, 1697
- v.* Thompson, 1624, 2071
- v.* Tipton, 2015
- v.* White, 757
- v.* Winchell, 2137
- v.* Wilson, 728, 781, 782, 795, 915, 962,
1538
- v.* Woodman, 733, 736, 739
- Miller, Den ex d., *v.* Miller, 852, 859
- Miller's Exrs. *v.* Miller, 961, 962
- Milligan's Appeal, 2136, 2138, 2153
- Milligan *v.* Poole, 1987
- v.* Wedge, 1193
- v.* Neher, 2020
- Milling *v.* Becker, 1335, 1342, 1343
- Millinger *v.* Bosman, 633
- Milliken *v.* Bailey, 2088
- Millikin *v.* Brown, 1915
- v.* Ham, 2033
- v.* Welliver, 938, 946, 948
- Mill River, etc., Co. *v.* Smith, 73
- Mills *v.* Argall, 1795
- v.* Bank, 1832
- v.* Comstock, 2098
- v.* Dennis, 2145, 2146
- v.* Estate of Grant, 1378, 1419, 1445, 1483,
1514, 1515
- v.* Fogal, 368, 2058, 228
- v.* Gore, 2035
- v.* Graves, 2302
- v.* Haines, 1599
- v.* Harris, 1795
- v.* Matthews, 1211
- v.* Merryman, 2251, 2252, 2258
- v.* Mills, 916, 935, 941, 965, 2055, 2168
- v.* Morris, 959
- v.* Newberry, 1684
- v.* Peed, 2258
- v.* Van Voorhies, 688, 708, 716, 727, 766,
782, 783, 800, 801, 925, 940, 2173
- v.* Witherington, 1986
- Millsbaugh *v.* McBride, 520, 2006, 2131
- Milne *v.* Moreton, 367, 720, 2057, 2288 /
- v.* Schmidt, 1512
- Milner *v.* Freeman, 650
- v.* Ramsey, 2009
- Milroy *v.* Lord, 1587
- Miltimore *v.* Miltimore, 662, 771, 919, 920, 1359
- Milton *v.* Colby, 139, 140, 2022
- v.* Grenville, 92
- v.* Haden, 982, 1045, 1221
- v.* Hudson River Steamboat Co., 1248
- v.* Milton, 856
- Milwaukee & M. R. Co. *v.* James, 98
- v.* Soutter, 98
- Mims *v.* Lockett, 2007
- v.* Macon W. R. Co. 2007
- v.* Mims, 2122, 2149
- Miner *v.* Beekman, 2151, 2174, 2175, 2185
- v.* Brown, 1941
- v.* Gilmore, 2225
- Hiner *v.* Lorman, 1922
- v.* Smith, 2150
- v.* Stevens, 1354
- Miners Bank *v.* Heiner, 2282
- Mineral Point R. Co. *v.* Keep, 1554
- Mines, Case of, 86
- Mineville, Succession of, 660
- Minigle *v.* City of Boston, 1129
- Minitier *v.* Minitier, 898, 957
- Minnesota *v.* Worthington, 594
- Minnesota Co. *v.* St. Paul Co., 98
- Minnesota Loan & Trust Co. *v.* Beebe, 1657
- Minning *v.* Batdorff, 315
- Minor *v.* Mayor, 2295
- v.* Rogers, 1587, 1593
- v.* Sharon, 1200
- v.* Willoughby, 1018, 1041
- Minot *v.* Mitchell, 1620
- v.* Taylor, 1682
- v.* Thompson, 974
- Minshall *v.* Lloyd, 71, 126, 130, 145, 146, 1186,
1187
- Minter *v.* Durham, 1883
- Minturn *v.* Seymour, 1697, 2314, 2315
- Mintzer *v.* St. Paul Trust Co., 1439, 1520
- Minuse *v.* Cox, 1725, 1755, 1756
- Mirick *v.* Hoppen, 2064, 2258
- Missionary Society *v.* Calvert's Admr., 487
- Mississippi Valley, etc., R. Co. *v.* U. S. Express
Co., 2064
- Missouri Inst. for Blind *v.* How, 2205
- Mitchel *v.* Weller, 2255
- Mitchell *v.* Badgett, 2272
- v.* Bartlett, 2066, 2162
- v.* Bogan, 2160, 2186
- v.* Burlington, 1515
- v.* Burnham, 799, 1992, 1993, 2031, 2032,
2040, 2102, 2109
- v.* Commonwealth, 990
- v.* Davis, 1287, 1288
- v.* Dors, 577
- v.* Froedley, 143
- v.* Home Ins. Co., 1224
- v.* Jones, 1980
- v.* Kingham, 1032, 1033
- v.* Mayor, 2236
- v.* Miller, 847, 856, 860
- v.* Milhoan, 1593
- v.* Moore, 1372, 1660
- v.* Parkham, 2363
- v.* Phillipsbury, 1094
- v.* Reed, 1089
- v.* Ryan, 598, 600, 603, 604, 614, 1016
- v.* Seipel, 2241
- v.* Sevier, 1365, 1367
- v.* Skinner, 1652
- v.* Starbuck, 1973
- v.* Stetson, 62
- v.* Tarbutt, 1902, 1966
- v.* The United States, 18
- v.* Walker, 2291
- v.* Ward, 929
- v.* Warner, 1093
- v.* Winslow, 839, 2017, 2019
- v.* Woodson, 2301
- v.* Word, 720, 869
- Mitchell's Lessee *v.* Mitchell, 266, 885
- Mitchelson *v.* Smith, 1380
- Mitchener *v.* Atkinson, 937
- Mitchinson, Doe d., *v.* Carter, 1056, 1057, 1105,
1113, 1973
- Mitford *v.* Mitford, 1361
- Mitmacht *v.* Cocks, 976
- Mittel *v.* Karl, 1034, 1941
- Mitten *v.* Faudrye, 56
- Mix *v.* Cowles,
v. Hotchkiss, 2089, 2090, 2144
- Mixon *v.* Coffield, 1165, 2251
- Mizell *v.* Burnett, 1857
- Mizner *v.* Russell, 2059
- v.* Munroe, 1272, 1294
- Moers *v.* White, 215, 216, 217, 236, 279

- Moak *v.* Coats, 734
 v. Johnson, 1245
Mobile Branch Bank *v.* Hunt, 2130
Mobile, M. D. & M. Ins. Co. *v.* Huder, 2153,
 2180
Mocher *v.* Reeves, 2081
Mockbee *v.* Claggett, 415
Mocker *v.* Reed, 2081
Model Lodging House Assoc. *v.* City of Bos-
 ton, 2095
Moderwell *v.* Mullison, 786, 1960
Moffatt *v.* Buchanan, 1779
 v. Shepard, 1643
 v. Smith, 1083, 1100, 1120, 1182, 2271
 v. Strong, 1082, 1172
Moffat *v.* Stroag, 2268
Mogg *v.* Biker, 2018
 v. Mogg, 490, 525, 1693
Mohawk & Hudson R. R. Co. *v.* Clufe, 43
 v. Niles, 1241
Moenquise it *v.* Commissioners of Roads, 2325
Mojoribanks *v.* Hovenden, 1831
Molson *v.* Doe ex d. Cooper, 346
Molton *v.* Camroux, 1033
Molyneux *v.* Molyneux, 1361
Monck, Doe d., *v.* Geekie, 1314, 1333
Moncrief *v.* Ross, 76, 1809
Monday *v.* Elmore, 1024
Monuell *v.* Monell, 1733
Monk *v.* Capen, 1411
 v. Cooper, 1179
Monkhouse *v.* Holme, 314
 v. Noyes, 1098
Monroe *v.* Armstrong, 983
 v. Douglass, 368, 2058, 2289
 v. Luke, 2092
 v. Merchant, 217, 799
 v. Van Meter, 589, 656, 680, 698, 1372
Montacute *v.* Maxwell, 1616
Montague *v.* Boston & A. R. Co., 2089
 v. Dawes, 2150, 2161, 2163
 v. Dent, 109, 121, 126, 132, 134, 138, 139
 v. Gay, 2269
 v. Hays, 1502, 1690, 1691
 v. Hall, 2272
 v. Maxwell, 965
 v. Richardson, 1483, 1514
 v. Smith, 28, 225, 969, 974, 1004
Montaye *v.* Wallahan, 2258
Montgomery, *Ex parte*, 120, 126
 v. Agricultural Bank, 1562
 v. Bevans, 523
 v. Bruere, 764, 783, 1992
 v. Chadwick, 2053, 2075, 2175, 2185
 v. Craig, 1144, 1145, 1148
 v. Dorion, 211, 492, 672, 774
 v. Doxion, 215, 216
 v. Eveleigh, 1375
 v. Gibbs, 1180
 v. Hickman, 1942
 v. Horn, 856
 v. Kirksey, 1625
 v. Masonic Hall, 2235
 v. McEwen, 2160
 v. Middlemess, 2145, 2155
Montgomery *v.* Millikin, 327
 v. Sturtevant, 2321, 2360
 v. Tate, 1364, 1367
 v. Tutt, 1491, 1496, 1497, 2156
Montpelier *v.* East Montpelier, 1555
Monypenny *v.* Daring, 1693
Mooberry *v.* Marye, 343
Moodle *v.* Reid, 1841
Moody *v.* Aiken, 110
 v. Buck, 1896
 v. Farr, 202
 v. Fleming, 517
 v. King, 690, 691, 780, 815, 820, 826, 885,
 1197, 1273
 v. Moody, 1038, 1939
 v. Seaman, 717
 v. Smoot, 1937
Moody *v.* Snell, 415
Moors *v.* Dixon, 1450, 1478
 v. White, 1659
Moon *v.* Durden, 671
 v. Rolling, 2303
Mooney *v.* Brinkley, 2187
 v. Cooledge, 2361
 v. Maas, 924, 925, 926, 928
Moor *v.* Black, 733
 v. Deen, 535
 v. Denn, 340, 533
 v. Hawkins, 1572
Moor, Denn ex d., *v.* Meller, 344
Moorcroft *v.* Dowding, 1691
Moore's Appeal, 2068
Moore, *Ex parte*, 933
Moore *v.* Armstrong, 1723
 v. Abernathy, 2286
 v. Beason, 810, 2073, 2097, 2136, 2138,
 2169, 2172
 v. Beasley, 1149, 1213, 1315
 v. Bowman, 2302
 v. Boyd, 1251, 1268, 1270, 1271, 1293, 1296,
 1351, 1356
 v. Byers, 1750
 v. Byrum, 2020
 v. Cable, 2087, 2088, 2090, 2095, 2175
 v. Chandler, 2153
 v. City of New York, 709, 712, 714, 715,
 718, 725, 726, 731, 734, 737, 940, 741,
 746, 749, 751, 767, 793, 796, 813, 821,
 828, 834, 838, 869, 893, 921, 922
 v. Cord, 2173
 v. Cornell, 2084
 v. Darby, 589
 v. Dean, 343
 v. Dimond, 535, 1831
 v. Dunning, 1460, 1463
 v. Estey, 764, 766, 800, 815, 1993
 v. Flynn, 1468, 1469
 v. Foley, 1008, 1009
 v. Frost, 871, 930
 v. Fuller, 2012, 2027
 v. Harrisburgh Bank, 811
 v. Harvey, 2270
 v. Hegeman, 755
 v. Hilton, 1707, 1769
 v. Hollins, 783
 v. Jackson, 983, 1742
 v. Kent, 711, 721, 722, 723, 725
 v. Little Rock, 2085
 v. Loose, 1165
 v. Luce, 490, 517, 520, 2300
 v. Lyons, 314, 316
 v. Madden, 1699
 v. Mandelbaum, 1621
 v. Mason, 1356
 v. Mayor, 798
 v. Mayor of New York, 819
 v. Miller, 1001
 v. Moore, 1285, 1330, 1465, 1589, 1919,
 1940, 1974, 2343
 v. Morrow, 1347, 1350
 v. Page, 645
 v. Pickett, 1592, 1691
 v. Pitts, 1113, 1856
 v. Plymouth, 266
 v. Reaves, 1421, 1422
 v. Ranson, 2222, 2245, 2246, 2247
 v. Raymond, 2007
 v. Richardson, 1364
 v. Rollins, 89, 765, 766, 802, 811, 812, 940
 v. Sanders, 1853, 1860
 v. Savill, 1860
 v. Shaw, 2165, 2167
 v. Schultz, 1559, 1561, 1565, 1655
 v. Smaw, 83, 84, 85, 88
 v. Smith, 115, 123, 145, 1289
 v. Spellman, 1713
 v. Spruill, 1234
 v. State, 1518
 v. Thomas, 903, 2038

- Moore v. Thompson**, 2298
v. Tisdale, 750, 775, 909
v. Titman, 1028, 2080, 2086
v. Townshend, 1277
v. Turpin, 1117, 2259
v. Valentine, 139
v. Vinter, 1365, 1366, 1369, 1370
v. Wade, 2045, 2047
v. Waller, 847, 861
v. Ware, 2103, 2148
v. Watson, 2126
v. Webb, 317, 338, 2228
v. Webber, 1167
v. Weber, 1066, 1079, 1081, 1082, 1127, 1191, 1196, 1202
v. Webster, 680, 684, 698, 1372
v. Whittis, 1387, 1431, 1434, 1439
v. Worthy, 832
Moore v. Wait, 560
Moors v. De Bervales, 767
v. Moors, 661
Moot v. Buxton, 1605
Moran v. Bank of Commerce, 1754
v. Palmer, 786
v. Sones, 663
Mordant v. Thorold, 870
Mordecai v. Parker, 1595, 1707
More v. Freeman, 648
v. Herrick, 1648
More v. Ditchemendy, 893
v. Saffara, 1956, 1962
Moreau v. Saffarinas, 786
Morehead v. Watkins, 996, 1254, 1307, 1322, 1337
Morehouse v. Cotheal, 402, 414, 470, 477, 544, 555
Moreland v. Myall, 51
Morey v. Abernathy, 2343
v. Herrick, 1634
Morgan v. Abergavenny, 60
v. Arthur, 137
v. Brutton, 1878, 1882
v. Boone, 1613
v. Conn, 857
v. Cox, 198
v. Curtenius, 1516
v. Curtis, 29
v. Davies, 1311, 1336
v. Davis, 2129
v. Elam, 1375, 1562
v. Herrick, 1889, 1890
v. King, 193, 1587
v. Lones, 1948
v. Moore, 1597
v. Morgan, 598, 611, 654, 656, 678, 679, 683, 684, 688, 689, 1267, 1372, 1893, 2094, 2175
v. Neville, 1515
v. Plumb, 2157
v. Reading, 69
v. Sackett, 801
v. Slaughter, 257
v. Staley, 1980, 1981
v. Stearns, 1378, 1421, 1443, 1445, 1496, 1503
v. Thames Bank, 647
v. United States, 1275, 1281, 1329, 1342, 1343
v. Wilkins, 2165
Morgan County v. Allen, 1581
Moriarty v. Martin, 1627
Morie v. Bishop of Durham, 1683
Moring v. Ward, 983, 990, 1002
Morley v. Morley, 1664, 1725, 1728
v. Rennoldson, 270, 271
Morphett v. Jones, 994
Morrall v. Jacob, 1791
v. Sutton, 531
v. Watterson, 1697, 1700
Moran v. McLarty, 2330
v. Sones, 1952, 1953
Morrell v. Dickey, 1835
Morrant v. Gough, 1797
- Morret v. Paske**, 76, 1708
Morrice v. Antrobus, 2252
Morrill v. Hopkins, 1450, 1467
v. Mackman, 983, 1010, 1013, 1322, 2212, 2260
v. Morrill, 1973, 1982, 1988, 2173
v. Noyes, 2018, 2019
Morris' Appeal, 125
Morris v. Bacon, 2107, 2108
v. Clay, 1032
v. Edgington, 1166, 2222
v. Floyd, 2122
v. French, 2021
v. Hastings, 1947
v. Henderson, 2
v. Joseph, 1618, 1771
v. Miller, 758
v. Morris, 670
v. Mowatt, 799
v. Niles, 1319, 1324, 1328
v. Nixon, 2037, 2046, 2048, 2049, 2169
v. Oakford, 2178
v. Pate, 2008
v. Phaler, 317
v. Potter, 321
v. Russel, 2335
v. Sargent, 1450, 1473
v. Showerman, 983
v. Tillson, 1083
v. Vanderen, 149
v. Wallace, 1719, 1721, 1724
v. Ward, 1450, 1475, 1478, 1502
v. Way, 2014
v. Wheeler, 2148
Morris Canal Co. v. Mitchell, 1273, 1287, 1288
Morrison's Case, 756
Morrison v. Abbott, 1431
v. Bean, 1502, 2160
v. Reirer, 1587
v. Berry, 127, 140
v. Bowman, 918, 942, 943
v. Braud, 2045, 2052
v. Buckner, 2067, 2188
v. Chadwick, 1168, 1174
v. Clark, 1947
v. Kelley, 1703, 1766, 1777
v. Kinstra, 1592
v. Marquadt, 2223
v. Mendenhall, 2100, 2101
v. Rice, 893
v. Rossignol, 971, 1008, 1009, 1053
v. Semple, 305, 308
v. Shuster, 1795
v. Stewart, 594
v. Thistle, 647, 648, 895, 896
v. Watson, 1522
Morroney's Appeal, 2120
Morrow v. Morgan, 2152
v. Morrow, 938
v. Scott, 2280
v. Turner, 2001, 2079
Morse v. Aldrich, 1076
v. Churchill, 2296, 2297
v. Copeland, 2211, 2240
v. Goddard, 1081, 1119, 1169, 1170, 1171, 2065
v. Goold, 1510, 1511, 1517, 1518
v. Hayden, 1869
v. Maddox, 1082, 1196
v. Merritt, 1277
v. Morse, 1980
v. Roberts, 1221
v. Royal, 1621, 1707, 1767, 1772, 1775
v. Shattuck, 1538, 2349
v. Smith, 2171
v. Whitchee, 2066
Morsell v. First Nat. Bank of Washington, 1747
Mortgage Co. v. Norton, 1489
Mortlock v. Buller, 1758
Morton v. Barrett, 288, 299, 300, 1534, 1553, 1560, 1583, 1594, 1597, 1606, 1710, 1712

- Morton *v.* Ball, 2090
v. McCannless, 1520
v. Noble, 792, 793, 1999, 2076
v. Ragan, 1481
v. Robard, 2365
v. Scholefield, 2231
v. Southgate, 1577, 1739
v. Tewart, 1691
v. Woods, 1050, 1058, 1294
- Mory *v.* Michael, 1822
- Mosby *v.* Mosby, 1811
- Moseley *v.* Marshall, 503, 511
- Moser. *In re*, 125
- Moses *v.* Levi, 1733
v. McPherson, 1180
v. Murgatroyd, 1885
- Mosgrave *v.* Bouser, 2121
- Mosher *v.* Mosher, 789, 797, 822, 841, 842, 940
v. Vehne, 2086
v. Yost, 525, 976
- Moshier *v.* Meeks, 2004, 2007
v. Norton, 2087
v. Reding, 1001, 1160, 1122, 1290, 1310, 1315, 1334, 1336
- Mosier's Appeal, 2177, 2138
- Mosle *v.* Ruhlan, 2359
- Mosley *v.* Mosley, 1820
- Moss's Appeal, 1581
- Moss *v.* Gallimore, 2065
v. Moss, 1622, 1646
v. Sheldon, 287
v. Warner, 1457, 1462, 1483, 1514
- Mossy *v.* Mead, 1316
- Mostyn *v.* West Mostyn Coal & Iron Co., 1080
- Mostyne *v.* Lancaster, 1039
- Motley *v.* Blake, 1984
v. Jones, 1242
v. Whitmore, 1933, 1940, 1951
- Mott *v.* Buxton, 299, 1607
v. Clark, 2158
v. Coddington, 1285
v. Palmer, 20, 27, 61, 122
v. Schoolbred, 2248
- Motteux *v.* The London Assurance Co., 1742
- Moulton *v.* Cornish, 2144, 2145
v. Cramroux, 987, 1034
v. Moore, 984
v. Robinson, 1234
- Mounce *v.* Byars, 2003, 2005, 2006
- Mounsey *v.* Ismay, 2204, 2211
- Mount *v.* Morton, 2978
v. Potts, 2154, 2179, 2180
v. Valle, 850
- Mount Holly *v.* Andover, 594
- Mt. Vernon Mfr. Co. *v.* Summit Ins. Co., 2166
- Mountain City Market House, etc., Assoc. *v.* Kearns, 1284, 1305
- Mountford *v.* Cadogan, 1786
- Movan *v.* Hays, 1590
- Mower *v.* Fletcher, 2308
v. Kemp, 1863
- Mowrey *v.* Sheldon, 2247
v. Wood, 2111
- Mowry *v.* Wood, 2015
- Mowser *v.* Mowser, 773, 887, 891
- Moxley *v.* Ragan, 1506
- Moyer *v.* Drummond, 1397, 1425, 1432
v. Pennsylvania Slate Co., 1515
- Moyle *v.* Ewer, 1267
v. Moyle, 561, 1720
- Moynahan *v.* Moore, 2131
- Mozart Building Association *v.* Frisdjen, 1355
- Mucklow *v.* Fuller, 1733
- Mueller *v.* Engeln, 1777
- Muggeridge's Trusts, 272, 1677
- Muir *v.* Berkshire, 2137
- Mulcarry *v.* Eyre, 1411
- Muldoon *v.* Hite, 2262, 2264
- Muldowney *v.* Morris & Essex R. R. Co., 643
- Mulford *v.* Laframe, 2357
v. Minch, 1745, 1776
v. Peterson, 810, 2100, 2102, 2107
- Mulhollan *v.* Thompson, 831
- Mullaney *v.* Mullaney, 654, 656, 675, 687, 1609
- Mullanphy *v.* Simpson, 2075
- Mullen *v.* St. John, 1197, 1198
v. Stricker, 2223
- Mullensen's Estate, 2026
- Muller, Estate of, 1317, 1342
- Muller *v.* Baker, 128
v. Boggs, 1804, 1901, 1903
v. Inderreiden, 1480, 1481
v. Muller, 2321
v. Wadlington, 2105, 2107, 2136
- Mulligan *v.* Newton, 49
v. Wallace, 1714
- Mullikin *v.* Mullikin, 2009
- Mullins *v.* Clark, 1506
- Mulloy *v.* Kyle, 974
- Mulry *v.* Norton, 2294
- Mumby *v.* Bowden, 1193
- Mumford *v.* Bowman, 291
v. Brown, 1054, 1083, 1182, 1191, 1201, 1891
v. Whitney, 49, 50, 55, 56, 2212, 2213
- Mumma *v.* Mumma, 1640
- Mummy *v.* Johnson, 2366
- Munch *v.* Cockeral, 1038
v. Shabel, 1652
- Mundy *v.* Monroe, 1999
v. Mundy, 1339
v. Sawter, 1806
v. Vawter, 2159
- Munger *v.* Perkins, 792, 793
- Municipality No. 1 *v.* New Orleans, 982, 1010, 1053
- Municipality No. 2 *v.* Orleans Cotton Press, 2293, 2294
- Munnerby *v.* Munnerbyn, 666
- Munro *v.* Allaire, 1768, 1769
v. Merchant, 2014
- Munroe *v.* Gates, 1982
v. Luke, 1915, 1916, 1967, 1983
v. Merchant, 1657
v. Stickney, 2248
- Munsell *v.* Carew, 1231, 1236
- Munson *v.* Plummer, 1274, 1280
v. Wray, 1002, 1329
- Munson's Admr. *v.* Plummer, 1286
- Murchison *v.* Plyler, 1441
- Murdoch's Case, 1766
- Murdock *v.* Chapman, 2016
v. Clark, 2087
v. Clarke, 2088
v. Ford, 2174, 2260
v. Gifford, 109, 112, 125, 133
v. Harris, 138
v. Hughes, 1622, 1781
v. Johnson, 336, 1709
v. Ratcliff, 823, 974, 975
v. Shackelford's Heirs, 416
- Murly *v.* McDermott, 2236
- Murphy *v.* Abrahms, 1965
v. Barnett, 1349
v. Calley, 2041, 2043, 2050
v. Crouch, 1481
v. Farwell, 2174
v. Grice, 1577
v. Hendricks, 2024
v. Higginbottom, 889, 1773
v. Hubert, 1648, 1649
v. Marland, 129, 139, 140, 2022
v. Murphy, 958
v. Murphy, 898, 899
v. Nathans, 1647
v. Ottenheimer, 1031
v. Peabody, 1633, 1648
v. Purifoy, 2053
v. Service, 997
v. Thomas, 1020
v. Trigg, 2047
- Murphy's Heirs *v.* Jury, 1942
- Murphy, Jackson ex d., *v.* Van Hoesen, 496, 499, 502

Murray *v.* Armstrong, 1261, 1284

v. Ballou, 1622
v. Barlee, 2012
v. Barney, 2030
v. Blackledge, 1744
v. Catlett, 2101
v. Cherrington, 1281
v. Emmons, 987, 1034, 1368
v. Gilbert, 54
v. Glass, 1691
v. Glasse, 645
v. Hall, 1903
v. Harway, 1058, 1143, 1156
v. Kelly, 215
v. Kelley, 219
v. Lilburn, 2109
v. Mount, 2268
v. Mount, 1020
v. Riley, 1277, 2040
v. Selts, 1434
v. Shanklin, 986
v. Smith, 2068
v. Stairs, 2354
v. Walker, 2045, 2078

Murrell *v.* Lyon, 1003
v. Mandelbaum, 1956
v. Matthews, 401Murry *v.* Wyse, 311Murthwaite *v.* Jenkinson, 288, 299, 373, 1594,
1606, 1712

Musgrave *v.* Brooks, 265
 Musham *v.* Musham, 1614, 1622
 Mushawer *v.* Patten, 2295
 Musick *v.* Barney, 2295, 2296, 2297
 Musselman *v.* Eshleman, 1776
 Musser *v.* Brink, 1239
v. Hershey, 69

Mussey *v.* Bulfinch Methodist Society, 37
v. Holt, 1026, 1030, 1120
v. Pierre, 673, 750
v. Sanborn, 1982

Mussina *v.* Bartlett, 2145
 Mussouri Bank *v.* Raynor, 1824
 Mustard *v.* Wohford's Heirs, 2344
 Mustin, Doe d., *v.* Goldwin, 1152, 1868

Mutton's Case, 1569
 Mutual Benefit Life Ins. Co. *v.* Brown, 1044
 Mutual Fire Ins. Co. *v.* Deale, 632, 681, 682,
1364, 1636, 1639
v. Wagner, 631, 1641, 1700, 1703

Mutual Life Ins. Co. *v.* Balch, 2162
v. Boughrum, 2153
v. Dake, 2121, 2122
v. Shipman, 1808, 2173
v. Southard, 2167

Muzzey *v.* Davis, 2206
 Muzzy *v.* Whitney, 1241, 1244Myer *v.* Myer, 1408
v. Whitaker, 68, 73

Myers *v.* Buchanan, 2125
v. Burns, 1074, 1084, 1086
v. De Mier, 791
v. Entriiken, 1719
v. Estell, 2066
v. Evans, 1473, 1475
v. Forbes, 999
v. Ford, 1400, 1405, 1459, 1502, 1519
v. Gemmel, 2223
v. Hazzard, 2106
v. Hobbs, 2233
v. Kantman, 2254
v. Mayfield, 2273
v. Myers, 308, 312, 1648, 1667, 1729, 1768
v. Reed, 1020, 1937
v. Rice, 1988
v. Spooner, 2303
v. Stilljacks, 2262, 2268
v. White, 47, 1995, 2064
v. Wright, 2148

Myers' Guardian *v.* Myers' Admr., 1520Myerson *v.* Neff, 1309, 1348Myrick *v.* Bill, 1393, 1484

N.

Nab *v.* Nab, 1691Nace *v.* Boyer, 1792Nagle *v.* Ingersoll, 59
v. Macy, 2078, 2104

Naglee's Appeal, 1674

Nailer *v.* Stanley, 2155, 2180Nairn *v.* Prowse, 959Naish *v.* Tatlock, 2266Nallet *v.* Smith, 267Nance *v.* Alexander, 2261, 2270, 2271
v. Hill, 1432*v.* Nance, 1431Nancy *v.* Hill, 1425Nanney *v.* Williams, 1801Nannock *v.* Horton, 319, 486Nant-y-Glo & B. Ironworks Co. *v.* Graves, 1761Napier *v.* Bulwinkle, 2223, 2229, 2236
v. Darlington, 1077Nash *v.* Berkmeir, 996, 1264, 1322*v.* Coates, 1583, 1795*v.* Kelly, 2106*v.* Kemp, 2235*v.* Minneapolis M. Co., 1202*v.* Norment, 1399Nason *v.* Allen, 841, 838Nassamon *v.* Nassamon, 597Nassbaum *v.* Northern Ins. Co., 2113, 2114Nathan *v.* Stern, 997National Bank of Metropolis *v.* Sprague, 786National Co. *v.* Bush, 2271National Fire Ins. Co. *v.* McKay, 800National, etc., Co. *v.* Donald, 2244Navarre *v.* Rutton, 1783Nave *v.* Berry, 1067, 1098, 1105, 1106, 1112,
1123, 1126, 1175, 1181, 1184Naylor *v.* Arnitt, 1037, 1038*v.* Collinge, 142*v.* Field, 669, 679Nazareth Benevolent Institution *v.* Lowe, 2005Nazarther Lit. & Ben. Inst. *v.* Lowe, 744, 778,
804, 814, 832
v. Ware, 2033Neal *v.* Brockham, 1381, 1515*v.* Coe, 1386, 1441, 1442, 1443*v.* Farmer, 706*v.* Gregory, 2302*v.* Robertson, 651, 1366*v.* Speigle, 2004Neale *v.* Hagthorp, 2088*v.* Mackenzie, 1167Neall *v.* Hill, 75Near *v.* Watts, 485Neary *v.* Bostwick, 1248Neate *v.* Marlborough, 2083, 2170Neave *v.* Moss, 1149Needham, *In re*, 1786Needham *v.* Allison, 80, 103, 106*v.* Bronson, 1940*v.* Hill, 1905Neel *v.* Neel, 89, 494, 495, 497, 544, 552, 561,
562, 811, 812Neeley *v.* Grantham, 75Neely *v.* Butler, 597, 601, 603, 613*v.* Haskins, 1863*v.* Jones, 2177*v.* Lancaster, 669 }*v.* Rood, 1667Negley *v.* Morgan, 2265Negroes Chase *v.* Plummer, 1632

Negus, Matter of, 1102

Neide *v.* Neide, 308, 309Neifert *v.* Ames, 2272Neill *v.* Keese, 1639, 1641, 1644, 1654Neilson *v.* Blight, 1600, 2105, 2107*v.* Iowa Eastern R. Co., 98*v.* Lagow, 1594, 1596, 1709, 1711, 1796,
1797Neiswanger *v.* Squier, 1188Nellis *v.* Coleman, 997*v.* Lathrop, 1149, 1212, 2269

- Nellis *v.* Nellis, 471
 Nellons *v.* Truax, 2154
 Nelson *v.* Bridgeport, 720
 v. Clay, 1986, 1988
 v. Davis, 300, 1606, 1796
 v. Eaton, 1031
 v. Holley, 733, 735, 739, 896, 923
 v. Liverpool Brewing Co., 1197, 1198, 1199
 v. Logow, 289
 v. McLenaghan, 736
 v. Pinegar, 1998, 2181, 2187
 v. Worrall, 1676
 Nelson's Heirs *v.* Clay, 552, 575
 Neoll *v.* Garnett, 947
 Neppach *v.* Jordan, 1314
 Nepeau *v.* Doe, 1348
 Nerac's Estate, 624, 767
 Nerhooth *v.* Althouse, 1214
 Nesbit *v.* Hanway, 2174
 Nesbitt *v.* Tredenick, 1708
 v. Trindle, 675
 v. Trunbo, 2327
 Nettleton *v.* Silkes, 54, 55, 56, 2213
 Neumaier *v.* Vincent, 1383, 1519
 Neufville *v.* Thompson, 648
 Neumeister *v.* Palmer, 1317, 1330
 Neumoyer *v.* Andreas, 2189
 Neves *v.* Scott, 1516, 1594, 1608, 1609, 1694
 Nevil's Case, 433, 435
 Nevil *v.* Saunders, 300, 1560, 1561, 1606, 1672, 1673
 Nevins *v.* City of Peoria, 2232
 Nevitt *v.* Bacon, 2093, 2094, 2146
 Nevlin *v.* Osborn, 2355
 New *v.* Nicoll, 1578
 New Albany *v.* Burke, 1581
 Newall *v.* Wright, 1120, 1220, 2063, 2077, 2112, 2144, 2147
 Newark *v.* Branding, 983
 Newark Savings Institution *v.* Forman, 1518
 Newberry *v.* Brunswick, 591, 752
 Newbold's Appeal, 1621
 Newbold *v.* Newbold, 2077
 v. Smart, 1889, 1890
 Newbrough *v.* Walker, 1245
 New Brunswick Land Co. *v.* Kirk, 54
 Newby *v.* Brownlee, 504
 v. Perkins, 1983, 1985
 v. Vestal, 2261
 Newcomb *v.* Bonham, 1996, 2050, 2158
 v. Clark, 2267
 v. Dewey, 2146
 v. Ramer, 49, 52, 1231, 1239
 v. Reimer, 49
 Newcomer *v.* Orem, 720
 Newell *v.* Fisher, 1033
 v. Hayden, 1515
 v. People, 2328
 v. Sanford, 1285, 1260
 v. Woodruff, 1898, 1913, 1915
 New England Jewelry Co. *v.* Merriam, 810, 1491, 1497
 New England Oyster Company *v.* McGawey, 1036
 Newhall *v.* Bart, 2039
 v. Five Cent Savings Bank, 728, 814, 818, 828, 925
 v. Lynn F. C. Savings Bank, 2073, 2074, 2083
 v. Pierce, 2042
 v. Wheeler, 289, 290, 299, 1560, 1563, 1576, 1594, 1607
 New Hampshire Bank *v.* Willard, 2029
 Newhart *v.* Peters, 2152
 New Haven Savings Bank *v.* Parttan, 1997, 1998
 New Ipswich Factory *v.* Batchelder, 2242
 Newhoff *v.* Mayo, 1187
 New Jersey Ins. Co. *v.* Meeker, 810
 New Jersey R. Co. *v.* Van Syckle, 970
 Newkirk *v.* Newkirk, 265, 305, 309, 310
 Newkirk, Jackson ex d., *v.* Embler, 533
 Newland *v.* Holland, 1405
 v. Newland, 351
 Newlin *v.* Freeman, 1562
 v. Newlin, 1375
 Newlove *v.* Callaghan, 1946
 Newman's Estate, 2282
 Newman *v.* Anderton, 984, 1176, 2250
 v. Chapman, 2092, 2365
 v. Jenkins, 522, 767
 v. Kershaw, 2057
 v. Rutter, 1140, 1144
 v. Samuels, 2037
 v. Willetts, 741
 New Orleans *v.* Guillotte, 1029
 New Orleans Nat. Banking Assoc. *v.* Adams, 1992
 New Orleans R. Co. *v.* Moye, 2206
 v. The Steamship Company, 1036
 v. United States, 2293
 New Parish of Exter *v.* Odwine, 2319
 Newson *v.* Hart, 1776
 v. Pryor, 2357
 New South Meeting House, *Re*, 31, 35, 36
 Newton *v.* Askew, 1791
 v. Ayscough, 316
 v. Cook, 802, 803, 805
 v. Griffith, 418, 469
 v. Harland, 1351, 1356
 v. Howe, 1246, 1911
 v. Marshall, 2079
 v. McKay, 2356
 v. McLean, 1706, 2006
 v. Newton, 2124
 v. Porter, 1622, 1760
 v. Preston, 1649, 1700
 v. Reid, 249, 257, 270
 v. Sly, 761
 v. Taylor, 1620, 1621, 1760
 v. Wilson, 1176, 2056
 New Vienna Bank *v.* Johnson, 2055
 New York Central R. Co. *v.* Saratoga & S. R. Co., 2247, 2251
 New York, C. & St. L. R. Co. *v.* Randall, 1316
 New York Dry Dock Co. *v.* Stillman, 1548
 New York Elevated R. Co. *v.* Manhattan R. Co., 1115
 New York & H. R. R. Co., Matter of, 197
 v. Kip, 2327, 2328
 New York & M. R. Co. *v.* Van Horn, 2323
 v. Van Horne, 2324
 New York Life Ins. Co. *v.* Rector, etc., St. George's Church, 1157
 New York L. Ins. & T. Co. *v.* Cutler, 2154
 v. Milnor, 2153, 2154, 2242
 v. Smith, 2109, 2110
 v. White, 2121
 New York Mut. Life Ins. Co. *v.* Boughrum, 2178, 2180
 New York State Bank *v.* Fletcher, 2136
 Niagara Falls International Bridge Co. *v.* Great Western R. Co., 1184
 Niblo *v.* N. A. Ins. Co., 1224
 Nice's Appeal, 318, 328, 1656, 1675, 2119, 2126
 Nichol *v.* Loy, 246, 253, 1515, 1746, 1748, 1749
 v. N. Y. & Erie R. Co., 1861
 Nicholas *v.* Chamberlain, 2245
 v. Purcell, 1410, 1412
 Nicholl *v.* Mumford, 1958
 v. Walworth, 1796
 Nicholl, Doe d., *v.* McKaeg, 1258, 1260, 1261, 1275
 Nicholls *v.* Butcher, 2, 308
 v. Byrne, 1213
 v. O'Neill, 1364, 1366, 1367, 1369, 1370
 v. Skinner, 322
 Nicholson *v.* Bettie, 459, 472
 Nichols, Matter of, 1517
 Nichols *v.* Allen, 1637, 1683, 1684
 v. Baxter, 2113, 2118
 v. Bucknam, 1890

- Nichols *v.* Cabe, 2046
v. Denny, 1568, 1729, 1882, 1883, 1968
v. Duprey, 2268
v. Eaton, 253, 254, 274, 1748
v. Foster, 2162
v. Glover, 2007
v. Hull, 2207, 2242
v. Marshland, 199
v. Nichols, 1980, 1981
v. Overacker, 1497
v. Randall, 2151
v. Reynolds, 2046, 2048, 2092, 2101
v. Smith, 1911, 1924, 1925, 1967, 2082
v. Williams, 1271, 1285, 1307, 1338
- Nicholson *v.* Halsey, 1580, 2095
v. Lauderdale, 1615
v. Leavitt, 720, 2057, 2288
v. Munigle, 1171, 1172
v. Smith, 1009
- Nicholson's Lessee *v.* Hemsley, 903
- Nickals *v.* Weim, 2309
- Nickels *v.* Otto, 2174
- Nicoll, Matter of, 1023
v. Mumford, 1712, 1794
v. N. Y. & Erie R. Co., 259, 266, 269, 272, 839, 1849, 1851, 1852, 1854, 1855, 1864, 1866, 1867
v. Ogden, 787, 824, 875, 881, 930, 1608, 1702, 1717, 1736
v. Scott, 75
v. Walworth, 1577, 1743
- Nicolls *v.* Rogers, 2056
- Nicolson *v.* Wordsworth, 1788
- Nirossi *v.* Phillipi, 617, 1212
- Nickell *v.* Handly, 247, 274, 300, 1606
- Nickerson *v.* Bowley, 1084
- Niedelet *v.* Wales, 1126, 1175
- Nightingale *v.* Burrell, 323, 396, 402, 411, 413, 415, 418, 424, 447, 465
v. Hidden, 297, 679, 680, 684, 1610, 1614
v. Lawson, 519
- Niles *v.* Gray, 306, 308, 309, 321
v. Hamon, 2153, 2180
v. Nye, 802
v. Ransford, 1670, 1755
- Nitzell *v.* Paschall, 2246
- Niven *v.* Belknap, 2174, 2302
- Nixon's Appeal, 1646
- Nixon *v.* Bynum, 2000, 2077, 2078
v. Nanney, 1398
v. Nixon, 1836
v. Potts, 1925
v. Rose, 251, 257
v. Williams, 601, 610
- Noble *v.* Bosworth, 103, 104, 130, 136, 146
v. Meyers, 1985
v. McFarland, 588, 1361, 1377, 1903, 1994
v. Hook, 1448
v. Mermott, 1788
v. Noble, 661
v. Sylvester, 81
v. Willock, 1836
- Nobles *v.* McCarty, 1281
- Noe *v.* Miller's Executors, 479
- Noel *v.* Bowley, 1743
v. Ewing, 671, 705, 708, 714, 715, 725, 893
v. Henry, 1884
v. Jevon, 832
v. McCrory, 1131, 1132, 1322
- Noke's Case, 2362
- Nokes *v.* Smith, 462
- Nolan *v.* Reed, 1388, 1390
- Noland *v.* Nelligan, 1630
- Nolen *v.* Roysten, 1212
- Nookes' Case, 1989
- Noonan *v.* Braley, Admr. of Lee, 2165
v. Orton, 983, 1075, 1089
- Norbury *v.* Norbury, 1721
- Norcross *v.* Norcross, 1998
- Nordant *v.* Thorold, 876
- Norman *v.* Burnett, 1592
- Norman *v.* Cunningham, 1937
v. Wells, 1059, 1076, 1077, 1124, 1138
- Norment *v.* Hull, 1244
- Norrice *v.* Baker, 56
- Norris *v.* Beyea, 344, 533, 671
v. Hensley, 249
v. Hoyt, 215
v. Johnston, 254
v. Johnstone, 1748
v. Kidd, 1378
v. Le Neve, 1708
v. Milner, 1849, 1861
v. Moody, 1863
v. Morrill, 1344
v. Morrison, 510
v. Moulton, 1412, 1501, 2075
v. Sullivan, 1903, 1904
v. Taylor, 1772
v. Thompson, 1844
v. Watson, 49
v. Wilkinson, 2002
- North *v.* Barnum, 1145, 1150, 1782
v. Philbrook, 289, 1596
v. Valk, 596
- North American Coal Co. *v.* Dyett, 1373, 1374
- North Baltimore Building Association *v.* Caldwell, 1770
- Northam *v.* Hurley, 2218, 2220, 2228, 2229
- Northampton Bank *v.* allet, 2110, 2111
- Northampton Paper Mills *v.* Ames, 2077
- Northbey *v.* Strange, 618
- North Carolina R. Co. *v.* Wilson, 1662
- Northcut *v.* Whipp, 691, 761, 780, 815, 820, 826, 883, 884, 885
- Northern *v.* State, 49, 57
- Northern Bank of Kentucky *v.* Roosa, 975, 1225
- Northern Cent. R. Co. *v.* Canton Co. of Baltimore, 145
- Northern Trans. Co. of Ohio *v.* Chicago, 2238
- Northey *v.* Burbage, 325
- Northfield *v.* Plymouth, 597
v. Veshire, 597, 752
- North Hudson R. Co. *v.* Booraem, 61
- Northrup *v.* Marguam, 1897, 1898, 1899, 1979
v. Foot, 2256
- Northumberland *v.* Aylesford, 946
- Northwestern Fertilizing Co. *v.* Hyde Park, 1554
- Northwestern Mut. Life Ins. Co. *v.* Allis, 2012
- Northy *v.* Northy, 2099, 2105
- Norton *v.* Babcock, 1093, 1094, 1095
v. Fagon, 774, 894
v. Fraecker, 1552
v. Gale, 995
v. Doe ex d. Sanders, 1222
v. Highleyman, 2138
v. Hixon, 1703
v. Ladd, 335, 1781
v. Leonard, 299, 1560, 1594, 1607, 1889
v. Lewis, 2151, 2155, 2180
v. Norton, 1553, 1595, 1597, 1797
v. Pettibone, 2332
v. Phelps ("Hewitt *v.* Phelps"), 1749
v. Snyder, 1087
v. Turville, 1783
v. Webb, 2079
- Norton, Jackson ex. d., *v.* Sheldon, 1156
- Norvell *v.* Walker, 2363
- Norway *v.* Norway, 1788
v. Rowe, 574
- Norwich *v.* Hubbard, 1905, 1996, 2084
- Norwich F. Ins. Co. *v.* Broomer, 2118
- Norwood *v.* Byrd, 1702
v. Marrow, 714, 716, 739, 740, 759, 861, 870, 892, 1349
- Nottes' Appeal, 2006
- Nottingham *v.* Jennings, 322, 324, 826, 925
- Nourse *v.* Henshaw, 2012
- Noves *v.* Clark, 2050
- Nowell *v.* Johnson, 2007
v. Wentworth, 1154, 1295

Nowlan *v.* Trevor, 1274, 1337
 Nowlin *v.* Whipple, 2243
 v. Winfre, 416, 447
 Noyes *v.* Blakeman, 1578, 1798
 v. Hemphill, 2248
 v. Marsh, 1052
 v. Rich, 2064, 2066
 v. Stauff, 996
 v. Sturdivant, 2093, 2094, 2095
 v. Terry, 105, 113
 v. Ward, 2302
 Nugent *v.* Cloon, 1754
 v. Gifford, 1667
 v. Riley, 2037, 2039, 2040, 2041, 2042, 2168
 Nunemacher *v.* Ingle, 2157
 Nunn *v.* Givhan, 1363, 1368, 1369
 v. Wilshire, 1626
 Nusom *v.* Clarkson, 2086
 Nussbaum *v.* Evans, 419
 Nutt *v.* Hamilton Ins. Co., 1051
 Nuttal *v.* Bracewell, 2227
 N. W. Mut. Life Ins. Co. *v.* Nelson, 1920
 Nyce's Estate, 1713
 Nyce *v.* Obertz, 730
 Nycom *v.* McAllister, 2307
 Nyce's Appeal, 887, 891
 Nye *v.* Taunton Branch R. R. Co., 796, 828, 922

O.

Oakes *v.* Mfg. Ins. Co., 2116
 v. Munroe, 1026, 1141
 Oakley *v.* Bennett, 367, 2057, 2288
 Oakley *v.* Aspinwall, 1242
 v. Scoonmaker, 1230
 v. Stanley, 2215
 Oakman *v.* Dorchester Mut. F. Ins. Co., 139, 141
 Oaks *v.* Oaks, 1460
 Oates *v.* Cooke, 290, 1563, 1594
 Oates D. Markham *v.* Cooke, 288, 1594
 Oatman *v.* Fowler, 2356
 O'Bannon *v.* Paremour, 2300
 v. Roberts, 2251, 2257, 2258
 Oberley *v.* Lerch, 94
 Obert *v.* Obert, 1906, 1975
 O'Brien *v.* Capwell, 1054, 1066
 v. Elliot, 708, 714, 880, 886, 891, 898, 899, 918, 920, 924, 929, 940, 944, 952
 v. Troxel, 1315, 1316
 v. Wetherell, 259, 266, 268
 O'Byrne *v.* Feeley, 535
 Ocean Beach Association *v.* Brinkley, 708, 719, 761, 763, 788, 831
 Ocean National Bk. *v.* Olcott, 1803
 Ockington *v.* Richey, 55
 O'Connell *v.* McGrath, 1141
 O'Connell *v.* Kelly, 2090
 O'Connor *v.* City of Memphis, 1802
 v. Kelly, 1154
 v. O'Connor, 2269
 O'Daniel *v.* Bakers' Union, 2297
 Odell *v.* Buck, 1034
 v. Durant, 1004
 v. Montross, 2038
 v. Odell, 1685
 Odenbaugh *v.* Bradford, 2050
 Odioma *v.* Lyford, 57
 Odiome *v.* Lyford, 1905, 1969
 Odom *v.* Beverly, 690
 v. Weathersbee, 1899
 O'Doherty *v.* McGloin, 1407
 O'Donnell *v.* Hitchcock, 126
 v. McMurdie, 1286
 Oelrichs *v.* Williams (Oelrichs *v.* Spain), 1668
 O'Farrall *v.* Simplot, 646, 669, 711, 721, 895, 1938
 Offerman *v.* Star, 1001, 1002
 Officer *v.* Young, 2332
 Offut *v.* Scott, 1961
 O'Flaherty *v.* Sutton, 841, 875
 Ofpeer *v.* Burchell, 2166
 O'Gara *v.* Eisenlohr, 751, 757
 Ogborn *v.* Eliason, 2027
 Ogbourne *v.* Ogburne, 737
 Ogden's Appeal, 299, 414, 1606, 1656, 1673
 Ogden *v.* Guidden, 2155
 v. Grant, 2038, 2040
 v. Groves, 2207, 2238
 v. Larrabee, 1690
 v. Robertson, 498
 v. Saunders, 1512, 1518
 v. Stock, 63
 v. Walker, 1309
 v. Walters, 2121, 2156
 Ogdensburg & L. C. R. Co. *v.* Vi. & C. R. Co., 1020
 Ogilvie *v.* Faljambe, 999
 v. Hull, 1168
 Ogle's Lessee *v.* Ogle, 455
 Oglesby *v.* Hollister, 1889, 1890
 Oglesby Coal Co. *v.* Pasco, 924
 O'Grady *v.* Bamshel, 2336
 O'Hanlin *v.* Den. ex d. Van Kleek, 236
 O'Hanlon *v.* Unthank, Jr., 266, 267
 O'Hara *v.* O'Neill, 1691
 O'Hear *v.* De Goesbriand, 30, 31, 32
 Ohio Life Ins. Co. *v.* Ledyard, 2126
 v. Winn, 2178
 Ohio Life Ins. & T. Co. *v.* Reeders, 2141
 Ohling *v.* Luitjens, 2146, 2151
 O'Keefe *v.* Calthorpe, 1662
 v. Kennedy, 1143, 1156
 Okeson *v.* Patterson, 2293
 Okey *v.* Bennett, 720
 Oland's Case, 498, 539, 1206, 1267
 Oland *v.* Burdwick, 1206, 1207
 v. Hardwicke, 539
 Olcott *v.* Bynum, 1635, 1650, 1651, 1652, 1683
 v. Robinson, 2158
 v. Tioga R. Co., 1554, 1769, 1775
 v. Wing, 1960, 1961
 Oldfield's Case, 2222
 Oldham *v.* Halley, 2043, 2054
 v. Henderson, 592, 624, 661, 1377
 v. Oldham, 501
 v. Pickering, 528
 v. Sale, 821, 905
 v. Woods, 1276
 Oldroyd *v.* Crampton, 983
 Olds *v.* Cummings, 2106
 Old South Society *v.* Crocker, 1686
 Olendorf *v.* Cook, 976
 Oleson *v.* Bullard, 1409, 1523
 O'Linda *v.* Lathrop, 72
 Oliver *v.* Alabama Gold Life Ins. Co., 1000
 v. Court, 1608, 1735
 v. Decatur, 2067
 v. Dougherty, 1635, 1646
 v. Hook, 2212, 2213, 2215, 2241
 v. Houdlet, 1031
 v. Montgomery, 1890
 v. Oliver, 1830
 v. Piatt, 1623, 1661, 1760, 1761, 1765, 1768, 1782
 v. Pitman, 2207, 2221
 v. Snowden, 1387, 1388, 1433, 1442, 1446
 v. Stone, 2353
 Olliffe *v.* Wells, 1637
 Olmstead *v.* Blair, 928
 v. Elder, 2103
 v. Niles, 53, 54, 55
 v. Olmstead, 340, 342
 Olney *v.* Howe, 1593
 Olson *v.* Nelson, 2056
 Olt *v.* Lohmas, 998
 v. Lohmas, 996, 1013, 1323
 Omaha Hotel Co. *v.* Kountze, 2066
 Ombony *v.* Jones, 1224
 O'Mulcahy *v.* Holley, 2111
 Onderdonk *v.* Ackerman, 1842
 v. Gray, 2084, 2087

- O'Neal *v.* Commonwealth, 597
 O'Neale *v.* Lodge, 1698
 v. Ward, 271
 O'Neil *v.* Harkins, 2233
 v. Seixas, 2106
 O'Neill *v.* Capelle, 2045, 2048, 2052, 2054
 v. Henderson, 1722
 Ongley *v.* Chambers, 2216
 Onslow *v.* ———, 79, 1185
 v. Corrie, 2265
 Onson *v.* Cown, 1643
 Ontario Bank *v.* Hennessey, 1241
 v. Loot, 1579
 Ontario State Bank *v.* Gerry, 1477
 Opdyke *v.* Bartles, 783
 v. Barttes, 2173
 Opinions of Justices, 893
 Oppenheimer *v.* Fritter, 1393
 Orchard *v.* Hughes, 2165
 Ord *v.* Chester, 1026
 v. Johnston, 1697
 v. McGee, 2104, 2106
 Ordway *v.* Remington, 2256
 Oregon Iron Co. *v.* Trullinger, 2223
 Oregon R. Co. *v.* Oregon R. & Nav. Co., 1020
 Oregon R. & N. Co. *v.* Mosier, 129
 Orford *v.* Benton, 692, 693, 793
 Orgill *v.* Kinshead, 2263
 Oriental Bank *v.* Freeze, 671, 1517
 v. Haskins, 959
 O'Riley *v.* McChesney, 2225
 Orlando's Case, 48
 Orleans *v.* Chatham, 1590, 1592, 1691, 1736
 Orleans Nav. Co. *v.* Llard, 1140
 Orman *v.* Day, 2234, 2235
 v. Orman, 1456, 1457
 Orme's Case, 1556
 Ormiston *v.* Olcott, 1731
 Ormond *v.* Hutchinson, 1783
 Orndoff *v.* Turman, 402, 447, 453, 467, 473
 O'Rorke *v.* Smith, 2207, 2221
 Orr, Matter of, 1521
 Orr *v.* Hadley, 689, 2062, 2063
 v. Hodgson, 216, 218, 673, 1657, 2014
 v. Hodson, 2347
 v. Hollidays, 599, 601
 v. O'Brien, 487
 v. Quimby, 2326, 2327
 v. Shaft, 1390, 1391, 1421, 1434, 1446
 Orrick *v.* Boehen, 710
 Orser *v.* Hoag, 217
 Orth *v.* Orth, 897
 Orton *v.* Knab, 2168
 v. Noonan, 1089
 Orvis *v.* Newell, 2140
 Osborn *v.* Carden, 1022
 v. Carr, 2139
 v. Hart, 2328
 v. Osborn, 1537, 1894
 v. Rider, 2355
 v. Schenck, 1922
 v. Wise, 983
 Osborne *v.* Brennon, 1244
 v. Crump, 2150, 2152
 v. Edwards, 1363
 v. Endicot, 778, 1635, 1638, 1651, 1699
 v. Farewell, 2254
 v. Hart, 2328
 v. Horne, 866
 v. Humphry, 974
 v. Morgan, 1194
 v. Shrieve, 416
 v. Tunis, 1098, 2013, 2129, 2157
 Osgood *v.* Abbott, 1861, 1862
 v. Davis, 1701
 v. Dewey, 1218
 v. Franklin, 1730, 1737, 1758, 1841, 1842,
 1843
 v. Howard, 63
 v. Thompson, 2046
 v. Thompson Bank, 2047
 Osman *v.* Sheage, 1558
 Osmond *v.* Fitzron, 1034
 v. Fitzroy, 756
 Osterhout *v.* Shoemaker, 764
 Osterman *v.* Baldwin, 1590, 2014
 Ostrander, Jackson ex d., *v.* Rowan, 1283, 1298
 v. Spickard, 916, 934, 935, 955
 Ostrom *v.* McCann, 2149, 2152
 Oswald *v.* Fratenburgh, 2264
 v. Kopp, 307
 Otis *v.* Deekwith, 1594
 v. McLellan, 1682
 v. McMillan, 2258
 v. Moulton, 212, 2298
 v. Parshley, 761, 764, 815, 826
 v. Prince, 270
 v. Sill, 2018
 v. Smith, 66
 v. Warren, 870
 Otis Co. *v.* Inhabitants of Ware, 1554
 Otley *v.* McAlpine's Heirs, 641, 1981
 Otley, Doe d., *v.* Manning, 1626
 O'Tool *v.* Brown, 202
 Ott *v.* Specht, 143
 v. Sprague, 1471
 Ottawauechee Sav. Bk. *v.* Holt, 2101
 Ottawa Plank Road Co. *v.* Murray, 2051
 Ottman *v.* Moak, 2011, 2177, 2178
 Otto *v.* Jackson, 1131, 2267
 Ottumwa Lodge *v.* Lewis, 64, 65, 507
 Ottumwa Woollen Mill Co. *v.* Hawley, 103,
 105, 123, 132, 133, 2080
 Ould *v.* Washington Hospital, 1609
 Ouseley *v.* Anstruther, 1623
 Outcalt *v.* Ludlow, 2299
 Outerbridge *v.* Phelps, 2241
 Outland *v.* Bowen, 396
 Outon *v.* Weeks, 1807
 Outtuon *v.* Dulin, 1213
 Overdeer *v.* Lewis, 1253, 1310, 1357
 Overfield *v.* Christie, 2295
 Overholt's Appeal, 186, 1964
 Overman *v.* Sanborn, 2263
 v. Sims, 467
 Overseer of Poor *v.* Sears, 224
 Overstreet *v.* Bates, 1781
 Overton *v.* Hollinshade, 2023, 2024
 v. Lacy, 1878, 1880, 1968
 v. Williston, 115
 Overturf *v.* Dugan, 355
 Oves *v.* Oglesby, 137, 138
 Oviatt *v.* Brown, 1773
 v. Sage, 1246, 1247
 Owen *v.* Bertholomew, 2300
 v. Boyle, 2273
 v. Ellis, 1806
 v. Fields, 2021
 v. Hyde, 547, 555, 558, 566, 743, 806
 v. Morton, 1897, 1914
 v. Norris, 2346
 v. Nye Company, 1035
 v. Peacock, 866, 930, 931
 v. Perry, 2340
 v. Robbins, 781, 782
 v. Slatter, 880, 890, 924
 v. Thomas, 999
 v. Wright, 1081
 v. Yale, 897
 Owens *v.* Collins, 1956
 v. Dickinson, 1835
 v. Dunn, 651
 v. Lewis, 55, 56
 v. Missionary Society of the Methodist
 Episcopal Church, 1603, 1604, 1659
 v. Owens, 1594
 Owing's Case, 1701
 Owston *v.* Ogle, 1903
 Oxford *v.* Ford, 1292, 2274
 v. Oxford, 1600
 Oxley, *Ex parte*, 1677
 Oxley *v.* James, 1300, 1301, 1306, 1335
 v. Lane, 249
 Oyster *v.* Oyster, 534

P.

- Pace *v.* Pace, 246, 253
 Pacific Iron Works *v.* Newhall, 2025
 Pacific Rolling Mill Co. *v.* Dayton, S & G.
 R. R. Co., 1020
 Pack *v.* Bathurst, 1825
 v. Mayor, 1194
 v. Thomas, 1698, 1701
 Packard *v.* Putnam, 1589, 1592, 1691
 Packer *v.* Rochester & S. R. Co., 2142, 2146,
 2156, 2157
 Packington's Case, 544, 559
 Packington *v.* Packington, 569
 Padding *v.* Clark, 918, 944
 Paddison *v.* Oldhan, 412
 Paddon *v.* Richardson, 1715
 Padelford *v.* Padelford, 545, 546, 547, 550, 556,
 559, 738
 Padgett *v.* Lawrence, 1642, 1645, 1651
 Paff *v.* Kenny, 1781
 Page's Estate, 684
 Page *v.* Brown, 1793
 v. Cooper, 1832, 2011
 v. Estey, 974, 1008
 v. Ewbanks, 1443
 v. Foster, 2053
 v. Fowlen, 47
 v. Hayward, 460
 v. Hinssman, 983, 1218
 v. Lashley, 2250
 v. Page, 835, 868, 869, 1635
 v. Palmer, 261, 1867
 v. Pierce, 2107
 v. Purr, 1174
 v. Robinson, 2067, 2077, 2186, 2187
 v. Rogers, 2042
 v. Roper, 1815
 v. Summers, 1689
 v. Way, 247
 v. Webster, 1882, 1799
 v. Western Ins. Co., 1668
 v. Wight, 1355
 Pahlman *v.* Smith, 1842
 Paice *v.* Archbishop of Canterbury, 317
 Paige *v.* Paige, 824
 Pain *v.* Smith, 2002
 Paine's Case, 620, 621, 623, 624, 675, 676, 677,
 681, 691, 788, 885
 Paine *v.* Aberdeen Hotel Co., 2272
 v. Benton, 2027
 v. City of Boston, 2223
 v. Coffin, 1158
 v. French, 2105, 2107
 v. Hutchens, 2290
 v. Jones, 2330
 v. Slocum, 1890, 1906
 v. Upton, 2330
 v. Tucker, 1041
 v. Wagner, 1939
 v. Wood, 68, 70, 71, 72
 Pairo *v.* Vickery, 1736
 Paisley's Appeal, 1593
 Palk *v.* Clinton, 1749, 2149, 2150, 2172
 v. Lord Clinton, 2076
 Pall *v.* Baulkley, 1040
 Pallman *v.* Mortgester, 1143
 Pally *v.* Saratoga R. Co., 2325
 Palmater *v.* Carey, 2166
 Palmer, *Ex parte*, 514
 Palmer *v.* Allicock, 19
 v. Danney, 840
 v. Edwards, 1073, 1109, 1112, 1118
 v. Fleshies, 2234
 v. Forbes, 98, 103
 v. Ford, 1139, 1140, 1158
 v. Gurnsey, 2168
 v. Guthrie, 2046
 v. Hawes, 1385, 1391, 1440
 v. Horton, 883
 v. Marguette Co., 1000
 v. Mead, 2157
 Palmer *v.* Miller, 2011
 v. Mulligan, 101, 2255
 v. Oakley, 1622
 v. Sawyer, 1030, 1073
 v. Simonds, 1629
 v. Steiner, 2252
 v. Stevens, 2085
 v. Wetmore, 1127, 1167, 2223
 v. Young, 1090
 Pantou *v.* Holland, 198, 2231, 2232
 v. Manley, 1475, 1479, 1506
 Papillon *v.* Voice, 444, 491
 Paquetel *v.* Gauche, 1213
 Papasy *v.* Papasy, 780
 Paradine *v.* Jane, 1099
 Pardee *v.* Lindley, 1407, 1408, 1414, 1437, 1441,
 1476, 1506, 1522, 1670, 2106
 v. Treat, 2072
 v. Van Anken, 2136, 2137, 2170, 2172
 Pardue *v.* Givens, 265
 Parent *v.* Callerhand, 1035
 Parfitt *v.* Hember, 1693
 Parham *v.* Parham, 957, 960, 963
 v. Thompson, 49, 52
 Paris *v.* Hulett, 2157
 Parish *v.* Gates, 2047
 v. Gilmanton, 1998
 v. Caspare, 2242, 2243
 v. Scott, 2331
 v. Ward, 221, 2289
 v. Wheeler, 2014
 Park *v.* Baker, 110
 v. Brooks, 729
 v. Castle, 1135, 1300, 1338
 v. Hardy, 685
 v. Hawkins, 2357
 Parke *v.* Kilham, 1901, 1908
 v. Mears, 2355
 Parker *v.* Allen, 1220
 v. Banks, 2298
 v. Boston & M. R. Co., 2230
 v. Carter, 621
 v. Chambliss, 578
 v. Constable, 1269, 1337
 v. Converse, 1662, 1754
 v. Copeland, 1104
 v. Foote, 1913, 2223, 2292
 v. Foy, 2006
 v. Girard, 1973
 v. Griswold, 2248
 v. Hayden, 936
 v. Hill, 2034
 v. Hollis, 996, 998, 1013, 1131, 1316, 1323
 v. Hotchkiss, 2226
 v. Jacobs, 2017
 v. Jones, 2080
 v. King, 1388, 1513
 v. Lincoln, 1873, 2014, 2015
 v. Murphy, 861, 869
 v. Nanson, 1213
 v. Nichols, 236, 2317, 2319
 v. O'Cear, 930
 v. Parker, 309, 335, 340, 342, 415, 417,
 723, 724, 790, 846, 877, 1838
 v. Parmele, 2059
 v. Proprietors of Locks and Canals, 212,
 1815, 1816, 1898, 1899
 v. Raymond, 1213
 v. Rochester, 2000
 v. Rule, 2334
 v. Smith, 99, 2362
 v. Snyder, 1635, 1648
 v. Staniland, 50, 51
 v. Stuckert, 214
 v. Tootal, 411, 413
 v. Van Cortland, 1591
 v. Webb, 2262
 v. White, 1845
 v. Whyte, 1185
 v. Winnipiseogee, Lake C. & W. Mfg.
 Co., 1669
 v. Wood, 2020

- Parkham *v.* Justices of Decatur Co., 2324
 Parkhurst *v.* Watertown Steam Engine Co., 2106
 v. Northern Cent. R. Co., 2019
 v. Van Cortland, 2174
 v. Watertown Steam Engine Co., 2106
 Parkins *v.* Coxey, 552, 553
 v. Dunham, 2223, 2345, 2347
 Parkinson's Appeal, 75, 76, 2121
 Parkinson *v.* Haubury, 2086
 Parkist *v.* Alexander, 1617, 1643, 1745, 1771, 2015, 2036
 Parkman *v.* Bowdoin, 417, 423
 v. Welch, 2153, 2184
 Parkman's Admr. *v.* Aicardi, 1112, 1123, 1184
 Parke *v.* Nichols, 2312
 Parks, *Re*, 1433
 Parks *v.* Boston, 1127, 1129, 1167, 2268
 v. Brooks, 729, 799
 v. Hall, 1993, 2037, 2049, 2127, 2128
 v. Hardy, 823, 843, 865
 v. McLellan, 718
 v. Nichols, 2319
 v. Parks, 1607
 v. Webb, 2020
 v. Whit, 1035, 1373
 Parmelee *v.* Cameron, 1697
 v. Dann, 2105, 2106, 2107
 Parmenter *v.* Walker, 2163
 v. Weber, 1057, 1109, 1112, 1121
 Parmer *v.* Giles, 1750
 v. Parmer, 2168
 Parmle *v.* Sloan, 1641
 Parrett *v.* Shaubhut, 2122, 2126
 Parris *v.* Cobb, 1032, 1782
 Parrish *v.* Stevens, 2206
 Parrot *v.* Barnes, 1301, 1306
 v. Barney, 1105, 1152, 1153, 1228
 v. Edmondson, 1842
 Parris *v.* Cobb, 1032, 1782
 Parry *v.* Herbert, 255
 v. House, 1148
 v. Wright, 2098
 Parry, Doe d., *v.* Hazell, 1336, 1337, 1340, 1341
 Parrott *v.* Kumpf, 1497
 Parsell *v.* Stryker, 1004
 Parsons, *In re*, 234
 Parsons *v.* Baker, 1630
 v. Bedford, 667
 v. Boyd, 1729, 1730, 1876, 1881, 1885, 1968
 v. Camp, 78, 79, 103, 106
 v. Copeland, 133, 134, 138
 v. Ely, 645
 v. Hughes, 2187
 v. Johnson, 2211, 2216
 v. Livingston, 1400, 1402, 1519, 1520
 v. Lyman, 1835
 v. McCracken, 2176
 v. Miller, 1972
 v. Noggle, 2174, 2175
 v. Russell, 2324
 v. Smith, 55
 v. Wells, 1996, 2102, 2103, 2107
 v. Winslow, 270, 271, 514
 artee *v.* Stewart, 1399, 1402, 1434, 1451
 v. Thomas, 1662
 Partington's Case, 400, 444
 Parteriche *v.* Powlet, 563, 740
 Parton *v.* Harvey, 752
 Partriche *v.* Broadhurst, 947
 Partridge *v.* Badger, 2342
 v. Berce, 2092, 2093
 v. Bere, 1279
 v. Dorsey, 401, 445, 463
 v. First Independent Church, 41, 2213
 v. Gilbert, 2232, 2235, 2236, 2237, 2243
 v. Havens, 1640
 v. Messer, 1623
 v. Partridge, 2105
 v. Scott, 2232
 v. Swazey, 2027
 Paschal *v.* Cushman, 1513
 v. Davis, 1723
 Pasey *v.* Cook, 300
 Passinger *v.* Thorburn, 1247
 Patapsco Guard Co. *v.* Morrison, 1832
 Patch *v.* City of Covington, 1247, 1248
 v. Keeler, 852, 859
 Patchin *v.* Cromach, 2344
 Paterson *v.* Boston, 1129
 v. Ellis, 322, 344, 396
 v. Lanning, 1989
 v. Murphy, 1691, 1791
 v. Wabash, St. L. & Pac. R. Co., 198
 Paton *v.* Murray, 2147
 Patrick *v.* Commissioners, 2325
 v. Marshall, 1986
 v. Morehead, 534
 v. Sherwood, 504, 505, 553
 Patridge *v.* Bere, 1993
 Patten *v.* Bond, 1164
 v. Dechon, 1059, 1071, 1072, 1073, 1077, 1112, 1115, 1117, 1124, 1139, 2251, 2262, 2265
 v. Pearson, 2157, 2163
 v. Smith, 1514
 Patterson *v.* Birdsall, 2138
 v. Blake, 1960, 1964
 v. Blight, 2254
 v. Boston, 1127, 1167, 2268
 v. Carneal, 799, 2076
 v. Campbell, 1624
 v. Douner, 2059
 v. Gaines, 755
 v. Hansel, 1145, 1723
 v. Huddart, 307
 v. Johnston, 2029
 v. Kreig, 1475
 v. Lanison, 2095
 v. Lawrence, 1820, 1823
 v. Martin, 1976
 v. McCousland, 228
 v. Moore, 281, 287, 531
 v. Patterson, 646, 647, 895, 1938
 v. Philadelphia & R. R. Co., 83
 v. Rabb, 2110
 v. Robinson, 1562
 v. Snell, 2322
 v. Stoddard, 1258, 1282, 1290, 1291, 2261, 2271
 v. Sweet, 1216
 v. Wilson, 1822
 v. Yeaton, 2055
 Pattison's Appeal, 355, 2334
 Pattison *v.* Blanchard, 1241
 v. Hill, 2099, 2107
 v. Powers, 2082
 Patton *v.* Adkins, 2086
 v. Axley, 1254, 1299, 1315, 1319, 1324, 1337
 v. Beecher, 1589, 1590
 v. Calhoun, 1889
 v. Chamberlain, 1592
 v. Crow, 1810
 v. Page, 2181
 v. Patton, 786
 v. Philadelphia, 595, 596
 v. Philadelphia & New Orleans, 751, 752
 v. Randall, 2
 v. Rankin, 1942, 1944
 Patty *v.* Bogle, 2274
 v. Goolsoy, 1824
 v. Middleton, 1050
 v. Pease, 2154, 2180
 Paul *v.* Paul, 1411, 1491
 v. Compton, 1629
 v. Davis, 2282
 v. Fulton, 1665, 1690, 1759
 v. Ward, 1349
 Paullings *v.* Barron, 1997, 1998, 2169
 Paup *v.* Sylvester, 1408
 Pawlet *v.* Clark, 707
 Pawlins *v.* Stewart, 2090

- Pawson *v.* Brown, 1638
 Paxson *v.* Lefferts, 423
 v. Potts, 938
 Paxton *v.* Douglass, 2081
 v. Harrier, 2134, 2184
 v. Paul, 2129
 v. Potts, 937
 v. Stuart, 1689
 Payn *v.* Beal, 251
 Payne, *Ex parte*, 34, 1631, 1632
 Payne *v.* Atterbury, 2004, 2008
 v. Avery, 2004
 v. Beecker, 733, 734, 735, 741, 838, 839
 v. Bullard, 1781
 v. Dotson, 892
 v. Harrell, 2009
 v. Herald, 2158
 v. James, 1202
 v. Patterson, 2011, 2017
 v. Payne, 654, 678, 679, 684, 688, 712, 918,
 945, 1372
 v. Rogers, 1196, 1108, 1202
 v. Sale, 1796
 v. Wilson, 2364
 Payton *v.* Sherburne, 1293
 Pea *v.* Pea, 106, 116, 132, 135
 Peabody *v.* Eastern Methodist in Lynn, 1886
 v. Hewett, 2209
 v. Lynn Methodist Soc., 2107
 v. Minot, 1911, 1912, 1922, 1967, 1985
 v. Patten, 2172
 v. Roberts, 2174
 v. Tarbell, 1538, 1576, 1633
 Peacock *v.* Eastland, 385
 v. Monk, 2012
 v. Purvis, 49
 v. Smart, 2279
 Peacock, Doe d., *v.* Raffan, 1328, 1339, 1341,
 1342
 Peak *v.* Ellicott, 1762
 Peake *v.* Cameron, 1446
 Pearce *v.* Ferris, 1350
 v. Foreman, 2006
 v. Hall, 2026
 v. McClenaghagh, 1797, 2201, 2243, 2245,
 2247, 2248
 v. Morris, 2170
 v. Savage, 335, 1594, 1597
 Pearl *v.* Harris, 1051
 v. McDowell, 2345
 Pears *v.* Covilland, 617
 Pearse *v.* Baron, 1038
 v. Ownes, 274
 Pearson *v.* Carlton, 1895
 v. East, 1620
 v. Howes, 596, 751
 v. Jamison, 1667
 v. Moreland, 1716
 v. Ries, 991, 1001
 v. Seay, 2044, 2051, 2053, 2054
 v. Spencer, 2211, 2216
 v. Taylor, 1766
 Pearson, Jackson ex d., *v.* Housel, 4, 305, 307
 309, 310
 Pease *v.* Benson, 2108
 v. Kelly, 2005
 v. Pilot Knob Iron Co., 1999, 2078
 v. Warren, 2100
 Peaslee *v.* Gee, 2357
 Peavey *v.* Tilton, 1786
 Peay *v.* Peay, 885
 Peck *v.* Austin, 1029
 v. Batchelder, 96, 104, 107, 108, 113, 135,
 136, 137
 v. Brummagen, 1947, 1949
 v. Carpenter, 1895, 1911
 v. Fisher, 1030, 1957, 1963
 v. Henderson, 1811
 v. Ingersoll, 1107, 1124
 v. Jones, 1127, 1167
 v. Knickerbocker Ice Co., 2259
 v. Millans, 2024, 2122, 2365
 Peck *v.* Newton, 1713
 v. Northrop, 1120, 2250
 v. Peck, 572, 595, 597,
 v. Sherwood, 505, 513
 v. Vandenberg, 1700, 1947
 Peckham *v.* Haddock, 2134
 v. Hadwen, 762, 817, 819
 Pederick *v.* Searle, 2299
 Pedrick *v.* Searl, 517
 v. Searle, 2297, 2300
 Peebles *v.* Reading, 1644, 1744
 Peed *v.* McGee, 2059
 Peel *v.* Lewis, 2227
 Peeler *v.* Guilkey, 1897, 1915
 Pegues *v.* Pegues, 1635, 1646
 Peirce *v.* Goddard, 62, 97, 142, 144
 Peirsoll *v.* Elliot, 2331
 Peiton *v.* Banks, 310
 Pelan *v.* Bevard, 975, 1424
 Pelham's Case, 516
 Pell *v.* Decker, 1489
 Pellenz *v.* Bullerdieck, 128
 Pelletreau *v.* Jackson, 1580
 Pelley *v.* Wathen, 2089, 2090
 Pells *v.* Brown, 320, 321, 418
 Pelton *v.* Knapp, 2134
 v. Westchester Fire Ins. Co., 1614, 2113
 Pemberton *v.* Hicks, 580, 628, 665, 666, 2278
 v. King, 1225
 v. Pemberton, 935, 941
 Pemberton's Lessee *v.* Hicks, 666
 Pennington *v.* Hanby, 2053
 Pence *v.* St. Paul, H. & M. R. Co., 1019
 Pender *v.* Lancaster, 1397
 v. Rhea, 1236
 Pendleton *v.* Hooper, 1381
 v. Pomroy, 766
 v. Rooth, 2095
 v. Vandevier, 516, 743
 Pendleton County *v.* Amy, 1041
 Pendergast *v.* Young, 1120
 v. Foley, 1785
 Peneyer *v.* Brown, 1138
 Penfold *v.* Mould, 1587
 Penhollow *v.* Dwight, 49, 51
 Penington *v.* Coats, 520
 Penman *v.* Slocum, 1611
 Penn *v.* Clemans, 2169
 v. Clemons, 1758
 v. Klyne, 2305
 v. Ott, 2016
 v. Peacock, 1844
 Penn Salt Mfg. Co. *v.* Neel, 1561
 Pennall's Appeal, 95
 Pennell *v.* Fern, 1021
 Pennell *v.* Deffell, 1720
 Pennhollow *v.* Dwight, 2334
 Penniall *v.* Harborne, 1152
 Penniman *v.* French, 96
 Pennington *v.* Gellard, 2233
 v. Hanby, 2168
 v. Seal, 14, 31, 1512, 1513, 1517
 Pennington *v.* Vell, 538, 731, 733, 741
 Pennington, Doe d., *v.* Taniere, 1320, 1331, 1332
 Pennock *v.* Coe, 98, 2018, 2019
 v. Eagles, 2127
 v. Pennock, 487, 1806, 1836
 Pennock's Estate, 118, 346, 458, 1591, 1593,
 1631, 1632, 1633
 Pennoyer *v.* Neff, 2142, 2324
 Pennsylvania *v.* Wheeling Bridge Co., 2326
 Pennsylvania Coal Co. *v.* Blake, 2129
 v. Sanderson, 200
 v. Sandersons, 199
 Pennsylvania Ins. Co. *v.* Parke, 1972
 Pennsylvania Lead Co.'s Appeal, 199, 2222
 Pennsylvania R. Co. *v.* Jones, 2241
 v. Parke, 1972
 Pennsylvania Salt Co. *v.* Neel, 88
 Penny *v.* Black, 1241
 v. Davis, 1786
 Lennybecker *v.* McDougal, 113

Penrose *v.* Erie Canal Co., 1518
 Pense *v.* Hixon, 891, 927
 Penthyn *v.* Hughes, 509, 519
 Pentland *v.* Stokes, 1785
 Penton *v.* Robert, 107, 119, 123, 129, 130, 131, 145, 146
 People *v.* Bank of Dansville, 1762
 v. Bennett, 1141
 v. Botsford, 1324
 v. Broadway Wharf Co., 1029
 v. Brown, 755
 v. Burk, 1036
 v. Canal Appraisers, 2294
 v. Carpenter, 1517
 v. Caton, 2338
 v. Central R. Co., 20
 v. City Bank, 1763
 v. City Bank of Rochester, 1762
 v. Conklin, 216, 217, 1657
 v. Culver, 1028
 v. Dudley, 2269
 v. Ferris, 595
 v. Field, 1356, 2291
 v. Folsom, 196, 215, 216, 218
 v. Gallagher, 2325
 v. Gillis, 820, 821
 v. Golet, 969, 1340
 v. Haskins, 2253
 v. Home Ins. Co., 2335
 v. Hovey, 662, 1359
 v. Howlett, 2254
 v. Irvin, 2289
 v. Jenness, 753
 v. Jeuners, 753
 v. Mayor of Brooklyn, 1102, 2325, 2335
 v. Mayor of New York, 197
 v. McCarthy, 1141
 v. Merchants' Bank, 1768
 v. New York Gas Light Co., 2328
 v. Norton, 1662, 1787
 v. Palmer, 646
 v. Paulding, 1307
 v. Quant, 2324, 2329
 v. Reed, 1263
 v. Rickert, 996, 1301, 1306, 1321, 1322, 1323
 v. Robertson, 1006
 v. Salem, 2325
 v. Shackno, 1274, 1344
 v. Schoonmaker, 1554
 v. Siner, 1213, 1216
 v. Smith, 197, 2327
 v. Snyder, 221, 222, 1657, 2014
 v. Spaulding, 1334
 v. St. Patrick's Cathedral, 40, 41
 v. Superior Court of N. Y., 2031
 v. Supervisors of Montgomery Co., 2335
 v. Toynbee, 2325, 2328
 v. Utica Cement Co., 498
 v. Utica Ins. Co., 1554
 v. Van Nostrand, 1263
 v. Van Rensselaer, 195, 209
 v. White, 370, 390
 People *ex rel.* Aldhouse *v.* Golet, 1327, 1329
 People *ex rel.* Botsford *v.* Darling, 1202, 1302, 1322, 1323, 1324, 1326, 1327, 1329, 1335, 1340, 2232
 People *ex rel.* Chrom. Steel Co. *v.* Spaulding, 1317
 People *ex rel.* Dilcher *v.* German United Evangelical Church, 34
 People *ex rel.* Grissler *v.* Dudley, 1052, 1062
 People *ex rel.* Hubbard *v.* Annis, 1287, 1288
 People *ex rel.* Kline *v.* Rickert, 981, 1013
 People *ex rel.* Norton *v.* Gillis, 477, 478, 501, 521, 993
 People *ex rel.* New York & H. R. R. Co. *v.* Commissioners of Texas, 96, 98
 People *ex rel.* Parker Mills *v.* Commissioners of Texas, 1554
 People *ex rel.* Schock *v.* Green, 1029

People *ex rel.* The New York Elevated Railroad *v.* Commissioners of Texas, 45
 People *ex rel.* Ward *v.* Kelsey, 992
 People's Bank *v.* Keech, 1884
 People's Ice Co. *v.* Davenport, 74
 v. Steamer Excelsior, 198, 983
 v. The Excelsior, 68
 People's Loan & Building Association *v.* White-
 more, 1213
 Peppard *v.* Deal, 306, 310, 331, 333, 334
 Pepper's Estate, 486, 487
 Pepper *v.* Haight, 2358
 v. O'Dowd, 2297
 Peppercorn *v.* Wayman, 1788
 Peralta *v.* Castro, 1697
 Perez *v.* Raybaud, 1191, 1197
 Perin *v.* Carey, 245, 257
 Perine *v.* Teague, 2678, 1317
 Perkins, *Ex parte*, 308
 Perkins *v.* Blood, 2304
 v. Boynton, 1884
 v. Cartwell, 1781
 v. Cottrell, 1367
 v. Cox, 561
 v. Dibble, 2038, 2039, 2129
 v. Dickinson, 247
 v. Eaton, 1898
 v. Governor, The, 1172
 v. Hay, 251, 257
 v. Little, 707, 776
 v. Mallerson, 2108
 v. Matteson, 2106
 v. McDonald, 301
 v. Nicholls, 1646, 1649
 v. Perkins, 1514
 v. Pitts, 2091
 v. Quigley, 1419
 v. Sterne, 2095, 2104, 2107, 2134
 v. Stockwell, 283
 v. Stone, 2099
 v. Swank, 118, 119, 122, 139
 Perley *v.* Chase, 2067
 Permyer *v.* McDaniel, 2339, 2340
 Pernam *v.* Wead, 2220, 2221
 Perot *v.* Levasseur, 2099
 Perrin *v.* Blake, 438
 v. Garfield, 2226
 v. Granger, 32, 40
 v. Lepper, 2251, 2256
 v. Sargeant, 1517
 Perrine *v.* Chessman, 2363
 v. Dunn, 2156
 v. Hankinson, 2260
 Perrot *v.* Perrot, 572
 Perry *v.* Adams, 1918
 v. Aldrich, 497, 2255, 2268
 v. Brown, 142
 v. Carr, 79, 1153, 1297
 v. Goodwin, 975
 v. Granger, 1905
 v. Grant, 2005
 v. Holden, 2357
 v. Kames, 2069
 v. Kline, 238, 401, 408, 411, 415, 420, 447, 469
 v. Meadowcraft, 661
 v. Meddowcraft, 2044, 2052, 2955
 v. McHenry, 1646, 1653
 v. Merritt, 1684-
 v. Perryman, 916, 935, 955
 v. Phillips, 1807
 v. Pierce, 2319
 v. Price, 2318
 v. Providence Ins. Co., 1005
 v. Roberts, 2099
 v. Swazey, 1636
 v. Toller, 537
 v. Woods, 315
 Perry Manfg. Co. *v.* Brown, 369, 2058
 Peritull *v.* Hind, 1457
 Person *v.* Merrick, 2148
 v. O'Neal, 2336

- Persons *v.* Alsip, 2148
v. Schaeffer, 2138
Pet *v.* Hammond, 2144, 2152
Pete *v.* Hammond, 2150
Peter *v.* Beverly, 94, 1555, 1560, 1599, 1663, 1731,
1780, 1806, 1810, 1839, 1841, 1842,
1843
v. Kendal, 982
Peters *v.* Barns, 1160
v. Elkins, 2065
v. Florence, 2134
v. Grubb, 2268
v. Jamestown Bridge Co., 2103, 2104,
2110
v. Lincoln & N. Y. H. R. Co., 1019
Peterson *v.* Clark, 829, 2040, 2053, 2080, 2187
v. Edmonson, 1126, 1175
v. Smart, 1195
Petition of Young, 2361
Petland *v.* Keep, 2241, 2243
Petre *v.* Espinasse, 1791
v. Heneage, 60
Petrie *v.* Bury, 1925
Petsch *v.* Briggs, 1335, 1340
Pettee *v.* Case, 1666, 2031, 2033
Pettengill *v.* Evans, 1153, 1297
Pettibone *v.* Edwards, 2148
v. Griswold, 2027, 2029
Pettingill *v.* Evans, 2067
Pettinghill *v.* Porter, 2207, 2221
Pettit *v.* Shepard, 2331
Pettman *v.* Bridger, 29, 30, 32
Petts *v.* Hendricks, 741
Petty *v.* Doe d. Graham, 1308
v. Kennon, 1286
v. Malier, 599, 675, 734, 735, 741, 1309,
2288
v. Tooker, 34
v. Petty, 708, 716, 727, 794, 795, 875, 912
Pettyjohn *v.* Beasley, 933, 947
v. Pettyjohn, 597
Peugh *v.* Davis, 2049, 2168, 2169
Peverly *v.* Sayles, 1483, 1514, 1515
Peyton *v.* Jeffries, 867, 868, 875
v. Smith, 304, 306, 309, 353, 1891
v. Stith, 1214
Pfanner *v.* Strumer, 47, 48, 1262, 1267
Pfund *v.* Herlinger, 1166
Pharis *v.* Leachman, 836, 1363
Phelan Estate, Matter of, 1517
v. Boylan, 504
v. Gardner, 1033
v. Kelly, 1873, 1917
Phelon *v.* Stiles, 1194
Phelps *v.* Chesson, 1860, 1862, 1868
v. Conover, 1496, 2008
v. Jackson, 1622
v. Jepson, 1876, 1881, 1882, 1883, 1968
v. Harris, 1669, 1739, 1832
v. Murray, 2018
v. Nave, 1113
v. Phelps, 329, 647, 1506, 1689
v. Rooney, 1378, 1379, 1387, 1390, 1417,
1431, 1436, 1440, 1475
v. Sage, 2085, 2128
v. Seely, 1690, 1691
v. Taylor, 1213
v. Townsley, 2100
v. Wait, 1195
v. Van Dusen, 2263, 2264
Phelps & Bigelow Windmill Co. *v.* Shay,
1496
Philadelphia *v.* Field, 2325
Philadelphia Nat. Bank *v.* Dowd, 1761, 1762
Philadelphia & R. R. Co. *v.* Durby, 1185, 1730
v. Johnson, 2082
Philadelphia, W. & B. R. *v.* Woelpper, 2015,
2018, 2019
Philbrick *v.* Ewing, 136
v. Spangler, 596
Philbrook *v.* Delono, 1537, 1700, 2005
Phileo *v.* Halliday, 487
Philips *v.* Crammond, 1515, 1611, 1623, 1635,
1636
v. Doe, 1060, 1061
v. Green, 2365
Philleo *v.* Smalley, 1378, 1445
Phillip's Estate, *The*, 233
Phillip *v.* Benjamin, 991
v. Doe ex d., Tucker, 1155
Phillipo *v.* Munnings, 1782, 1783
Phillipott's Cases, 1040
Phillips *v.* Allen, 542, 543, 546, 547, 556, 557,
560
v. Aurora Lodge, 1019
v. Bishop, 1473, 1474, 1489
v. Covert, 1153, 1252, 1277, 1297
v. Disney, 725
v. Doe, 1138, 1150
v. Doolittle, 1157
v. Eastern R. Co., 1019
v. Eastwood, 1684
v. Ferguson, 1858
v. Grayson, 1361
v. Green, 1031, 2343
v. Gregg, 1916
v. Hele, 340
v. Holmes, 2045, 2067
v. Hulsizer, 2045
v. Hunter, 368, 2057, 2288
v. Kent, 2299
v. Kingsfield, 1456
v. La Forge, 697
v. Maxwell, 2272
v. Mebury, 1858
v. Monges, 1132, 1135, 1317
v. Moore, 2014
v. Mosely, 1318, 1326
v. Mullings, 1801
v. Pearson, 2126
v. Phillips, 325, 610, 619, 623, 634, 786,
2036, 2123, 2211, 2241, 2242
v. Saunderson, 2008
v. Sherman, 1908
v. Sinclair, 2175
v. Smith, 564
v. South Park Commissioners, 1690
v. Springfield, 1460, 1466
v. Stanchi, 1485
v. Stevens, 1068, 1098, 1099
v. Thompson, 1614
v. Winslow, 98, 2018, 2019
v. Wooster, 681
v. Worford, 689
Phillips' Academy *v.* King, 1541, 1555, 1670
Phillips, Doe d., *v.* Butler, 1336
v. Rollins, 1309
Phillips, Jackson ex d., *v.* Aldrich, 1296
Phillips' Lessee *v.* Robertson, 996, 1160, 1214,
1322
Phillipson *v.* Kerry, 1801
v. Mullanphy, 138
Phillpott *v.* Elliott, 1649
Philpot *v.* Hoare, 1113
Phinney *v.* Johnson, 841, 844, 924
Phipps *v.* Ingraham, 994
v. Kelynge, 1693
v. Lord Ennismore, 1748
Phoenix Co. *v.* Fletcher, 2239
Phoenix Ins. Co. *v.* Continental Ins. Co., 1059
Phyfe *v.* Riley, 2000, 2169
v. Wardell, 1089, 1090, 1091
Physick's Appeal, 318, 328, 1675
Physick *v.* Physick, 596
Piatt *v.* Dawes, 1020
v. Hubbell, 1976
v. Oliver, 695, 1623, 1770, 1963
v. Vattier, 1519
Pibus *v.* Mitford, 1538
Picardy *v.* Central Bank, 1690, 1691
Pickard *v.* Collins, 1199
v. Kleis, 1130, 1134
v. Sears, 2302
Picksen *v.* Reed, 136

- Pickers v. Webster, 49
 Pickering v. Coates, 1656
 v. Danson, 1200
 v. Langdon, 535, 536
 v. Pickering, 1872
 v. Reynold, 2334
 v. Shotwell, 1656
 Pickett v. Brown, 2206
 v. Buckner, 800, 801, 2164
 v. Chilton, 645
 v. Dowdell, 2303
 v. Ferguson, 1164
 v. Jones, 2104, 2160
 v. Lyles, 199
 v. Peay, 918, 928, 935, 942, 944
 v. Pecay, 916
 v. Sutter, 1033
 Pico v. Columbet, 1895, 1904
 Pickle v. McKessick, 1860
 Picot v. Page, 1883, 1900
 Pidge v. Tyler, 208, 2364
 Pidgeley v. Rawling, 560
 Pidgeon v. Trustee of Schools, 2071
 Pier v. Carr, 1128, 1129, 1168
 Pierce v. Brew, 1004
 v. Brown, 1220, 1222
 v. Burroughs, 504
 v. Cambridge, 1288
 v. Chace, 1935, 1940, 1941
 v. Chicago, etc., R. R. Co., 1515
 v. Commissioner of Emigration, 1863
 v. Dyer, 64
 v. Emery, 97, 98, 142, 2017, 2018, 2019, 2342
 v. George, 106
 v. Goddard, 2186
 v. Hakes, 414, 600, 681, 692
 v. Hobbs, 731
 v. Keator, 2213, 2214, 2215, 2211, 2240
 v. McKeehan, 1759
 v. Methodist Episcopal Church, 41
 v. Milwaukee R. Co., 2018
 v. Milwaukee & St. P. R. Co., 2019
 v. Minturn, 2204
 v. Pierce, 966, 1131, 1634, 1657, 2254, 2270
 v. Potter, 2158
 v. Robinson, 2045, 2047, 2050
 v. Trigg, 1964
 v. Wannett, 613, 628
 v. Williams, 852, 855, 858, 859, 877
 v. Win, 499
 Piercy v. Roberts, 253
 Pierre v. Fernald, 2223
 Pierrepont v. Barnard, 55, 56
 Pierson v. Armstrong, 2359, 2360
 v. Hitchner, 859, 860
 v. Howey, 751, 752
 v. Lane, 118, 378, 380, 396, 422, 458
 v. Shore, 77, 1091
 v. Townsend, 2338
 v. Truax, 1456
 v. Turner, 212, 1309
 Pifer v. Ward, 744, 745, 778, 814, 891, 922, 923
 Piggot v. Mason, 1008
 Piggott's Case, 1827
 Pigot v. Garnish, 1023
 Pike v. Brown, 1063, 2068
 v. Collins, 2027
 v. Eyre, 1107, 1123
 v. Goodnow, 2153, 2181
 v. Miles, 1480, 1481
 v. Underhill, 806, 850
 v. Wassell, 504
 Pilcher v. Rawlins, 1778
 Pile v. McBratney, 501
 Pilkington v. Boughy, 1630, 1638
 Pilla v. German School Assoc., 217, 218
 Pilling v. Armitage, 1087
 Pillow v. Love, 126
 v. Wade, 647
 Pillsbury v. Moore, 2226, 2245
 Pillsworth v. Hopton, 571
 Pim v. Downing, 1733, 1734
 P. R. M. Co. v. D. S. G. R. Co., 1042.
 Pidgen, Doe d., v. Richards, 1263, 1293, 1295
 Pindall v. Trevor, 1620, 1760
 Pine v. Rector of Trinity Church, 1159
 v. Liecester, 1118
 Pinero v. Judson, 1343
 Pingree v. Coffin, 1665, 1690
 Pingrel v. McDuffe, 2220
 Pingrey v. Watkins, 1112, 1117
 Pinhorn v. Souster, 1266, 1294, 1296, 1297, 1307, 1334
 Pinkerton v. Tumlin, 1501, 1502, 1579
 Pinkham v. Gear, 851, 852, 856
 Pinkston v. Brewster, 1781
 Pinnell v. Boyd, 2060, 2068, 2069
 Pinney v. Fellows, 1690, 1691
 Pinnington v. Galland, 92
 Pinnock v. Clough, 1645, 1651, 1653
 Pinson v. Ivey, 1539, 1659
 v. McGehee, 1690
 Pinston v. Ivey, 1782
 Pintard v. Goodloe, 2006
 Pintard, Jackson ex d., v. Bodole, 1016
 Piper's Estate, 504, 506, 534
 Piper v. Johnston, 1362
 v. May, 662
 v. Moulton, 1603, 1604, 1686
 v. Richardson, 750
 v. Smith, 1961, 1964, 1965
 Pipkin v. Allen, 1896
 Pippin v. Ellison, 2
 Piqua Branch State Bank v. Knoop, 2335
 Piscataqua Bridge Co. v. New Hampshire Co., 2325
 Piscataqua Exchange Bank v. Carter, 1699
 Pitcher v. Barrows, 2364
 v. Tovey, 1074, 2265
 Pitkin v. Noyes, 51
 Pitt, Doe d., v. Hogg, 1146
 v. Hunt, 1361
 v. Jackson, 656, 1040, 1838
 v. Shew, 145
 v. Smith, 1032, 1033, 1034
 Pittman v. Pittman, 1586
 Pitts v. Aldrich, 808, 925, 2130
 v. Aldridge, 728
 v. Cable, 2052, 2053
 v. Hall, 1884
 v. Hendrix, 46
 v. Parker, 2007
 v. Pitts, 894
 Pittsburgh v. Danford, 2302
 v. Scott, 2328
 Pittsburgh, C. & St. L. R. Co. v. Columbus C. R. Co., 1019
 Pittsburgh & St. L. R. Co. v. Rothchild, 368, 2057
 Pittsburgh, etc., R. R. Co. v. Theobald, 1194
 Pittsburgh, V. & C. R. Co. v. Bentley, 473, 494
 Pittsfield Bank v. Howk, 1503
 Pixley v. Clark, 2232
 v. Higgins, 2120
 Pizalla v. Campbell, 737, 837
 Plaisted v. Holmes, 1602
 Planter v. Cunningham, 1079
 v. Serwood, 624, 625, 627
 Planters' Bank v. Davis, 693, 698, 703
 v. Henderson, 1481
 v. Neely, 1716
 v. Prater, 1622, 2106
 v. Sharp, 1510, 1511
 v. Walker, 136
 Planters' Bank of Mississippi v. Sharp, 2332
 Planters' Bank of Tennessee v. Davis, 692
 Planters' Ins. Co. v. Diggs, 1138, 1139, 1151, 1157
 Planters and Merchants' Bank of Mobile v. Andrews, 1540, 1554
 Plantt v. Payne, 820
 Plato v. Roe, 1996, 2039, 2050, 2168

- Platt's Estate, 636
 Platt *v.* Brown, 2321
 v. Johnson, 101, 2225
 v. Smith, 2141
 v. Squire, 2147
 v. Stewart, 1975, 1985
 Platto *v.* Cady, 1476, 1496
 Player, Den ex d., *v.* Nicholls, 973, 980, 1553,
 1595, 1597, 1694
 Playford *v.* Playford, 2173
 Pleasant *v.* Benson, 1306, 1344
 Pleasants *v.* Claghorn, 1002, 1323
 Pledger *v.* Easterling, 1784
 v. Ellerbee, 659, 760, 764, 781, 800, 870,
 925
 Plenty *v.* West, 1560
 Plimb's Case, 1554
 Plimpton *v.* Converse, 2207, 2219, 2244
 v. Farmers' Ins. Co., 2114
 v. Insurance Co., 2118
 Pluck *v.* Diggs, 1109
 Plumb *v.* Sawyer, 635, 637, 671, 1376
 v. Tubbs, 259, 267, 268, 269, 1858
 Plumer *v.* Guthrie, 2050
 v. Plumer, 78, 79, 80, 566, 1213
 Plumleigh *v.* Cook, 706, 1071, 1849
 Plummer *v.* Jarman, 1641
 Plunket *v.* Homes, 320, 693, 694
 Plush *v.* Digges, 1112
 Plymouth *v.* Hickman, 1691
 Plympton *v.* Boston Dispensary, 504, 505
 Poad *v.* Watson, 335
 Podmore *v.* Gunning, 347, 1691
 Poedon *v.* Boston L. R. Co., 2216
 Poer *v.* Peebles, 2273
 Pogue *v.* Clark, 2148
 Poignard *v.* Smith, 2091, 2092, 2101, 2295
 Poindexter *v.* Blackburn, 537
 v. McCannon, 2052, 2053
 Poindexter's Exrs. *v.* Green's Exrs., 510
 Polack *v.* Ptoche, 1099, 1106, 1152
 Polk *v.* Gallant, 1773
 v. Reynolds, 810, 1047
 v. Rose, 2335
 Pollack *v.* Kelly, 1024, 1930, 1939, 1945
 Pollard *v.* Greenville, 1040
 v. Hagan, 707
 v. Jekyl, 208
 v. Mutual F. Ins. Co., 2115
 v. Noyes, 510
 v. Shafer, 553, 1072, 1074, 1075, 1203
 v. Slaughter, 780
 v. Somerset Mut. F. Ins. Co., 2116
 Pollen *v.* Brewer, 1142, 1258, 1269, 1351
 Polliitt *v.* Forrest, 2254
 v. Long, 2225
 Pollock *v.* Cronise, 2251
 v. Kittrell, 1252
 v. Madison, 1098
 v. Speidel, 401, 402, 410, 447, 450, 461,
 465
 v. Stacy, 1112
 Polyblank *v.* Hawkins, 1364, 1365
 Pomeroy *v.* Bailey, 1623
 v. Lambeth, 1268
 v. Latting, 2124, 2125
 v. Mills, 2211
 v. Partington, 1039, 1040, 1807
 v. Pomeroy, 727, 794, 912
 Pomet *v.* Scranton, 2126
 Pomfret *v.* Ricroft, 1166, 2207, 2208
 v. Winsor, 1783
 Pond *v.* Clarke, 2133, 2141
 v. Eddy, 2045
 v. Johnson, 868
 v. Kimball, 1309, 1432
 Ponder *v.* Catterson, 1214
 v. Graham, 597, 893
 Pool *v.* Balkie, 653, 656, 680, 688, 697, 699,
 1372
 v. Hathaway, 2127, 2130
 v. Lewis, 2228
 Pool *v.* Morris, 446, 1912
 v. Pool, 1666
 Poole's Case, 49, 126, 130, 146, 1187
 Poole *v.* Bentley, 993
 v. Cook, 1513
 v. Gerrard, 1406, 1409, 1450, 1452, 1454,
 1455, 1470, 1473, 1474, 1491, 1524
 v. Johnson, 2171
 v. Longuerville, 1365
 v. Mundy, 1715
 Pooley *v.* Budd, 1574
 Poor *v.* Horton, 711, 759
 v. Oakman, 63, 141, 514
 Pope *v.* Anderson, 1881
 v. Biggs, 1171, 1172, 2065
 v. Devereaux, 2247
 v. Durant, 2146
 v. Elliott, 254, 272
 v. Garland, 1301, 1325
 v. Garraud, 1182
 v. Harkins, 1212, 1894, 2250, 2257
 v. Henry, 211, 2366
 v. Jacobus, 2111
 v. Meade, 733, 839
 v. Nickerson, 2057
 v. O'Hara, 2246
 v. Pope, 347, 1627, 1632, 1684
 v. Town of Union, 2205, 2206
 v. Whitcombe, 316
 Pope's Exrs. *v.* Elliott, 1747
 Popham *v.* Banfield, 202, 1870
 v. Banfield, 1807
 Popkin *v.* Bumstead, 803, 808, 887, 928
 Poposkey *v.* Munkwitz, 1245
 Porch *v.* Fries, 587, 588, 617, 620, 631, 632, 653,
 660, 670, 1362
 Porche *v.* Bodin, 45, 46, 49
 Porcher *v.* Daniels, 1806
 Port *v.* Clements, 2146
 v. Jackson, 1101, 2263, 2264
 v. Port, 594, 596, 752, 757
 Porter *v.* Bank of Rutland, 1371, 1502
 v. Batclay, 866
 v. Bowers, 671, 1363, 1364, 1366
 v. Blieler, 985, 1022, 1023
 v. Bradley, 320, 321, 322
 v. Cole, 2353
 v. Doby, 300, 1605, 1609, 1694
 v. Durham, 2225
 v. Gorden, 1324
 v. Hill, 1924, 1967, 1976
 v. Hubbard, 2271
 v. Lafferty, 2091
 v. Lazear, 792, 793
 v. Lopes, 1974
 v. Mayfield, 1213
 v. McClure, 1239
 v. Mariner, 1518
 v. Merrill, 1072, 1115, 1156
 v. Moores, 1735
 v. Muller, 1922, 2036, 2151
 v. Nelson, 2046
 v. Noyes, 729, 730, 1092, 1093
 v. Pierce, 1698
 v. Pillsbury, 2157
 v. Porter, 624, 633, 651, 661, 662, 670, 1366
 v. Robinson, 715, 781, 836, 2349
 v. Rockford, 2335
 v. Sweeney, 2252, 2257, 2259
 v. Vaughn, 1281
 v. Williams, 1795
 Portington's Case, 373, 900, 1851
 Portis *v.* Hill, 1710, 1723
 Portland *v.* Topham, 1830
 Portlock *v.* Gardener, 1784
 Posey *v.* Bass, 1454
 v. Budd, 401, 447
 v. Cook, 1560, 1606
 Post *v.* Dart, 2071, 2112
 v. Dorr, 2066
 v. Kearney, 1075, 1112
 v. Kimberley, 1240

- Post *v.* Logan, 2268
 v. Moran, 1141
 v. Parshall, 2240
 v. Pearsall, 2211, 2212, 2214, 2217
 v. Phelan, 1287
 v. Post, 973, 1256, 1257, 1260, 1271, 1274,
 1280, 1281, 1337
 v. Velter, 1054, 1068, 1106, 1107, 1201
 Poston *v.* Eubanks, 2155
 v. Gillespie, 658, 659, 795
 v. Jones, 1081
 Potier *v.* Barclay, 751
 Potomac Coal Co. *v.* Cumberland, etc., R. Co.,
 1180
 Pott's Appeal, 396, 402, 419
 Pott *v.* Eytton, 1242
 v. Todhurst, 2349
 Pottenger *v.* Stewart, 415
 Potter *v.* Brown, 753, 755
 v. Chapin, 166
 v. Cromwell, 103, 111, 112, 113, 114, 116,
 117, 133, 135, 137, 1186
 v. Everett, 839
 v. Gardner, 1749, 1764
 v. Knowles, 1288
 v. McAlpine, 269
 v. Mercer, 992, 993, 1314
 v. Seymour, 1104, 1195
 v. Stevens, 2105, 2107
 v. Titcomb, 368, 750, 2058, 2289
 v. Wakefield, 646
 v. Wheeler, 785, 857, 886, 887, 1973, 1975,
 1989
 v. Worley, 955
 Potts *v.* Cloeman, 2297
 v. Davenport, 976, 1423, 1424, 1434, 1445,
 1461
 v. New Jersey Arms Co., 113
 v. Plaisted, 2131
 v. Smith, 2208
 Pouce *v.* McEloy, 1637
 Pouder *v.* Catterson, 1213
 Poullan *v.* Kinsinger, 2335
 Poulteney *v.* Shelton, 1185
 Poulter *v.* Killengback, 50
 Poultney *v.* Barrett, 1138
 v. Holmes, 1118, 2252
 Pournell *v.* Harris, 411, 447, 468
 Powcey *v.* Bowen, 1838
 Power *v.* Cassidy, 1637, 1684
 v. Haffley, 2282
 v. Jendevine, 1824
 v. Nesbit
 v. Power, 1985
 Powers *v.* Andrews, 2169, 2171
 v. Bergen, 2328, 2329, 1798
 v. Dennison, 144, 1268
 v. Golden Lumber Co., 2169
 v. Jackson, 779, 787
 v. Kueckhoff, 1755, 1778, 1779
 v. Lester, 200, 2016, 2101
 v. Ocean Ins. Co., 2114, 2115
 v. Wheler, 779
 Powell *v.* Boggs, 2291
 v. Conant, 2033, 2035
 v. De Hart, 1286
 v. Dillon, 998, 1043
 v. Gossom, 607, 608, 609, 610
 v. Glenn, 1796
 v. Glover, 76, 1621
 v. Hadden's Exrs., 1281
 v. Jewett, 1666
 v. Knox, 1730, 1885
 v. Monson & B. Mfg. Co., 105, 106, 591,
 729, 730, 740, 761, 788, 789, 791, 823,
 827, 841, 842, 844, 866, 900, 909, 1092,
 1093
 v. McAsham, 145
 v. Murray, 1562, 1781
 v. Powell, 660, 733, 736, 1110, 1887
 v. Rollins, 570
 v. Sims, 2223, 2224, 2241
 Powell *v.* Smith, 1007, 2141
 v. Tuttle, 2159
 v. Weeks, 773
 v. Williams, 1997
 Powis *v.* Smith, 1901
 Pownal *v.* Myers, 1707, 1713
 v. Taylor, 1665, 1690, 1723
 Powseley *v.* Blackman, 1279
 Powys *v.* Blagrove, 570, 573
 Prall *v.* Smith, 669, 1366
 Prather *v.* Hooper, 692
 Prather *v.* Foote, 974, 1039
 v. Hill, 1758
 v. McDowell, 901, 911, 1777
 Pratt, *Re*, 1463
 Pratt *v.* Ayer, 1592
 v. Bank of Bennington, 520, 2097, 2107
 v. Brown, 2328
 v. Clark, 2005, 2009
 v. Coffman, 46
 v. Colt, 1747
 v. Douglass, 918, 944
 v. Farrar, 1137, 1293, 1294, 1296, 1351,
 1355
 v. Felton, 933, 947
 v. Flamer, 408, 415, 424
 v. Frear, 2174
 v. Levan, 1114, 1115
 v. New York Central Ins. Co., 1058,
 1059
 v. Pratt, 2080
 v. Sanger, 449
 v. Schofield, 2100
 v. Smith, 588
 v. Theft, 750
 v. Thornton, 1714, 1726, 1767, 1768, 1776,
 1781
 v. Van Wyck, 1997, 2009
 Pratt, Doe d., *v.* Timins, 1595, 1596
 Pray's Appeal, 1721
 Pray *v.* Clark, 1053, 1087
 v. Pierce, 2316, 2317
 v. Stebbins, 1024, 1033, 1935, 1942, 1944,
 1952
 Preacher's Aid Society *v.* England, 298, 1564,
 1796
 Preble *v.* Hay, 1310
 Preece *v.* Corrie, 2252
 Preece *v.* Sellick, 2241
 Prendergast, 1740
 Prentice *v.* Achorn, 1033
 v. Brimhall, 2166
 v. Geiger, 2225
 v. Jaassen, 1987
 Presbaker *v.* Freeman, 2038, 2039
 Presbyterian Church *v.* Andruss, 29, 31, 32, 33,
 36
 v. Johnston, 1744
 Prescott *v.* De Forrest, 1122
 v. Ellingwood, 2102
 v. Elm, 1274, 1335, 1338, 1340, 1341, 1343
 v. Hull, 2107
 v. Nevers, 210, 1899, 1914, 1915, 2296
 v. Otterstatter, 1084, 1085
 v. Prescott, 411, 1386, 1442, 1443
 v. Trueman, 729, 1092, 1093, 1094, 1095
 v. Walker, 760, 788
 v. White, 2228, 2229
 v. Williams, 2228, 2229
 Presley *v.* Davis, 323, 1782
 Presly *v.* Scribbling, 1703, 1741
 Prestman *v.* Silljacks, 974, 1219, 1220
 Preston *v.* Briggs, 135, 145, 146, 1204
 v. Fyer, 647
 v. Hawley, 2270
 v. McCall, 2254
 v. Ryan, 49
 v. Wilcox, 1662
 Pretts *v.* Ritchie, 711
 Pretty *v.* Bickmore, 1198, 1199, 1201
 Prettyman *v.* Unland, 2272
 v. Walston, 504, 505, 1101

- Prevost, Succession of, 595
Prevost *v.* Clark, 1629
 v. Gratz, 1623, 1695, 1782
 v. Prevost, 596
Prevot *v.* Lawrence, 987, 1035, 1221
Prewett *v.* Buckingham, 1781
 v. Wilson, 959
Prey *v.* Johnson, 2362
Priar *v.* Entwistle, 1323, 2271
Price, *In re*, 1399, 1629
Price *v.* Alexander, 1240, 1242, 1244
 v. Assheton, 1088
 v. Binham, 647
 v. Brayton, 119
 v. Byrn, 1776
 v. Chase, 591
 v. Cutts, 2038
 v. Dyer, 65, 1007, 1008
 v. Gover, 2045, 2047
 v. Griffith, 999
 v. Haynes, 2354
 v. Hicks, 824
 v. Hobbs, 711, 712, 713, 725, 748, 759,
 822, 840, 841, 842, 843, 844
 v. Hunt, 1257
 v. Johnston, 713
 v. Karnes, 2052
 v. Masterson, 2061
 v. Methodist Episcopal Church, 32
 v. Minot, 1665, 1689, 1690
 v. Mott, 671
 v. Mulford, 1783
 v. Nicholas, 998
 v. Perree, 1996, 2051
 v. Price, 42, 44, 769, 770, 816, 817, 857,
 1293, 1295
 v. Pickett, 498, 538, 1207
 v. Reeves, 1655, 1690
 v. Sisson, 1543, 1559, 1575, 1655, 1692, 1704,
 1736
 v. Weehawken Ferry Co., 61
 v. Woodford, 938
Price, Doe d., *v.* Price, 1267, 1293, 1326
Prichard, 225
Prickett *v.* Ritter, 1131, 1135, 1136, 1316, 1339
Pride *v.* Bubb, 2012
 v. Earl of Bath, 883
Pridgeon *v.* Excelsior Boat Club, 1166, 1167
Priest *v.* Cone, 2013
 v. Cummings, 712, 750, 775, 905, 908, 1657
Priestly *v.* Johnson, 123
Primm *v.* Barton, 1486
 v. Syewart, 523
 v. Walker, 1911, 1924
Prince's Case, 182/
Prince *v.* Case, 144, 617
 v. Hake, 1506
Princeton *v.* Adams, 1850
Principal Harrow School *v.* Alderton, 565,
 2212, 2213
Prindle *v.* Anderson, 1302, 1326, 1328, 1339,
 1344
Pringe *v.* Childs, 2291
Pringle *v.* Dunkly, 271
 v. Dunn, 1778, 2121, 2123, 2359, 2366
 v. Pringle, 2100
 v. Witten, 730
Prior *v.* Foster, 1045
Prior, Doe d., *v.* Ongley, 1266
Prison Charities, *In re*, 1685
Pritchard *v.* Elton, 1996, 2168, 2321
Pritts *v.* Ritchey, 759, 782, 804, 828
Probasco *v.* Johnson, 2003, 2004
Probert *v.* Morgan, 994, 1837
Procter *v.* Bigelow, 717, 871
 v. Cowper, 2176
 v. Ferebee, 75
 v. Gilson, 81
 v. Keith, 1059
 v. Newhall, 686
 v. Procter, 1666
 v. Tows, 1140
Proctor *v.* Hodgson, 2220, 2242
 v. Robinson, 2102
Producers *v.* Laughran, 1626
Proffit *v.* Anderson, 566
 v. Henderson, 549
Proprietors of Battle Sq. Church *v.* Grant, 302,
 322, 323, 327, 1049, 1851
Proprietors of Kennebeck Purchase *v.* Springer,
 2098, 2291, 2292
Proprietors of Meeting-House *v.* City of
 Lowell, 64, 507
Proprietors of No. Six *v.* McFarland, 1258, 1290
Proprietors of South Congregational Meeting-
 House *v.* Lowell, 1015
Proprietors of Union Meeting-House *v.* Rowell,
 36
Proseus *v.* McIntyre, 1636, 1640
Protchard *v.* Brown, 1579, 1697, 1699, 1700
Proud *v.* Bates, 90, 93
Prout *v.* Hoge, 2106
 v. Roby, 1059, 1060, 1061, 1154
 v. Wiley, 1031
Prouty *v.* Prouty, 1274, 1338
Prov. C. U. *v.* Cliott, 1043
Providence County Bank *v.* Benson, 2118
Providence Gas Co. *v.* Thurber, 112, 1186
Providence Savings Bank *v.* Hall, 1227
Providence Tool Co. *v.* Corliss Steam Engine
 Co., 2242
Provo *v.* Calder, 982, 983, 985
Provoost *v.* Clayer, 536
Provost *v.* Calder, 2263
Prug *v.* Davis, 2282
Pryal *v.* Entwistle, 996
Pryon *v.* Mood, 299, 1553
Pryor *v.* Bowryman, 2073
 v. Stone, 1386, 1387, 1419, 1420, 1431, 1434,
 1436, 1439, 1442, 1443, 1459
 v. Wood, 586
Pue *v.* Pue, 2247
Puddicombe Doe d., *v.* Harris, 1308
Puffer *v.* Clark, 2142
Pugh *v.* Arton, 129, 130, 143, 146
 v. Bell, 782, 827
 v. Currie, 787, 1960
 v. Good, 1977
 v. Holt, 2040, 2148
 v. Leed, 1006, 1040
 v. Pugh, 1622
Pugsley *v.* Aikin, 975, 1134, 1136, 1224, 1254,
 1255, 1300, 1334, 1342
Pulbam *v.* Byrd, 536
Pullan *v.* Cincinnati & C. Air-Line R., 2066
Pulch *v.* Bell, 63
Pullen *v.* Middleton, 436
 v. Ready, 1157
 v. Rianhard, 1560, 1674, 1675
Pulliam *v.* Byrd, 317, 319, 1820
 v. Sewell, 1510
Pulman *v.* Cincinnati, & C. Air-Line R. Co.,
 2018, 2019
Pulteney *v.* Craven, 1040
 v. Shelton, 79
Pulpress *v.* African Church, 1740
Pulse *v.* Hamar, 996, 1036
Pulvertoft *v.* Pulvertoft, 1791
Pumpelly *v.* Phelps, 1247
Purcell, Matter of, 2016
 v. English, 1191, 1197
 v. Goshorn, 2331
 v. Smidt, 215, 216
 v. Wilson, 310, 1897, 1915
Purdie *v.* Whitney, 288, 1754, 2159
Purdy *v.* Bullard, 2002
 v. Huntington, 520, 810
 v. Huntington, 2096, 2098, 2104, 2110,
 2121
 v. Purdy, 782, 1613, 1651, 1881, 1968
Purefoy *v.* Rodgers, 816
 v. Rogers, 322, 324, 886, 1940
Purinton *v.* Northern Illinois R. Co., 135
Purl *v.* Duvall, 782

Purner *v.* Piercy, 50, 51, 52, 54, 55
 Purrrington *v.* Pierce, 842, 2042
 Pursley *v.* Forth, 2155
 Purvis *v.* Wilson, 1914, 1983
 Pusey *v.* Pusey, 60
 Pushman *v.* Filitter, 347, 1629, 1632, 1684
 v. Tilliter, 1627
 Putnam *v.* Kitchie, 1726
 v. Mercantile Insurance Company, 1668
 v. Westcott, 975, 1225
 v. Wise, 1001, 1229, 1232, 1233, 1234, 1235,
 1236, 1238, 1239
 Putnam *v.* Bicknell, 647
 v. Callamore, 305, 806, 808
 v. Emerson, 305, 308, 311, 335
 v. Farnham, 2071
 v. Gleason, 234
 v. Johnson, 1456
 v. New Albany & S. C. J. R. R. Co.,
 1581
 v. Putnam, 753, 1884, 2151, 2184
 v. Retchie, 1022, 1023, 1908, 1912, 2185
 Putnam's Free School *v.* Fischer, 1730, 1788,
 1806
 Putney *v.* Day, 53, 54, 55, 537
 v. Dresser, 1877
 Pybus *v.* Smith, 251, 257, 647
 Pye, *Ex parte*, 1587, 1739
 Pyer *v.* Carter, 2207
 Pyle *v.* Pennock, 105, 111, 113, 114, 138, 144,
 2022
 Pym *v.* Bowrman, 2170
 v. Lockyer, 260, 272
 Pynchon *v.* Lester, 785, 802, 803
 v. Stearns, 521, 544, 550, 555, 557, 565, 575,
 1164

Q.

Quackenboss *v.* Clarke, 1114, 1119
 Quackenbush *v.* Danks, 1510, 1511
 Quaker Society *v.* Dickenson, 225
 Quarles *v.* Garrett, 947
 v. Quarles, 2357
 Quarrington *v.* Arthur, 811
 Queen *v.* Brighton, 753
 v. Chorley, 2243, 2245, 2247
 v. Inhabitants of Greenboro, 2203
 v. Inhabitants of Parish of Lee, 105
 v. Millis, 595
 v. Northumberland, 85
 Queen Anne's Co. *v.* Pratt, 814
 Queen's College *v.* Hallett, 553
 Quehl *v.* Peterson, 1453
 Quick *v.* Whitewater Township, 2325
 Quimby *v.* Conlan, 2300
 v. Dill, 516
 v. Higgins, 2279, 2283
 v. Manhattan Cloth Co., 113, 117, 132
 Quinn *v.* Brittain, 2087, 2088
 v. Coleman, 713
 Quincy *v.* Cheeseman, 2067
 Quincy, The Inhabitants of, *v.* Spear, 1290
 Quint *v.* Little, 2095
 Quinnette *v.* Carpenter, 1131, 1315, 1316
 Quinn *v.* Perham, 1045
 v. Shields, 1689
 Quiver *v.* Baker, 2301

R.

Rabb *v.* Griffin, 603, 679, 686, 689
 Rabe *v.* Tyler, 1885
 v. Taylor, 1902
 Rabun *v.* Rabun, 1665, 1690
 Raby *v.* Ridehalgh, 1721
 Race *v.* Oldridge, 1399, 1402
 Rachael *v.* Pearsall, 1010, 2259
 Racine & M. R. R. Co. *v.* Farmers' L. & T.
 Co., 1727

Racouillat *v.* Rene, 2037
 v. Sansevalin, 215, 2126
 Radcliffe *v.* Mayor of Brooklyn, 2230, 2232
 Radcliffe *v.* Wood, 1399
 Radford *v.* Carwile, 251, 257, 896
 v. Willis, 1867
 Radley *v.* Kuhn, 1798
 Radway, *Re*, 1504
 Rae *v.* Harvey, 202
 Rafferty *v.* Mallory, 1778
 v. New Brunswick Ins. Co., 2115
 Ragland *v.* Justice, 1995
 v. Rogers, 1390, 1419
 Ragsdale *v.* Lander, 996
 v. Ragsdale, 1589
 Raguet *v.* Roli, 2060
 Rahway Savings Institute *v.* Irving Street
 Baptist Church, 110
 Rail *v.* Dotson, 338, 536
 Railroad Co. *v.* Boyer, 492
 v. Schurmeier, 69
 v. Sly, 1019
 Raines *v.* Corbin, 935, 941, 956
 v. Kneller, 1138, 1150
 v. Walker, 2301
 Rakestraw *v.* Brewer, 2094
 Raleigh & Garton R. Co. *v.* Davis, 2325
 Ralls *v.* Highs, 931
 Ralph *v.* Lomer, 1214
 Raisback *v.* Walk, 996, 1322
 Ralston *v.* Fields, 2305
 v. Ralston, 723, 724, 789, 821, 840, 844,
 846, 863
 v. Waln, 318, 328, 1674
 Ramires *v.* Kent, 215, 122
 Ramirez *v.* McCormack, 2207
 Rammelsburg *v.* Mitchell, 1740
 Ramsbottom *v.* Wallis, 2172
 Ramsdell *v.* Emery, 1646
 v. Fuller, 1947, 1948
 v. Maxwell, 1259
 v. Ramsdell, 318, 536, 1815
 Ramsden *v.* Dyson, 1087
 v. MacDonald, 625
 v. Thorton, 1278
 Ramsey *v.* Joyce, 795
 v. March, 298, 1558, 1565, 1607, 1655
 v. Merriam, 2164
 v. Smith, 2330
 Ranba *v.* Bill, 835
 Rancel *v.* Croswell, 415
 Randall *v.* Aburtis, 1166
 v. Bradley, 2174, 2175
 v. Cleveland, 553
 v. Duff, 2073, 2170
 v. Dusenbury, 1587
 v. Elwell, 98
 v. Ghent, 2331, 2359
 v. Hazleton, 2160
 v. Krieger, 714
 v. Lower, 2301
 v. Mallett, 1911
 v. Phillips, 1618, 1885, 1968
 v. Sanderson, 2223
 v. Shrader, 1815
 v. Thompson, 997
 v. Tuchin, 305, 308, 310, 312
 v. Chesapeake Canal Co., 2362
 Randel *v.* Elder, 1387, 1415, 1419, 1439, 1440
 Randolph *v.* Carlton, 1212, 2250, 2251
 v. Doss, 764, 765
 v. Gwnne, 105
 Rands *v.* Kendall, 782, 826, 828, 1998, 2078
 Rangeley *v.* Midland R. Co., 2203, 2211
 Ranger *v.* Great Western R. Co., 1872
 Ranke *v.* Hanna, 892, 912
 Rankert *v.* Clow, 2009
 Rankin's Appeal, 614
 Rankin *v.* Demott, 2254
 v. Harper, 1647, 1658
 v. Kinsey, 2067
 v. Loder, 1794

- Rankin *v.* Mayor, 2100, 2104, 2105, 2106, 2148
v. Mortimere, 2050, 2168
v. Rankin, 94, 656, 657, 1754, 1755
v. Shaw, 1481
v. Warner, 2359
 Ranlett *v.* Cook, 1320
 Rannels *v.* Gerner, 903
 Ranney *v.* McCullen, 2166, 2167
 Ransley *v.* Stott, 252, 369, 454, 461
 Ransom, Matter of, 767, 768
 Ransom, *Re*, 786, 787
 Ransom *v.* Babcock, 1290
v. Nichols, 670
v. Ransom, 587, 781
v. Sutherland, 2167
 Ransone *v.* Prayer, 2055
 Rantin *v.* Robertson, 1079
 Ranyer *v.* Lee, 731
 Rapelye *v.* Prince, 2089
 Rapheal *v.* Boehm, 1725
 Rapier *v.* Gulf City Paper Co., 2169
 Rapp *v.* Stoner, 2068
 Rappanier *v.* Bannon, 2136, 2138
 Rardin *v.* Walpole, 2136, 2138, 2160
 Rashleigh *v.* Master, 307
 Rasor *v.* Qualls, 1205, 1210
 Rasure *v.* Hart, 1399, 1402
 Ratcliffe *v.* Graves, 1715
 Rathbone *v.* Clark, 2154
v. Dyckman, 965
v. Tioga Nav. Co., 224
 Raliff *v.* Ellis, 1589, 1610, 1697, 1701
 Rattle *v.* Popham, 1039
 Raubdscheck *v.* Senken, 2257
 Rauch *v.* Dech, 2018
 Raugh *v.* Ritchie, 2274
 Rausch *v.* Moore, 711, 734, 741, 838
 Ravencroft *v.* Ravencroft, 661
 Raverty *v.* Fridge, 904
 Rawdon *v.* Rawdon, 660, 755
 Rawinson *v.* Clarke, 1241
 Rawley *v.* Holland, 1538
 Rawlings *v.* Adams, 679, 680
v. Landes, 76
v. Ruttell, 842
 Rawlins *v.* Buttel, 894
v. Goldfrap, 322
v. Lowndes, 765, 804, 829
v. Rawlins, 618
 Rawlinson *v.* Miller, 1974
 Rawls *v.* Deshler, 1746
 Rawlings *v.* Hunt, 2020
 Rawson *v.* Inhabitants, 1856
v. Inhabitants of School District No. 5,
 in Uxbridge, 1850
v. Putman, 2092
 Rawstron *v.* Taylor, 2230
 Ray, *Ex parte*, 1371
 Ray *v.* Adams, 1629
v. Lynes, 2223
v. Oliver, 2158
v. Pung, 780, 885, 1576
v. Simmons, 1586, 1587, 1592
v. Sweeney, 21, 78, 2223
 Raybold *v.* Raybold, 1592, 1691
 Raybourn *v.* Ramsdell, 1138, 1150, 2254
 Rayland *v.* Rogers, 1388
 Raymond *v.* Holden, 591
v. Kerker, 2250
v. Thomas, 2255
v. White, 104, 108
 Rayner *v.* Stone, 1083
v. Lee, 717, 731
 Raynham *v.* Wilmarth, 864
 Raynor *v.* Haggard, 1290
v. Selnus, 2146, 2151
v. Raynor, 841
Re Adams, 1824
Re Albany Street, 2328
Re Rogers, 2327
Re Sands Ale Brewing Co., 2119
Rea v. Copelin, 1620
 Read *v.* Allen, 1170
v. Erington, 1141
v. Flogg, 2301
v. Frankfort Bank, 1511
v. Gaillard, 2040
v. Goodyear, 2295
v. Lawns, 2250
v. Payne, 307
v. Robinson, 1016, 1786
v. Stedman, 1637
v. Truelove, 1660
 Read, Doe d., *v.* Ridout, 1335
 Reade *v.* Livingston, 1626
v. Ward, 117
 Reading's Case, 1917
 Reading *v.* Weston, 2054
 Reading R. Co. *v.* Boyer, 493
 Readman *v.* Conway, 1202
 Ready *v.* Hamm, 800
v. Kearsley, 297, 1592
 Real Estate Trust Co. *v.* Balch, 2330
 Ream *v.* Harnish, 1207, 1230
 Rear *v.* Rear, 772
v. Winkler, 730
 Rearich *v.* Swinehart, 1698, 1702
 Reasoner *v.* Edmundson, 1999
 Reaume *v.* Chambers, 281, 288, 531, 586, 603,
 605, 612, 668, 706
 Reavis *v.* Fielden, 2106
Re Breck, 2260
 Recht *v.* Kelly, 1506
 Reck's Estate, 1420, 1433
 Recknow *v.* Schank, 1348, 1353
Re Commercial Bulletin Co., 2266
Re Commissioners Central Park, 2324
 Rector *v.* Burkhard, 1198
v. Burkhardt, 1197
v. Gibbon, 1446
v. Rotten, 1450, 1467
v. Waugh, 284, 1877, 1924, 1967
 Rector, etc., of Trinity Church *v.* Higgins, 1101
v. Vanderbilt, 1105
Re Curry *v.* Burrus, 2324
Re D'Angibau, 1827
 Redd *v.* Burrus, 2020
 Reddall *v.* Bryan, 2327
 Redden *v.* Barker, 1290
 Reddick *v.* Grossman, 1998, 2078
v. Walsh, 731, 767
 Redding *v.* White, 1029
 Rede *v.* Farr, 1058, 1138
 Redfern *v.* Middleton, 515, 1142, 2321
v. Redfern, 1403, 1405, 1407, 1408, 1450,
 1479
 Redfield *v.* Utica & S. R. Co., 970
 Redford *v.* Gibson, 2008
 Redgrave *v.* Redgrave, 757
 Redlon *v.* Barker, 103, 105, 108
 Redman *v.* Sanders, 1997, 1998, 2077, 2077
 Redpath *v.* Rich, 217
v. Roberts, 1295, 1343
 Red River Roller Mills *v.* Wright, 101, 2224,
 2225
 Redshaw *v.* Governor, 1009
 Redstrake *v.* Townsend, 402, 447, 470
 Redus *v.* Hayden, 603, 688, 692, 703
 Redwood *v.* Riddick, 1782
 Reece *v.* Allen, 1707, 1713
 Reech *v.* Kenegal, 1616
 Reed *v.* Allerton, 1660
v. Ash, 718, 733, 735, 739
v. Austin, 1702
v. Bartlett, 2258
v. Batchelder, 2343
v. Campbell, 1087
v. Crocker, 2278
v. Dickerman, 918, 932, 944, 946, 947, 951
v. Fidelity Insurance Trust and Safe
 Deposit Co., 1988
v. Gorden, 1558
v. Johnson, 52
v. Jones, 1893, 1896

Reed *v.* Kennedy, 763, 824
v. Latson, 1580, 2061
v. Lewis, 1104, 1184, 1185
v. Lukins, 1665, 1690
v. Marble, 2110, 2149, 2151
v. Morrison, 765, 766, 783, 830, 923
v. Reed, 561, 681, 692, 700, 703, 812, 1266,
 1293, 1294, 1296, 1350, 1355, 2040, 2087,
 2090, 2185
v. Reynolds, 1128, 1174
v. Shepley, 1160
v. Stevenson, 764, 766
v. Underhill, 1826
v. Union Bank of Winchester, 1506
v. Ward, 2268
v. Washington Fire Ins. Co., 1051
v. West, 1923, 2244
v. Whitney, 782, 831
Reed, Executors of, *v.* Reed, 494
Reeder *v.* Barr, 2359
v. Dargan,
v. Purdy, 1357
v. Sayre, 52, 205, 1208, 1210, 1264, 1300,
 1302, 1322, 1323, 1326, 1335
v. Shearman, 533
Reel *v.* Elder, 773
Reelman *v.* Sanders, 2073
Rees *v.* Chicago, 2206
v. Livingston, 1665, 1690
v. Waters, 664
Reese *v.* Waters, 659, 673, 750
Reeve *v.* Attorney-General, 1605, 1659
v. Bird, 1173
Reeves *v.* Baker, 1627
v. Dougherty, 1615
v. Hayes, 2036, 2106, 2109
v. Petty, 1404, 1405
v. Treasurer of Word Co., 2328
Reformed Dutch Church, Matter of, 36, 38, 40
Reformed Dutch Church *v.* Veeder, 1556, 1557
Reformed Pres. Church, 225
Re Fowler, 2327
Reformed Prot. Dutch Church *v.* Mott, 1557
Reg. *v.* Brown, 755
v. Howes, 1464
v. London, etc., 479
v. Spurrell, 1288
v. The Inhabitants of Chawton, 1314
v. Westbrook, 2254
Regan *v.* Baldwin, 1180
v. Zeeb, 1408
Regina *v.* Chawton, 1334
v. Copp, 2235
Register *v.* Rowell, 287
Re Hamburger, 2260
Re Harvey's Estate, 1836
Re Heller, 1892
Re Highway, 2325
Rehoboth *v.* Hunt, 1908
Re Hutchinson, 1824
Rehm *v.* Chadwick, 91
Reichert *v.* McGlure, 2126
Reichhoff *v.* Brecht, 1620, 1622
Reid *v.* Atkinson, 1627, 1684
v. Blackstone, 1629
v. Campbell, 917, 933
v. Fitch, 1588
v. Gordon, 208
v. Hollinhead, 1242
v. Kirk, 61
v. Lamar, 1375, 1562
v. Mullins, 2164
v. Parsons, 1058, 1138
v. Shergold, 319, 1836
Reidy *v.* Small, 1789, 1790
Reiff *v.* Horst, 670, 713, 725, 726, 731, 741, 910
v. Reiff, 537
Reifsnnyder *v.* Hunter, 348
Reigard *v.* McNeil, 2045
Reinhard *v.* Lantz, 402, 449, 450, 472
Reilly *v.* Mayer, 2164
v. Smith, 1486

Reily *v.* Miami Ex. Co., 924
v. Ringland, 1267
Reimer *v.* American Contract Co., 1861
Reinbach *v.* Walter, 1419, 1499
Reinders *v.* Koppelman, 1815, 2282
Reineman *v.* Robb, 2109
Reinicker *v.* Smith, 1024
Reinhard *v.* Bank of Kentucky, 1794
Reinhardt *v.* Bradshaw, 2309
Reinhart *v.* Collins, 2254
Reinskopf *v.* Rogge, 1033
Reise *v.* Enos, 2217, 2218, 2219
Reitenbaugh *v.* Ludwick, 2039, 2085, 2087,
 2088, 2184
Reithman *v.* Brandenburg, 1133, 1316, 1331
Reitz *v.* Reitz, 1620, 1644, 1652
Reitzell *v.* Eckard, 762, 819
Relyea *v.* Beaver, 20, 58, 570
Remick *v.* Butterfield, 1766
Remington *v.* Cardale, 1138
v. Millard, 2206
Remicker *v.* Smith, 1033
Re Middleton, 2327
Remsen *v.* Hay, 2168
Remson *v.* Conklin, 1060
Ren *v.* Buckelet, 1843
v. Bulkely, 1807, 1845
Renard *v.* Brown, 2073, 2137, 2172
Renaud *v.* Daskam, 1052
v. Tourangeau, 499
Rendle, Doe d., 1040
Rendleman *v.* Rendleman, 919
Reney *v.* Bell, 2151
Renfe *v.* Harrison, 1016
Renfoe's Heirs *v.* Taylor, 746
Reniger *v.* Fagossa, 454
Renolds *v.* Baker, 2175
Renond *v.* Daskam, 1075, 1091
Renwick *v.* Renwick, 635, 636, 661, 662
Renzichausen *v.* Keyser, 1553, 1597
Renzie *v.* Penrose, 2349
Report of the Judges, 1548
Repp *v.* Repp, 2006
Repplier *v.* Buck, 1737
Requa *v.* City of Rochester, 2206
Reske *v.* Reske, 1385, 1500
Resor *v.* Resor, 962
Respublica *v.* Campbell, 1263
Reuff *v.* Coleman, 270
Reuss *v.* Picksley, 1000
Reusselaer & S. R. Co., *In re*, 2237
Revalk *v.* Kraemer, 1398, 1400, 1404, 1405, 1408,
 1418, 1434, 1450, 1451, 1473, 1475, 1478,
 1480, 1490, 1491, 1493, 1523
Revel *v.* Watkinson, 509
Reves *v.* Herne, 270
Revett *v.* Harvey, 1735
Rex *v.* Bardwell, 1288
v. Cheshum, 1273
v. Cheshunt, 1288, 1309
v. Collett, 1261, 1267, 1275, 1280
v. Edwards, 498
v. Fillongley, 1275, 1278
v. Greenhill, 1464
v. Inhabitants of Fillongley, 1256
v. Inhabitants of Herstmonceaux, 1339
v. Inhabitants of Northamptonshire,
 2206
v. Jobling, 1275
v. Keletern, 1288
v. Kelstern, 1309
v. Longnor, 2352
v. Minister, 1288
v. Pappineau, 57
v. Pedley, 1199
v. Pension, 755
v. Rees, 1288
v. Shipdham, 1288
v. Snape, 1288
v. Stock, 1288
v. Tynemouth, 1288
v. Wilson, 1788

Reybold *v.* Dodd Admsr., 1889
 Reyburn *v.* Mitchell, 2136, 2137
 Reynald, *Ex parte*, 126
 Reynald, *Ex parte*, 120
 Reynard *v.* Spence, 785
 Reynolds *v.* Baker, 2176
 v. Collins, 525
 v. Commrs. of Stark Co., 2342
 v. Commrs. State Co., 823
 v. Green, 2175
 v. Lathrop, 2250, 2257
 v. Lee, 487
 v. McCurry, 731, 733
 v. Monkton, 29, 30
 v. Orvis, 233
 v. Pitt, 1157, 1872
 v. Pixley, 1426
 v. Pool, 1245
 v. Reynolds, 760, 762, 771, 774, 815, 820,
 894, 921
 v. Robinson, 1648
 v. Shuler, 115, 145, 146, 1224
 v. Stark Co., 224, 974
 v. Sumner, 1641, 1651
 v. Vance, 728, 795, 913
 v. Waller, 1033
 v. Welch, 1624
 v. Williams, 988
 v. Wilmeth, 1894
 v. Wilson, 2154, 2159
 Rhea *v.* Puryear, 1643
 v. Tucker, 1634, 1699
 Rhet *v.* Mason, 1633
 Rhien *v.* Robbins, 216
 Rhine *v.* Ellen, 1700
 Rhinehart *v.* Stevenson, 2156
 Rhines *v.* Baird, 2046
 Rhoades *v.* Canfield, 1124
 v. Davis, 960
 v. Parker, 2032, 2033, 2064
 v. Rhoades, 1984
 Rhodes *v.* Dutcher, 2162
 v. Evans, 2150
 v. McCormick, 64, 1386, 1416, 1420, 1431,
 1435, 1437, 1442
 v. Williams, 1432
 Rhone *v.* Gale, 1152
 Rhyne *v.* Guevara, 1219
 Ricard *v.* Sanderson, 2166
 v. Williams, 210, 2242, 2290, 2292
 Rice *v.* Adams, 138
 v. Austin, 1240, 1241
 v. Barnard, 1961, 1965
 v. Bird, 2055
 v. Bixler, 2349
 v. Boston & W. R. Co., 234
 v. Burnett, 299, 1553, 1673, 1710, 1712
 v. Cribb, 2107
 v. Cunningham, 1623
 v. Dewey, 2017, 2302
 v. Hoffman, 588, 624, 632, 643, 670, 672,
 1361, 1363, 1364
 v. Lumley, 771, 773, 919, 920, 1359
 v. Minnesota & N.W. R., Co., 2304, 2305,
 2313
 v. Nelson, 930
 v. Osgood, 234
 v. Parkman, 2329
 v. Peet, 1032, 1033
 v. Pelt, 2345
 v. Rice, 2031, 2040, 2041, 2049, 2053, 2123
 v. Rockefeller, 1677
 v. Sandors, 2070
 v. State, 595
 Rich *v.* Basterfield, 1194, 1199
 v. Bolton, 1135, 1255, 1258, 1260, 1261,
 1269, 1270, 1271, 1275, 1281, 1293,
 1294, 1296, 1301, 1302, 1320, 1322,
 1325, 2254
 v. Cockell, 1562
 v. Doane, 2044, 2052, 2053, 2084
 v. Flanders, 671

Rich *v.* Hotchkiss, 1850
 v. Keyser, 1310, 1338, 1350
 v. Rich, 737
 Richard *v.* Ayers, 520
 v. Bent, 1094
 v. Brehm, 595, 596, 752
 v. Liford, 539
 v. Richard, 795
 v. Robson, 1687
 v. Talbird, 928
 Richards, *In re*, 125, 127
 Richards *v.* Bester, 1051
 v. Chace, 1450, 1473, 1475, 1478
 v. Chambers, 1836
 v. Delbridge, 1588, 1638
 v. Folsom, 207
 v. Greene, 1402, 1451, 1475
 v. Griffith, 2138
 v. Holmes, 2163, 2164
 v. Learning, 2007
 v. Manson, 1957, 1963
 v. Mayor of New York, 5
 v. N. W. Protestant Dutch Church, 41
 v. Randolph, 2365
 v. Richards, 728
 v. Rose, 2234, 2298
 v. Sely, 1162
 v. Taverner, 1176
 v. Torbet, 573, 576
 v. Wardell, 1231
 v. Whittle, 2263
 v. Wordell, 1207
 Richardson *v.* Baker, 2009
 v. Blakemore, 2272
 v. Borden, 104, 135, 136
 v. Boright, 1031, 2011
 v. Bowman, 976
 v. Buswell, 1515
 v. Cambridge, 2127, 2128, 2131
 v. Clements, 2240
 v. Copeland, 96, 97, 133, 135, 138, 142,
 143
 v. Field, 2071
 v. Harvey, 1217
 v. Hildreth, 2085
 v. Hockenhull, 810
 v. Inglesby, 1592
 v. Jones, 1019, 1766, 1774, 1775
 v. Langridge, 1135, 1136, 1252, 1255, 1261,
 1262, 1265, 1268, 1281, 1302, 1320, 1321,
 1325
 v. Merrill, 1972
 v. Monson, 1906
 v. Parrot, 2156
 v. Pate, 1031
 v. Peterson, 2272
 v. Spencer, 1621
 v. Richardson, 1587, 1922
 v. Ridgely, 2008
 v. Schultz, 959
 v. Stodder, 297, 1672, 1673
 v. Strong, 986, 1034
 v. Studenham, 1009
 v. Vermont Cent. R. Co., 2231, 2232,
 2326
 v. Wilson, 772
 v. Woodbury, 2038, 2045
 v. Wyatt, 824
 v. Wyman, 792, 905
 v. York, 478, 545
 v. Young, 2095
 Richart *v.* Richart, 948
 Richberg *v.* Bartley, 1156
 Richmond *v.* Davis, 1037
 v. Vassalborough, 1456
 Rickard *v.* Robson, 1688
 v. Talbird, 926
 Rickards *v.* Rickards, 1088
 Ricketts *v.* Montgomery, 1707, 1769
 Riddell *v.* Grinnell, 823
 Riddick *v.* Cohoon, 350
 v. Walsh, 925

Riddle *v.* Brown, 84
v. Cutter, 1609
v. Driver, 62, 89
v. Holl, 890, 2059
v. Littlefield, 1014, 1204
Riddlesberger *v.* Mentzer, 888
Riddlesden *v.* Wiga, 755
Rideaut *v.* Paine, 202
Rider *v.* Kidder, 779, 1646, 1647
v. Kohler, 1226
v. Maul, 1977, 1978
v. Rider, 1634
v. Smith, 2208
Ridge *v.* Prathes, 2305
Ridgeley *v.* Crandall, 2343
v. Johnson, 1660, 1731
v. Stillwell, 981, 1135, 1136, 1254, 1264,
1284, 1303, 1307, 1319, 1320, 1322,
1326, 1328, 1339
Ridgely's Exrs. *v.* Gartell, 2305
Ridgely *v.* McLaughlin, 463, 466
Ridgeway's Appeal, 1962
Ridgeway's Minors, 1721
Ridgeway *v.* Mastings, 792, 905, 911, 915, 926,
927
v. McAlpine, 870, 872, 930, 931
v. Underwood, 75
v. Wharton, 1039
Ridgley *v.* Stillwell, 2255
Ridgway *v.* Parker, 337
Ridley *v.* McNairy, 2260, 2261
v. Ridley, 1033
Ridout *v.* Harris, 30
v. Paine, 314, 326
Rife *v.* Geyer, 254, 273, 500, 1605, 1607, 1655,
1656, 1673, 1675, 1694, 1695, 1736,
1737, 1742, 1748, 1763
Rigden *v.* Vallier, 1882, 1883, 1910, 1966, 1968
Rigdon *v.* Vallie, 1882
Rigge, Doe d., *v.* Bell, 1022, 1136, 1323
Riggin *v.* Love, 1919
Riggs *v.* American Tract Society, 2345
v. Armstrong, 2029
v. Sally, 403, 415, 418, 463, 464
Riggs, Doe d., *v.* Bell, 1013, 1014
Right *v.* Darby, 1136, 1317
v. Sidebotham, 302, 331
v. Thomas, 1807
Right & Bassett *v.* Thomas, 1040
Right d. Phillips *v.* Smith, 1607
Righter *v.* Forrester, 2120
Rigler *v.* Cloud, 611, 654, 655, 680, 682, 683, 685,
699, 1372
Rigney *v.* City of Chicago, 2
v. Lovejoy, 2105, 2107
Riker *v.* Durke, 641, 1981, 1982
Riley *v.* Bates, 855, 858
v. Clamorgan, 855, 858
v. Jordan, 1281
v. McCord, 2145
v. Million, 1217
v. Phelm, 1434
v. Riley, 1024, 1361
v. Simpson, 1197, 1198
Rimseyer *v.* Morss, 62, 63
Rinehart *v.* Olwine, 1207, 1230, 1232, 1263
Ring *v.* Burt, 1410, 1473
v. Franklin, 1666
v. Hardwick, 322, 323
v. Huntington, 1033
v. McCoun, 1559
Ring's Exr. *v.* Woodruff, 2089
Ringgold *v.* Barley, 1455
v. Ringgold, 1608, 1617, 1618, 1669, 1708,
1715, 1719, 1725, 1734, 1735, 1757, 1773
Ringo *v.* Binus, 1585
v. Woodruff, 2296, 2297
Rinkin *v.* Rinkin, 74
Ripley *v.* Davis, 1246
v. Luigart, 955
v. Paige, 104, 107
v. Selgman, 77

Ripley *v.* Waterworth, 787
v. Wentworth, 528, 825
v. Whittman, 1126
v. Wightman, 1179, 2269
Ripperdon *v.* Cozine, 2007
Rippetoe *v.* Dwyer, 2155
Rippon *v.* Norton, 247, 253
Rippy *v.* Gaunt, 1034
Risely *v.* Ryle, 1290
Rising *v.* Stannard, 1026, 1252, 1253, 1266, 1270,
1293, 1296, 1305, 1350, 1352, 1356, 1967
Risk *v.* Hoffman, 2150
Ritchie *v.* Eichelberger, 2180
v. McDuffie, 2068
v. Putman, 741
Ritger *v.* Parker, 2156, 2201, 2211, 2244
Rittenhouse *v.* Leverring, 865
Ritter's Appeal, 1791
Ritter *v.* Phillips, 2071
Rivard *v.* Gisenhof, 292
Rivers *v.* Friff, 315
Rives *v.* Dudley, 224, 1778
v. Rives, 510
Rivets *v.* Brown, 1343
Rix *v.* Smith, 1782
Rizer *v.* Berry, 1364
Roab *v.* Beaver, 251
Roach *v.* Davidson, 737
v. Peterson, 1178
v. Wadham, 1820
v. White, 651, 657
Roads *v.* Symmes, 2304, 2305
Roanws *v.* Archer, 247
Roath *v.* Driscoll, 572, 2227, 2230, 2233
Robb *v.* McBride, 1459
Robbins *v.* Butler, 1707, 1769
v. Eaton, 2011
v. Eckler, 2192
v. Love, 2349
v. McDonald, 1425
v. Mount, 1054, 1066, 1199
v. Oldham, 51
v. Robbins, 777, 885, 1824
Robb's Appeal, 1623
Robbs *v.* Ankeny, 465
Robert *v.* Coco, 1510
v. Ristine, 1154
v. West, 1361
Roberts' Will, In matter of, 1456
Roberts *v.* Baker, 82
v. Barker, 1263
v. Brinker, 315
v. Cone, 970
v. Cooper, 1836
v. Crayer, 725
v. Dauphin Dep. Bank, 133, 138
v. Davey, 1058, 1138
v. Dixwell, 654, 684, 685, 697, 1693
v. Fleming, 2163, 2185
v. Forsythe, 281, 284
v. Geis, 1107, 1123
v. Grubb, 1338
v. Haines, 94
v. Jack, 2271
v. Jackson, 692, 1163, 1164, 1580
v. Jackson, ex d. Webb, 1047
v. Karr, 2206
v. Mansfield, 2094, 2095, 2106, 2175
v. McCarty, 1963, 1964
v. McCord, 2222
v. McGraw, 1904
v. McMahan, 2045
v. Richards, 2045
v. Roberts, 237
v. Shryer, 890
v. Spicer, 1371
v. Stanton, 1840
v. Sutherland, 1994, 2000
v. Taylor, 1732
v. Tennell, 996, 1013, 1323
v. Unger, 2303
v. Welch, 2094, 2146

- Roberts v. Whiting, 486, 541, 634, 635, 636, 637
v. Wiggins, 829, 985, 986, 1030, 1031, 2011
Roberts, Den ex d., v. Forsyth, 286, 531
Roberts, Doe d. v. Polgrean, 1360, 1361
Robertson v. Baker, 786
v. Bullion, 34, 1660
v. Campbell, 2043
v. Corset, 106, 123, 142
v. Fraser, 1883
v. McAfee, 2359
v. Meadors, 543
v. Mowell, 265
v. Norris, 1364, 1365
v. Robertson, 1588, 1648
v. State, 596
v. Stevens, 606, 615, 693, 1577, 1678, 1679
v. Stark, 2027
v. St. John, 1037
v. Sublett, 1795
v. Van Cleave, 2073, 2074, 2170, 2171
v. Walker, 2330
v. Western M. & F. Ins. Co., 1766
Robertson, Doe d., v. Gardiner, 1320
Robertson's Admr. v. Paul, 1497
Robeson v. Pittenger, 2223, 2224
Robie v. Chapman, 682, 684
v. Smith, 1274, 1293, 1294, 1334
Robinett v. Preston, 1667
Robinson's Case, 1398
Robinson v. Bailly, 1215
v. Bates, 745, 783, 792, 793, 810, 905, 907, 911, 914
v. Bland, 2339
v. Bliss, 1623
v. Brennan, 2022, 2024
v. Brock, 645
v. Buck, 658, 913
v. Campbell, 720, 1516
v. Codman, 598, 611, 679, 680, 684, 680, 763, 788, 798, 815, 832, 1576, 1578, 1579
v. Cross, 2132
v. Cropsey, 2042
v. Dart's Exrs., 1375
v. Deering, 997, 1127, 1167, 1171, 1286, 1293, 1304
v. Doulass, 211
v. Douthitt, 2301
v. Dugale, 1814
v. Dugate, 317
v. Grey, 300, 1605, 1606, 1672, 1673, 1709
v. Eagle, 1024, 1919, 1932, 1941, 1950, 1952
v. Ezzell, 2020
v. Fairfield, 2346
v. Farrelly, 2050
v. Gee, 51
v. Hardcastle, 1828, 1830, 1838
v. Harman, 1091, 1245
v. Hathaway, 1214
v. Holt, 1131, 1144, 1145, 1146, 1147, 1212, 1214, 1216, 1219
v. Hook, 1782
v. Lakeman, 630
v. Leavitt, 2097, 2131, 2178
v. Lehman, 2257, 2272
v. L'Engke, 1100
v. Litton, 231, 575, 2188
v. Mauldin, 1703, 2018, 2020
v. McDonald, 1988
v. Miller, 516, 744, 781, 819, 828, 831, 834, 847, 856, 861, 1133
v. Moon, 905
v. Perry, 1111, 1118
v. Phillips, 2298
v. Rapelye, 1625, 1794
v. Reynolds, 2346
v. Robinson, 553, 650, 2250, 2260, 2261
v. Russell, 2081, 2187
v. Ryan, 2151
v. Sampson, 2134
v. Smith, 1630
v. Swearingham, 1447, 1456
v. Swett, 208, 210
Robinson v. Swope, 2327
v. Thrailkill, 2240, 2241
v. Townsend, 777, 819
v. Urquhart, 2134, 2138
v. Webb, 1194
v. Weeks, 1031
v. Wheelright, 251, 257
v. Wiley, 1483, 1514, 1515
v. Williams, 2030, 2271
v. Willoughby, 2039
v. Wilson, 1519
v. Wright, 122
Robinson, Doe d., v. Dobell, 1310
Robison v. Walker, 1427, 1428, 1430
Robson v. Flight, 1031
v. Lindrum, 1411
Roby v. Flanders, 746, 867, 873, 931
v. Phelon, 647
Roby, Doe d., v. Maisley, 1295, 1350
Roche v. Farnsworth, 2151
Rochford v. Hackman, 249, 253, 274, 485, 501, 1677
Rock v. Hart, 1725
Rockford Ins. Co. v. Nelson, 2113
Rockhill v. Spraggs, 2349
Rockingham v. Penrice, 497
Rochon v. Levett, 600, 601, 605, 629, 643, 645, 655, 657, 663, 1372
Rockland v. Morrill, 522
Rockman v. Alwood, 2045
Rockwell v. Bradley, 1997
v. Hobby, 2003, 2112
v. Hubble's Admr., 1502, 1516, 1518, 1570
v. Humphrey, 2044
v. Morgan, 494, 496, 561, 811, 844, 848
v. Rockwell, 794
v. Servant, 2094
Roco v. Green, 1399
Roddy's Appeal, 2137
Roddy v. Cox, 1246, 1912
v. Elam, 2151
Rodgers v. Bonner, 50
v. Jones, 2151
v. Wallace, 1819
Rodman v. Hedden, 2141
Rodney v. Shankland, 1672
Rodriguez v. Heffernan, 1756
Rodwell v. Phillips, 53, 54
Roe v. Baldwere, 446
v. Blackett, 302
v. Davis, 416
v. Farrers, 489
v. Grew, 422
v. Griffith, 830
v. Hodgeson, 1021, 1022
v. Jeffrey, 322, 418
v. Jerome, 1700
v. Lees, 1275, 1281, 1302, 1320, 1326, 1338
v. Pattison, 2
v. Popham, 1538
v. Reade, 1742
v. Rees, 1264
Roe d. Brune v. Prideaux, 1838
Roe d. Durant v. Roe, 1311
Roe d. Evans v. Davis, 444
Roe d. Jordan v. Ward, 1264, 1325
Roe ex d., v. Lees, 1325
Roe ex d. Hunt v. Galliers, 257, 274
Roe ex d. Hunter v. Galliers, 257, 274
Roe ex d. Peter v. Pay, 339
Roe ex d. West v. Davis, 1060
Roe, Lessee of Posey, v. Budd, 469
Roff v. Duane, 998, 1017, 1042
v. Johnson, 1411, 1483, 1514
Roffey v. Bent, 501
v. Henderson, 145, 1186
Rogan v. Walker, 237, 1854, 2048, 2050, 2169
Rogers v. American Board, 271
v. Benson, 1952
v. Boynton, 1159
v. Brooks, 33, 1369

- Rogers *v.* Brown, 123
v. Buchard, 235
v. Colt, 1576
v. Crow, 109, 111, 117, 120, 121, 132, 134, 135, 136, 137, 138, 139
v. Danforth, 268
v. De Forest, 2129
v. Eagle Fire Ins. Co., 237, 2316, 2318, 2319, 2320
v. Gillinger, 96, 2186
v. Goodman, 2191
v. Grazebrook, 2079
v. Greenbush, 671
v. Grider, 1024, 1729, 1920, 1935, 1941, 1950, 2320
v. Herron, 2171
v. Hillhouse, 2322, 2348
v. Hinton, 1815
v. Holyoke, 2152
v. Humphreys, 2065
v. Jones, 196, 2191
v. Joyce, 210
v. Law, 267
v. Ludlow, 1374, 1672, 1673
v. Madden, 2295
v. McCauley, 1652
v. Meyers, 2073, 2169
v. Moore, 108, 516, 744, 1142
v. Murray, 1653
v. Prattville Mfg. Co., 132
v. Ragland, 1388
v. Renshaw, 1450, 1475, 1478
v. Rogers, 325, 1580
v. Sebastian, 1857
v. Sinsheimer, 2236
v. Smith, 1375, 1376, 1674
v. Snow, 1014, 1154
v. Swain, 2223
v. Taylor, 93
v. Trader Ins. Co., 2133
v. Walker, 986
v. Waller, 1148, 1214, 1348
v. Wiggs, 1290
v. Woody, 903
- Rogers. Doe d., *v.* Coote, 1039
v. Pullen, 1258, 1294
- Rogers Locomotive, etc., Works *v.* Kelly, 1655
- Rohrabacher *v.* Ware, 135
- Rohrbach *v.* Germania Fire Ins. Co., 631, 1912
- Rolfe *v.* Gregory, 1761, 1784
v. Harris, 1157, 1871
- Roll *v.* Smalley, 2148
- Rollins *v.* Columbia Fire Ins. Co., 240, 2115
v. Forbes, 2157, 2167
v. O'Farrel, 1455
v. Moody, 297
v. Riley, 1849, 1854, 2314, 2315
- Rolph *v.* Crouch, 1190
- Rolt *v.* Lord Somerville, 569
- Romilly *v.* James, 322
- Rona *v.* Meier, 259, 264, 499, 1814
- Rondall *v.* Duif, 2073
- Rood *v.* New York & E. R. Co., 2360
v. Willard, 976, 1017
- Roodhouse *v.* Roodhouse, 1984
- Roods *v.* Symmes, 2291
- Roof *v.* Stafford, 985, 1030, 1031
- Rooper *v.* Benson, 808
- Rooks *v.* Moore, 983, 1246
- Roome *v.* Phillips, 315, 1752
- Rooney *v.* Crary, 1157
v. Gillespie, 1294
- Roop *v.* Rogers, 1964
- Roose *v.* Hungate, 1334
- Roose, Evans, *In re*, *v.* Williams, 724
- Roosevelt *v.* Fulton, 688
v. Hopkins, 1139
v. Roosevelt, 273
v. Thurman, 415, 447, 471
- Root *v.* Bancroft, 2092
v. Brotherson, 369, 2058, 2339
v. Collins, 2155
- Root *v.* McGrew, 1510
v. State, 2335
v. Stuyvesant, 1039, 1809, 1810
- Roper *v.* Halifax, 1845
v. McCook, 2009
- Rose, *Re*, 2266
- Rose *v.* Baker, 2107
- Ropley *v.* Prince, 2090
v. Bun, 2240
v. Clark, 596, 752, 759
v. Gill, 1023
v. Hayden, 1642, 1643, 1644
v. Hill, 315
v. Reynolds, 957
v. Sanderson, 1366
v. Swan, 2151
v. Wynn, 1245, 1246
- Roseboom *v.* Mosher, 188, 1842
v. Roseboom, 345, 1895, 1904
v. Vechten, 205, 454, 459, 477, 478, 481, 511, 521
- Rosecarrick *v.* Benton, 1996
- Rosekrans *v.* White, 1084
- Rosenblat *v.* Perkins, 1322, 1333
- Roser *v.* Slade, 346
- Rosevelt *v.* Fulton, 800
- Rosewell *v.* Prior, 1199
- Ross *v.* Adams, 284, 669, 679, 1368
v. Barclay, 1609, 1729, 1787
v. Blair, 718
v. Boardman, 802
v. Butler, 198
v. Cobb, 1023
v. Drake, 316
v. Duval, 1516
v. Dysart, 1065, 1081, 1082, 2258
v. Garrison, 1309, 1930
v. Gill, 1023
v. Gould, 211
v. Hannah, 1447
v. Heintzen, 2007
v. Henderson, 1962
v. Kennison, 2072
v. Norvel, 1648
v. Norvell, 2175
v. Norville, 2046
v. Overton, 1098, 1099, 1175
v. Ross, 344, 660, 662, 2282, 2283, 2289
v. Schneider, 1306, 1319
v. Swaringer, 1231, 1232, 1233, 1238
v. Sweeney, 1440
v. Toms, 415, 447, 471
v. Tremain, 1864
v. Utter, 2148
v. Van Aulen, 1290
v. Welch, 51
v. Whitson, 2005
v. Wilson, 785, 857, 2017
v. Worthington, 2038
- Rosse *v.* Wainman, 83
- Rossee *v.* Jarvis, 1145
- Rosseter *v.* Simmons, 2, 308
- Rossiter *v.* Cossit, 783, 802
- Rotch *v.* Morgan, 1768
- Roth *v.* Duane, 1043
v. Wells, 50
- Rothchild *v.* Hudson, 2263
v. Williamson, 969, 1131, 1304, 1327, 1328, 1331
- Rotherham *v.* Greene, 2196
- Rothwell *v.* Dewees, 1585, 1643, 1738, 1990
- Rounds *v.* Delaware L. R. Co., 1195
- Rountree *v.* Dennard, 1398
v. Lane, 1976
v. Talbot, 479
- Roupe *v.* Carradine, 1516
- Rourke *v.* Coulton, 2069
- Rouse's Case, 1346
- Rouse *v.* Martin, 198
- Roush *v.* Emerick, 2255
- Routledge *v.* Dorrill, 1812, 1838
- Rovelsky *v.* Brown, 1958

- Rowan *v.* Lytle, 1160, 1310, 1319, 1344, 1348,
1350, 1355
v. Mercer, 2149
v. Riley, 2259
v. Sharp's Rifle Mfg. Co., 2018, 2019,
2020
v. State, 2324
Rowan's Creditors *v.* Rowan's Heirs, 1747
Rowand *v.* Anderson, 143
Rowbotham *v.* Pearce, 1168
v. Wilson, 90, 93, 2213, 2233, 2240
Rowden *v.* Malster, 436
v. Wallster, 435
Rowe *v.* Bradley, 794
v. Hamilton, 910, 956, 960
v. Johnson, 733, 736, 739, 870, 876
v. Power, 849, 851
v. Table Mountain Water, 2167
v. Williams, 1051, 1052
v. Wood, 2185
Rowel *v.* Walley, 510, 518
Rowell *v.* Doyle, 71, 74
v. Jewett, 1854, 1872
v. Kline, 538
Rowen *v.* Kelsey, 83, 1016
v. Riley, 2252
Rowland *v.* Pendleton, 2271
v. Rowland, 794, 913
v. Warren, 402
Rowlandson, *Ex parte*, 1240, 1241, 1242, 1244
Rowlett *v.* Grieve's Syndic., 2177
Rowley *v.* Adams, 434
Rowney *v.* Rowney, 1368
Rowton *v.* Rowton, 781
Royall's Admr. *v.* McKenzie, 1734
Roy *v.* Garnett, 1557
v. McPherson, 1622
Royce *v.* Guggenheim, 1054, 1127, 1128, 1166,
1167, 1168, 1169, 1173, 1200
Royer *v.* Ake, 1067, 1099, 2262, 2263
Royster *v.* Royster, 761, 815, 870
Royston *v.* Royston, 893, 1364, 1988, 1989
Rozelle *v.* Rhodes, 1428
Rozenthal *v.* Mayhugh, 902
Rozier *v.* Fagan, 2332
v. Johnson, 1982
Rubeck *v.* Gardner, 216
Rubey *v.* Barnett, 317, 319, 338
v. Barrett, 1815
Ruby *v.* Abyssinian Society of Portland, 2088
Ruch *v.* City of Rock Island, 1861, 1862
Ruckler *v.* Hiller, 21
Ruckman *v.* Astor, 2184
v. Outwater, 81
v. Ruckman, 2100
Rucks *v.* Taylor, 2149
Rudd *v.* Golding, 1138, 1150
Rudolph *v.* Rudolph, 957
Rue *v.* Alter, 1515
Rue High, Appellant, 1456
Ruefsnyder *v.* Hunter, 249
Ruffier *v.* Wormack, 2044, 2054
Ruffin *v.* Cox, 801, 817
Ruffner *v.* McLennan, 711
Ruggles *v.* Barton, 2102, 2103
v. Clare, 1864
v. First Nat. Bank of Centreville, 47,
2159
v. Lawson, 1016
v. Lesure, 2213
v. Williams, 2046
Ruggles, Jackson ex d., *v.* Martin, 341
Rugely *v.* Robinson, 247, 253
Ruiz *v.* Norton, 1698
Rumball *v.* Ball, 2142
Rumery *v.* McCullen, 1795
Rumfelt *v.* Clemens, 924
Rumford Inhabitants *v.* Wood, 1029
Rump *v.* Gerken, 1163
Rundell *v.* Lakey, 1094
Rundle *v.* Allison, 695
v. Delaware, etc., Canal Co., 69
Rundle *v.* Pegram, 594, 596
Runey *v.* Edmonds, 639, 1367
Rung *v.* Shoneberger, 2297
Runnels *v.* Runnels, 267
v. Webber, 1093
Runyan *v.* Coster's Lessee, 224, 225
v. Mesereau, 800, 1995, 2000, 2105, 2111,
2129
Ruohs *v.* Kooke, 1480, 1482
Rupp. *In re*, 1399
v. Eberly, 332, 536
v. Orr, 1738
Ruppe *v.* Steinbach, 1921
Rush *v.* Davidson, 2335
v. Gordon, 1390, 1392
v. Lewis, 1742, 2107, 2119, 2130
Rushin *v.* Shields, 2122
Rushmore *v.* Miller, 2166
Rusing *v.* Rusing, 291
Russ *v.* Mebius, 1637
v. Morris, 2331
v. Perry, 729, 884, 1093
Russell's Appeal, 1790, 1801, 2120
Russell's Case, 982
Russell *v.* Allard, 1274
v. Allen, 1028, 1118, 2064, 2065, 2268
v. Annable, 1029, 1030
v. Austin, 803, 1580
v. Beebe, 2307
v. Blake, 2088
v. Brown, 2125
v. Clark's Exrs., 1622
v. Coffin, 2316
v. Darwin, 1009
v. Davis, 2295, 2296, 2297
v. Doty, 1017
v. Elden, 337
v. Edwin's Administrator, 1020, 1212
v. Fabyan, 1127, 1144, 1148, 1167, 1171,
1213, 1285, 1297, 1309, 1317, 1318,
1346, 1347, 1348, 1350, 1353, 1355,
2258, 2268
v. Gee, 842, 844
v. Hammond, 1626
v. Harford, 2216
v. Howard, 2136, 2138
v. Jackson, 2218, 2220, 2222
v. Jarvis, 1147
v. Lee, 823
v. Lennon, 1432
v. Lewis, 1579, 1595, 1706
v. Lowth, 1510, 2309
v. Marks, 1899, 1900
v. McCarthey, 1335, 1340
v. Miller, 824
v. Mixer, 2130
v. Peyton, 1662, 1783
v. Pistor, 2069, 2070, 2112, 2166, 2178
v. Ramsey, 2323
v. Randolph, 1512, 1513
v. Richards, 56, 63, 123
v. Rumsey, 904
v. Russell, 811, 1229, 1798, 1808, 1809,
1905, 2002
v. Shenton, 1198
v. Southard, 2031, 2037, 2043, 2048, 2049,
2052, 2055, 2089, 2169
v. State, 595
v. Switzer, 1591, 1592
v. Taylor, 727
v. Temple, 44, 817
v. Titus, 1222
v. Waite, 2042
Russell, Jackson ex d., *v.* Rowland, 1148, 1220,
1248
Rutgers *v.* Hunter, 1008, 1088, 1089
Ruth *v.* Overbrunner, 225, 1680
Rutherford *v.* Graham, 847
v. Green, 1751
v. Munce, 783, 926
v. Read, 744
v. Ruff, 1033

Rutherford *v.* Stamper, 230r
v. Stewart, 2018
v. Williams, 2163
 Ruterland *v.* Williams, 2163
 Rutland Marble Co. *v.* Ripley, 88
 Rutledge *v.* Smith, 1590, 1796
 Rutt *v.* Howell, 1488
 Rutter *v.* Small, 1898, 1900
 Rutledge *v.* Whelan, 1158
 Ryall *v.* Ryall, 1691, 1700
v. Stevens, 125
 Ryan *v.* Adamson, 2114
v. Brown, 68, 70
v. Carr, 2364
v. Doyle, 1777
v. Dox, 1611, 1614, 1619, 1620
v. Dunlap, 2106
v. Freeman, 620
 Ryckman *v.* Gillis, 92, 2237
 Rycroft *v.* Christy, 1791
 Ryder *v.* Flanders, 2302
v. Hulse, 653
v. Mansell, 2119
v. Ryder, 1464
v. Sissin, 1715
v. Thomas, 1193
 Ryer, *Re*, 2327
 Ryer *v.* Gass, 808, 809
 Ryerson *v.* Eldred, 1160, 1213, 1222
v. Quackenbush, 2251, 2267, 2269
 Ryrers *v.* Farewell, 1279
 Rylands *v.* Fletcher, 199
 Ryras *v.* Ryras, 1883

S.

Sachaveral *v.* Dale, 442
 Sachet *v.* Wheaton, 22, 23
 Sacheverell *v.* Trogate, 2259
 Sackett's Case, 1456
 Sackett *v.* Giles, 661
v. Sackett, 149, 552, 1153
v. Twining, 889
 Sackville West *v.* Holmesdale, 1609
 Saddler's Co. *v.* Badcock, 1077
 Sadler's Appeal, 1777
 Sadler *v.* Hobbs, 1732, 1733
v. Langham, 2327, 2328
v. Pratt, 1838
 Safely *v.* Gilmore, 1248, 2255
 Saffin's Case, 980
 Safford *v.* Annis, 51, 52
v. Rantoul, 1588
v. Safford, 712, 759, 762, 777, 781, 819, 820
 Sagar *v.* Eckert, 493, 519, 520
v. Tupper, 2153, 2172
 Sage *v.* Central R. Co., 2155
v. Sherman, 1671
v. Truslow, 1101
 Sager *v.* Tupper, 2136
 Sagitary *v.* Hide, 1626
 Sagoharie, Jackson ex d., *v.* Dobbin, 1213
 Sahler *v.* Signor, 215
 Sailer *v.* Sailer, 1894
 Sainet *v.* Duchamp, 2254
 Sainsbury *v.* Matthews, 46, 49, 51, 52
 Saint *v.* Pilley, 125, 142
 St. John *v.* Benedict, 1538
v. Bumpstead, 2151, 2154
v. Camp, 2027
v. Palmer, 1128, 1168, 1172
v. Quitsom, 1219
v. Quitzow, 1212, 1220
v. St. John, 1034
v. Standing, 1247
 St. Johnsbury & L. R. Co. *v.* Willard, 61
 St. Louis *v.* Kamie, 1202
v. Morton, 1029, 1213, 1221
 St. Louis, J. M. & G. R. Co. *v.* Hecht, 198,
 995, 1315, 1317

St. Louis Smelting & Refining Co. *v.* Green,
 2304
 St. Louis University *v.* McClune, 2296
v. Kemp, 1586
 St. Mary's Church *v.* Miles, 59
v. Stockton, 1872
 St. Michael's Church *v.* Behrens, 1168
 St. Saviour's *v.* Smith, 1074, 1077
 St. Victor's *v.* Daubert, 1241, 1242, 1243
 Sainter *v.* Fergusson, 1872
 Salade *v.* James, 1234
 Sale *v.* Crutchfield, 409, 416, 419, 469
v. Moore, 347, 1627, 1630, 1631, 1684
v. Saunders, 1367
 Salem *v.* Edgerly, 2176
 Salisbury *v.* Bigelow, 1791
v. Hale, 1131
v. Marshall, 1200
v. Shirley, 1026, 2261, 2262
 Salisbury, Earl of, *v.* Bennett, 271
 Salle *v.* Primm, 2293
 Sallee *v.* Chandler, 1621
 Salmer *v.* Forbes, 96
 Salmon *v.* Bennett, 1623, 1625
v. Clagett, 515, 2080, 2081, 2187
v. Hoffman, 2004
v. Matthews, 1176
v. Smith, 979
v. Stuyvesant, 1039
 Salter's Case, 529
 Salter *v.* Kidgley, 2361
 Saltmarsh *v.* Beene, 1765, 1774
v. Smith, 718, 733, 735, 736, 739
 Saltonstall *v.* Sanders, 1685
 Salusbury *v.* Denton, 1685
 Sames *v.* Payne, 885
 Samlman *v.* Onions, 572
 Sammes' Case, 1556, 1557
 Sample *v.* Robb, 2303
v. Rowe, 2106
v. Sample, 917, 955
 Sampson *v.* Burnside, 2238
v. Easterby, 1071, 1078
v. Graham, 142
v. Grimes, 2250, 2258
v. Henry, 1356, 1357
v. Hoddinott, 2224, 2227, 2228, 2248
v. Shaeffer, 1140, 1296
v. Williamson, 1378, 1408, 1467, 1468,
 1473, 1475, 1478, 1488, 1489, 1490, 1491,
 1502, 1518
 Samson *v.* Thorton, 2034
 Sanborn *v.* Chamberlin, 1093
v. Kittridge, 1773
v. Morrill, 1247
v. Osgood, 2060
v. Rolinson, 2038
v. Woodman, 1870
 Sandback *v.* Quigley, 870
 Sanderlin *v.* Baxter, 2241
 Sanders *v.* Cassady, 2100
v. Ellington, 82, 1205, 1207
v. Hooper, 2089, 2090
v. Hyatt, 415, 447, 471
v. Martin, 2235
v. Merryweather, 1058
v. Morrison, 1729
v. Partridge, 1072, 1108, 1115, 1117, 1118,
 1119, 1143, 1156, 2262, 2265
v. Pope, 1157, 1158, 1872
v. Reed, 2186
v. Richards, 2159
v. Wilson, 2185
 Sanderson *v.* Dobson, 202
v. Jackson, 998, 1043
v. Mayor, 1166
v. Price, 1998, 2078
 Sanford *v.* Clarke, 1199
v. Harvey, 1274, 1335, 1340, 1343
v. Irby, 288, 299, 1594, 1711
v. Jackson, 916, 917, 918, 934, 942, 955
v. Johnson, 1263, 1274, 1281

- Sandford v. McLean, 885, 867, 873, 886, 905, 930
Sandfoss v. Lones, 1643
Sandhill v. Franklin, 1310
Sands v. Ale Brewing Co., *In re*, 2119
 v. Church, 2112
 v. Hughes, 1112, 1148
 v. Lynham, 236, 279, 2347
 v. Pfeiffer, 136, 137
Sandwith v. De Silver, 2262
Saner v. Bilton, 1083, 1153
Sanford v. Bulkley, 2147
 v. Jackson, 944
 v. Jarvey, 1340
 v. Lackland, 253
 v. Norris, 1643
 v. Turner, 1160
San Francisco v. Canavan, 2212
 v. Fulde, 2298
Sangamon & M. R. Co. v. Morgan Co., 98
Sanger v. Uptown, 1581
Sangster v. Love, 2103, 2106, 2111, 2140
Sangston v. Love, 2105
Sansom v. Harrell, 1464
Santell v. Armor, 1425
Sanxay v. Hunger, 2218
Sarabus v. Fenlon, 1388, 1390
Sargent v. Adams, 20
 v. Ashe, 2260
 v. Baldwin, 1792
 v. Ballard, 2214, 2226, 2240
 v. Courier, 1230, 1231
 v. Howe, 2106
 v. Parson, 1894, 1967
 v. Pierce, 32
 v. Smith, 1074
 v. Townes, 337, 557
 v. Wilson, 1523
• Sarles v. Sarles, 545, 546, 555, 557, 565, 566,
 1141
Sarsfield v. Healy, 1251, 1261, 1275
Sarter v. Gordon, 1697
Satterfield v. John, 1662
Satterlee v. Matthewson, 1221
Sauder's Lessee v. Morningstar, 449
Sauer v. Meyer, 1156
Saul v. Creditors, 755
 v. His Creditors, 1946
Saumarez v. Saumarez, 307
Saunders v. Edwards, 1609
 v. Evans, 1839
 v. Frost, 2073, 2089, 2090, 2173
 v. Hanes, 287, 973
 v. Harris, 1598
 v. Leslie, 832
 v. Musgrove, 1264, 1292
 v. Newman, 2229, 2247
 v. Saunders, 1887
 v. Schmaelzie, 1663
 v. Webber, 1667
Savage v. Burnham, 917
 v. Crill, 910
 v. Dovsky, 2062
 v. Foster, 2147
 v. Hall, 728, 806, 809, 810, 2097, 2103,
 2131
 v. Holyoke, 2011
 v. Mason, 1063, 1972
 v. O'Neil, 646
 v. Savage, 1931, 1982
Savery v. King, 76
Savile v. Blacket, 1847
 v. Scarborough, 60
Saville's Case, 442
Saville v. Saville, 511
Savings Bank v. Allen, 2332
 v. Ayres, 1454, 1495, 1496
 v. Bates, 2332
 v. Freese, 2148
 v. Grewe, 2099
Sawter v. Kendall, 734
Sawyer's Appeal, 1647
Sawyer v. Adams, 2119, 2121
Sawyer v. Davis, 4
 v. Dozier, 339
 v. Hanson, 2331
 v. Hoag, 1581
 v. Kendall, 2299, 2357
 v. Lyon, 2026
 v. Skowhegan, 1707
 v. Twiss, 73, 79, 103, 106, 184
 v. Wall, 683
 v. Zachary, 1023
Saxton v. Hitchcock, 2044
 v. Mitchell, 311
Say v. Barwick, 1034
 v. Stoddard, 1278, 1281, 1293, 1297
Say-and-Seal v. Jones, 1709
Saye v. Jones, 1797
Sayers v. Hoskinson, 812
 v. Wall, 678, 682, 699, 1372
Saylor v. Kocher, 310
 v. Paine, 1637
Saylors v. Saylors, 1600, 1601
Sayre v. Hughes, 1647
 v. Townsends, 1634, 1646, 1651
 v. Weil, 1588, 1669
 v. Wisner, 671
Scales v. Maude, 1587
Scammon v. Campbell, 841, 853
Scanlan v. Geddes, 2021
 v. Porter, 321
 v. Turner, 903
 v. Wright, 215, 492, 503, 1657, 2014
Scantlin v. Allison, 1894
Scarborough v. Borman, 1373
 v. Smith, 1894
 v. Stinson, 2090
 v. Watkins, 647, 895
Scarry v. Eldrich, 2071
Schadt v. Heppie, 1521
Schaefer v. Reilly, 2109
Schaeffer v. Beldsmeier, 1520
 v. Weed, 891
Schaick ex d. Jackson v. Davis, 1150
Schall v. Williams' Valley R. Co., 2300
Scharfenburg v. Bishop, 2018
Schearff v. Dodge, 2131
Schee v. Wiseman, 974, 975
Scheerer v. Dickson, 1202
 v. Stanley, 1120
Schefering v. Huffman, 646
Scheible v. Bacho, 2059
Scheidt v. Belz, 2258
Scheifele v. Schmitz, 123
Scheiffelin v. Carpenter, 1168
Scheller v. Stein, 2122
Schellinger v. Blackerly, 982
Schenck v. Conover, 2144, 2145
 v. Ellingwood, 1840
 v. O'Neil, 2059
 v. Schenck, 1734
Schenley's Appeal, 1226
Schenley v. Commonwealth, 971
Scheppi v. Gindele, 1066
Schermer's Appeal, 1509
Schermerhorn v. Buell, 988
 v. Gouge, 1110
 v. Miller, 611
 v. Negus, 240, 259, 261, 262, 1858
 v. Vanderheyden, 1698
Schjack, Jackson ex d., v. Vincent, 488
Schieffelin v. Carpenter, 1159
 v. Stewart, 1715, 1716, 1725
Schiffer v. Pruden, 707, 774, 883, 894, 919, 920,
 921
Schile v. Brokhahus, 2236
Schilling v. Holmes, 1128, 1168
Schindel v. Schindel, 588, 681, 682
Schinkel v. Hanewinkle, 2129
Schintz v. McManamy, 2341
Schlaefel v. Corson, 1622, 1760
Schlarb v. Holderbaum, 1520
Schlarfenburg v. Bishop, 1050
Schley v. Fryer, 2068

- Shley *v.* Lyon, 1553, 1560, 1583
 Schlemmer *v.* North, 135
 Schluter *v.* Bowery Savings Bank, 1658, 1659
 Schmidt, Estate of, 1446, 1449
 v. Pettit, 1098, 1176
 Schmit *v.* Auferty, 996
 Schmitz *v.* Lauferty, 1323
 Schmucker *v.* Libert, 2070
 Schnelby *v.* Ragan, 2004
 v. Schnelby, 776, 806, 856
 Schneider *v.* Botch, 2298
 v. Lord, 1322
 v. Stahlr, 1364, 1367, 1827
 Schmitt *v.* Willis, 813
 Schoch's Appeal, 661
 Schoch's Estate, 662
 Schoffen *v.* Laudauer, 1391, 1392, 1420, 1433
 Schofield *v.* Doscher, 2165
 School Directors *v.* Carlile, 1554
 v. Dunkelberger, 1744
 School District *v.* Benson, 517, 2299
 v. Lynch, 2209
 School Trustees *v.* Hovey, 1479, 1506
 Schoonmaker *v.* Stockton, 342
 Schott *v.* Harvey, 976
 Schouton *v.* Kilmer, 1503
 Schreiber *v.* Creed, 2214
 Schriber *v.* Platt, 1485
 Schriver *v.* Meyer, 313, 328, 330, 331, 332, 333,
 334
 v. Meyer, 306
 v. Teller, 2154
 Schroeder *v.* Gemeinder, 1052
 Schuck *v.* Gerlanck, 2074
 Schuessler *v.* Dudley, 1403
 Schuff *v.* Ransom, 2345
 Schuisler *v.* Amos, 1131, 1132
 Schult *v.* Harvey, 1201
 Schultz *v.* Moll, 661
 Schumeier *v.* St. Paul & Pac. R. Co., 69
 Schutt *v.* Baker, 1247
 v. Large, 2365
 Schuyler *v.* Broughton, 1949
 v. Hanna, 1520, 1521
 v. Leggett, 996, 1013, 1321, 1322, 1323
 v. Smith, 969, 1131, 1132, 1134, 1135, 1136,
 1315, 1317, 1343, 1348
 Schuyler, Jackson ex d., *v.* Corliss, 1056, 1105,
 1113
 Schuykill *v.* Dauphan R. Co., 1067
 v. Schmoele, 1129
 Schuykill, etc., *v.* R. Co. *v.* Schmoele, 1082, 1167,
 1127
 Schuykill Co. *v.* Thoburn, 2062
 Schwartz's Estate, 1021
 Schwartz *v.* Kuhn, 2295
 Schwarz *v.* Sears, 1999
 Schweickhardt *v.* St. Louis, 1193
 Schwoerer *v.* Boylston Market Assoc., 1069
 Scituate *v.* Hanover, 1588, 1592
 Scoggins *v.* State, 597
 Scoffins *v.* Grandstaff, 2301
 Scofield *v.* Hopkins, 1500
 Scorell *v.* Boxall, 49, 52
 Scott *v.* Alberry, 307
 v. Avery, 1051
 v. Bentel, 2241
 v. Buchanan, 985, 986, 1031, 2052, 2073,
 2343, 2344
 v. Clinton, 98
 v. Deyer, 1379, 1444
 v. Elkins, 2298
 v. Featherston, 2177
 v. Freeland, 1766, 1768, 1773, 2163
 v. Gallagher, 1764
 v. Gibbons, 247
 v. Guernsey, 653, 1905
 v. Hancock, 849, 860
 v. Hawsman, 1162, 2260
 v. Henry, 2038, 2039
 v. Howard, 731
 v. Johnson, 985
 Scott *v.* Key, 1633
 v. Levy, 1217, 1222
 v. Liverpool, 1051
 v. Logan, 315
 v. Lunt's Admr., 1071
 v. Lunts, 1004, 1121
 v. McFarland, 2039
 v. Nicoll, 2248
 v. Perkins, 1806
 v. Porcher, 1600
 v. Purcell, 1773
 v. Ramsey, 1234
 v. Rand, 1662
 v. Scott, 856, 865, 1098, 1164
 v. Simmons, 1054, 1191, 1201, 1202
 v. State, 1923
 v. Stewart, 1754, 1755
 v. Stipe, 1850
 v. Terry, 2288
 v. Turner, 2105, 2106
 v. Tyler, 271, 1858
 v. Umbarger, 1620
 v. Ward, 712
 v. Ware, 2065, 2087, 2333
 v. Webster, 811, 2081
 v. Wharton, 2188
 v. Whipple, 2356
 v. Willis, 1227
 Scott's Exrs. *v.* Gorton's Exrs., 1766
 Scovell *v.* Boxall, 537
 Scovill *v.* Kennedy, 1979
 Scoville *v.* Canfield, 2056
 Scranton *v.* Stewart, 1031
 Screven *v.* Gregorie, 2207
 Scribner *v.* Hockok, 2177
 Scrimshire, 753
 Scriver *v.* Smith, 2211
 Scrivner *v.* Dietz, 1791
 Scruggs *v.* Blair, 824, 1964
 v. Murray, 485
 Scudder *v.* Trenton, 2325, 2328
 Scuffield *v.* Brown, 2208
 Scull *v.* Beatly, 1519, 1522
 v. Reeves, 1600, 1729, 1786, 1794, 1795
 Scully *v.* Delany, 1733
 v. Murray, 1326, 1327, 1328, 1329
 Scurfield *v.* Howes, 314, 1608, 1733, 1735
 Scuyler *v.* Leggett, 2274
 Seabrook *v.* King, 2207
 v. Meyer, 1174, 2268
 Seabury, Doe ex d., *v.* Stewart, 1289
 Seagrave *v.* Seagrave, 773, 921, 939, 965
 Seager *v.* McCabe, 813
 Seagood *v.* Meale, 1087
 Seale *v.* Soto, 1986
 Sealer *v.* Kittner, 1113
 Seals *v.* Cashien, 1999
 Seamaus *v.* Carter, 1504, 1505, 1517
 Searcy *v.* Short, 1398
 Seargent *v.* Steinberger, 1729
 Searle *v.* Chapman, 1494
 v. Price, 883
 v. Whipperman, 2151
 Searles *v.* Jacksonville R. Co., 2136
 Sears *v.* City of Boston, 1455, 1456
 v. Cuningdam, 305, 1684, 1824
 v. Dewing, 2254
 v. Dixon, 1450, 1475, 1478, 2042, 2043,
 2053
 v. Hanks, 1394, 1415, 1481
 v. Hind, 1250
 v. Hyer, 641
 v. Munson, 1893
 v. Russel, 323, 1796
 v. Sears, 1407
 v. Sellew, 1894
 v. Smith, 997, 1131, 1315, 1316
 v. Stinton, 1046
 Seaton *v.* Davis, 1344
 v. Jamison, 874
 v. Marshall, 1397
 v. Son, 1426

Seaver *v.* Durant, 2087, 2185
v. Phelps, 987, 1032
v. Spink, 2120
Seawell *v.* Greenway, 1724, 1725, 1728
Sebastian *v.* Ford's Heirs, 1290
v. Johnson, 2159
Sebring *v.* Mersereau, 1984
Second Congregational Church of North Bridge-
water *v.* Waring, 33
Second Nat. Bank *v.* The O. E. Merrill Co.,
1316
Second Pres. Church *v.* Disbrow, 336
Second Reformed Pres. Church *v.* Disbrow,
317, 319, 320, 346, 1593, 1632
Secor, *Ac.*, 2266
Secor *v.* Pestana, 1309, 1319, 1340
Secrest *v.* McKenna, 760
v. Pruner, 2052, 2053
Sedgewick *v.* Cleveland, 2152
v. Laffin, 281, 283, 284, 285, 531
See *v.* Deer, 292, 293
Seeger *v.* Pettit, 1224
Seeger's Exrs. *v.* Seeger, 1754
Seekonk *v.* Rehoboth, 1005
Seekright *v.* Moore, 826
Seelers *v.* Seelers, 202
Seely's Appeal, 897
Seely *v.* Seely, 411, 415
Seelye, Jaykson *ex d.*, *v.* Morse, 1356, 1635
Seem *v.* McLees, 1336, 1339, 1340
Seers *v.* Hind, 1057, 1249
v. Russell, 324
Segee *v.* Perley, 54
Segond *v.* Garland, 1373, 1562
Seibert *v.* Minneapolis & St. L. R. Co., 2141
v. Wise, 423
Seibold *v.* Christman, 1640
Seichrist's Appeal, 1643
Seidenparger *v.* Spear, 2212, 2213
Seider *v.* Seider, 836, 1406
Seiders *v.* Giles, 1981
Seifert *v.* City of Brooklyn, 5
Seimon *v.* Schurck, 1652
Selby *v.* Alston, 1580, 2096
v. Greaves, 2250
v. Stanley, 2005
Selden *v.* Seymour, 2349
v. Vermilya, 1507
v. Vermilyea, 1808, 1809
Seldon's Appeal, 1502, 1691
Self's Admr. *v.* Tune, 534
Selkrig *v.* Davies, 358, 719, 2289
Sellers *v.* Davis, 883
Selleck *v.* Selleck, 953
Sellers *v.* Lester, 2020
v. Sellers, 203
v. Stalcup, 2048
Sellman *v.* Cummins, 904
Sellman *v.* Bowman, 757, 758, 866, 870, 873, 875,
930
v. Sellman, 234
Sellon *v.* Reed, 1472
Sellwood *v.* Gray, 2147
Selwin *v.* Selwin, 1572
Semmons *v.* McKay, 694
Semmes *v.* United States, 1253
Semple *v.* Burd, 2126
v. Lee, 2151
Senhouse *v.* Christian, 2220
Senter *v.* Mitchell, 2020
Sentill *v.* Roberson, 679, 680, 699
v. Robinson, 689
Sentney *v.* Overton, 1723
Sergeant *v.* Ingersoll, 1777
v. Ruble, 2133
v. Steinberger, 1876, 1881, 1882, 1920,
1936, 1969
Session *v.* Donnelly, 531
Seton *v.* Shade, 2050, 2168
Settegast *v.* Schrimpf, 216, 223
Settembre *v.* Putnam, 1622
Seuzeneau *v.* Saloy, 2059

Severance *v.* Griffith, 2082, 2103
Sevier *v.* Greenway, 2049
v. McWhorter, 1795
Sewall *v.* Cargill, 1556
v. Lee, 726, 750, 883
v. Proctor, 827
v. Roberts, 202, 1791, 1792, 1798
v. Sewall, 662, 774
Seward *v.* Huntington, 2152
v. Jackson, 1626, 2349
Sewell *v.* Angerstein, 105, 121
v. Denning, 1637
v. Holland, 1923
v. Hollian, 1923
v. Howard, 403
Sexton *v.* Chicago Storage Co., 1122
v. Wheaton, 648, 1626
Seymour's Case, 379, 372, 390, 456, 457, 827, 884,
885
Seymour *v.* Canandaigua, N. F. & R. Co., 2017,
2018
v. Carl, 2208
v. Darrow, 2027, 2028
v. Delancey, 1033, 1697, 1758
v. Davis, 2074, 2172
v. Freer, 94, 1090, 1665, 1690, 1782
v. Harvey, 1847
v. Lewis, 2244
v. McDonald, 1184
v. McKinstry, 2109
v. Sanders, 2309
Seys *v.* Price, 953
S. F. & O. R. Co. *v.* Oakland, 1029
Shaak's Estate, *In re*, 755
Shackleford *v.* Bailey, 2295
v. Hall, 270, 1858
v. Handley, 1696
Shaeffer *v.* Chambers, 1087, 2185
v. Mill, 778
v. Ward, 814
v. Weed, 744, 745
Shafer *v.* Wilson, 2233
Shaffer *v.* Anderson's Admr., 891
v. Enew, 2283
v. Richardson's Admr., 887, 892, 894
v. Shaffer, 947
v. Sutton, 1299, 1303, 1327
v. Weed, 922, 923
Shaftesbury *v.* Duchess of Marlborough, 1832
Shafto *v.* Butler, 1361
Shakespeare *v.* Alba, 996
Shall *v.* Biscoe, 2004, 2007
Shallenberger *v.* Ashworth, 1364
Shaller *v.* Brand, 911
Shankland's Appeal, 273, 299, 500, 1583, 1606,
1675, 1741, 1748
Shanks *v.* Blackiston, 415
v. Klein, 1964
Shannon *v.* Bradstreet, 1039, 1040
v. Burr, 1111, 1123
v. Frost, 34
v. Marsellis, 2180
v. Marsellis, 2154
Shapland *v.* Smith, 300, 1605, 1797
Shapleigh *v.* Pillsbury, 1556, 1557, 1569
Share *v.* Anderson, 947
Sharkey *v.* McDermott, 2282
v. Sharkey, 2039
Sharman *v.* Eakin, 2309
v. Jackson, 292
Sharon *v.* Davidson, 1901
Sharon Iron Co. *v.* Erie, 1855
v. City of Erie, 1869
Sharp *v.* Bailey, 1477, 1480
v. Barker, 2089
v. Fly, 1789
v. Goodwin, 1622
v. Johnson, 1515
v. Orme, 2354
v. Pettit, 443, 461, 875, 876, 885
v. St. Sauveur, 750
v. Sharp, 308, 2333

- Sharp *v.* Speir, 1515, 2335
 v. Thompson, 416
 Sharpe *v.* Cossarat, 1677
 v. Gerry, 2027
 v. Kelley, 1146, 1221, 1297, 1309
 v. Orme, 2364
 Sharpless *v.* Borough of Westchester, 651
 v. Welsh, 1585
 v. West, 633, 670
 Sharpley *v.* Jones, 717, 731, 737
 Sharpsteen *v.* Tilton, 1810
 Shatterwhite *v.* Rosser, 2297
 Shattock *v.* Shattock, 1821, 1825, 1826
 Shattuck *v.* Gregg, 807, 835, 847, 851, 852, 862
 v. Lovejoy, 1058, 1138
 Shaver *v.* Shaver, 1920
 Shaw *v.* Beebe, 2303
 v. Beers, 515
 v. Beery, 1887
 v. Beveridge, 30, 31, 32, 38, 83
 v. Bill, 2018
 v. Bowman, 1208
 v. Boyd, 898, 954, 957
 v. Bunney, 2086, 2155
 v. Burton, 2082
 v. Farnsworth, 1000
 v. Foster, 2002
 v. Gould, 719
 v. Hearsey, 1887, 1919, 1930, 1931, 1932, 1938, 1952, 1967, 1969
 v. Hoadley, 2150, 2164
 v. Hussey, 344
 v. Lawless, 347, 1627, 1632
 v. Lenke, 101, 121, 135, 139
 v. Norfolk, 2040, 2041
 v. Norfolk Co. R., 2146
 v. Partridge, 1024, 1033, 1360, 1363, 1364, 1368, 1369, 2264
 v. Read, 1647
 v. Russ, 909
 v. Simmers, 1040
 v. Spencer, 1622, 1637, 1714, 1745, 1746, 1749, 1765
 v. Stenton, 1166
 v. Thompson, 820
 v. Walbridge, 2168
 v. Wallace, 983, 1287
 v. Weight, 422, 1553, 1594
 v. White, 823, 843, 844
 v. Wright, 288, 289, 1594
 Shaw, Jackson *ex d.*, *v.* Spear, 1160
 Shawhan *v.* Lang, 2258
 v. Long, 2251, 2257
 Shawmut Bank *v.* Boston, 1176
 Shawmut Nat. Bank *v.* Boston, 66, 1015
 Shaw's Trust, *Re*, 1038
 Shea's Appeal, 899
 Shea *v.* Sixth Ave. R. Co., 1195
 v. Tucker, 1651
 Sheafe *v.* Cushing, 534, 536
 v. Gerry, 2027, 2029
 v. O'Neil, 215, 673, 732, 864, 865
 Shearer *v.* Corbin, 2336
 v. Loftin, 1794
 v. Ranger, 729, 1002, 1093, 1094
 v. Shearer, 694, 1961, 1964, 1965
 Shebert *v.* Winston, 1440, 1975
 Sheckell *v.* Hopkins, 2051, 2055, 2168
 Shee *v.* Hale, 253, 260, 272, 273, 1677
 Sheecomb *v.* Hawkins, 1040
 Sheedy *v.* Reach, 1683
 Sheehy *v.* Miles, 1520, 1521, 1950
 Sheen, *Re*, Thomas, *Ex parte*, 105, 108, 110
 Sheerer *v.* Stanley, 2259
 Sheet's Estate, 500, 1675
 Sheets *v.* Peabody, 1722
 v. Selden, 1005, 1083, 1106, 1157, 1177, 1182, 2256
 Sheetz's Will, 416, 424
 Sheffield *v.* Lovering, 2286
 Sheible *v.* Bacho, 2056
 Sheilds *v.* Atkins, 1783
 Sheils *v.* Stark, 1969
 Sheirburn *v.* Cordove, 1516
 Shelby *v.* Hearne, 1074
 v. Shelby, 1782, 1874
 Sheldo *v.* Smith, 1795
 Sheldon *v.* Bird, 2170
 v. Bliss, 916, 935, 956
 v. Davey, 1269, 1271, 1293, 1319
 v. Edwards, 110, 125, 810, 2098
 v. Estate of Rice, 1715
 v. Hoffnagle, 2136
 v. Hopkins, 920
 v. School District, 1180
 v. Vail, 35
 v. Wildman, 1782
 v. Wright, 2158
 Shell *v.* Duncan, 891, 1453
 v. Martin, 2331
 Shelley's Appeal, 1509
 Shelley's Case, 302, 359, 423, 439, 440, 441, 460, 498, 881, 1530, 1693, 1604
 Shelley, Doe d., *v.* Edlin, 300, 1595, 1605
 Shelley *v.* Shelley, 60, 1609
 Shelton *v.* Alcox, 2276
 v. Armor, 2363
 v. Bliss, 933
 v. Carroll, 729, 847, 861
 v. Codman, 975, 1072, 1074, 1120, 1125
 v. Doe, 1212
 v. Eslava, 1144
 v. Lewis, 1622
 v. Marshall, 2056
 v. Orr, 1423, 1424
 v. Shelton, 1590
 Shepard *v.* Brewer, 1464, 1466
 v. Briggs, 1185
 v. Elliot, 2088
 v. Martin, 1213
 v. Merrill, 1172
 v. Philbrick, 47, 49
 v. Pybus, 1200
 v. Rinks, 1978
 v. Shepard, 322, 323, 646, 648, 2141
 v. Spaulding, 115, 130, 145, 146, 1164, 1187
 v. Taylor, 2096
 v. Wood, 2335
 Shepardon *v.* Rowland, 1911, 1924
 Shepherd *v.* Adams, 2153
 v. Burkhalter, 2123
 v. Cassidy, 1455, 1457, 1460, 1461, 1462, 1465, 1495
 v. Cummins, 996
 v. May, 2069, 2072
 v. Nottidge, 1620
 v. White, 1497, 1649
 Shephard *v.* Little, 1538
 Shepherd *v.* Commissioners of Ross Co., 1662
 v. McEvers, 1599, 1500, 1660, 1661, 1662, 1671, 1672, 1720, 1760, 1764, 1777, 1786, 1787, 1795, 1800
 v. Shepherd, 1697
 v. White, 1647
 v. Young, 1897
 Shepley *v.* Cowan, 2307, 2308
 Sheppard *v.* Pratt, 2094
 v. Wardell, 903
 Sheppard, Doe d., *v.* Allen, 1104
 Shepperd *v.* Cummins, 1322
 Sheratz *v.* Nicodemus, 2007
 Sherburne *v.* Jones, 1267, 1284
 Shersensbury's Case, 2340
 Sheridan *v.* Welsh, 2091, 2101
 Sherill *v.* Sherill, 2302
 Sherman *v.* Champlain Transp. Co., 1144, 1150
 v. Dodge, 297, 1548, 1549, 1550, 1605, 1753, 2315
 v. Dutch, 2251, 2257, 2258
 v. Kane, 1897
 v. Willett, 45, 821
 v. Williams, 1014, 1081, 1127, 1166, 1168
 Sherratt *v.* Bentley, 1788

- Sherrerd *v.* Cisco, 2235, 2237
Sherrid *v.* Southwick, 1471, 1472, 1524
Sherrill *v.* Hopkins, 2056
Sherrord *v.* Callegghan, 646
Sherry *v.* Picken, 51, 52
Sherwin *v.* Lasher, 2254, 2256
Sherwood *v.* Andrews, 1791
 v. Barlow, 2322
 v. Dunbar, 2132
 v. Harral, 1102
 v. Phillips, 1322
 v. Reade, 1515, 1755
 v. Seaman, 1197
 v. Vanderburgh, 764, 800, 870
Shibla *v.* Ely, 1781
Shiel *v.* McNitt, 1872
Shields *v.* Atkins, 373, 1782
 v. Batts, 717, 836
 v. Hunt, 838
 v. Keys, 667
 v. Kinbrough, 1087
 v. Loyear, 688, 1219
 v. Lozean, 1995, 1998, 2078, 2129, 2131
 v. Netherland, 486
 v. Shinn, 1752
 v. Stark, 1876
Shields' Heirs *v.* Batts, 735, 741
Shiells *v.* Blackburne, 1183
Shilling *v.* Holmes, 1081
Shillingford *v.* Good, 2259
Shillito *v.* Pullen, 1026
Shimer *v.* Hammond, 810, 2136
 v. Mann, 396
Shindelbeck *v.* Moon, 1085, 1198
Shinn *v.* Budd, 2137
 v. Fredericks, 2096, 2130
 v. Holmes, 307, 309, 312, 326
 v. Shinn, 1932, 1944, 2150
Shintz *v.* Lauferty, 995
Shipbrook *v.* Hinchinbroek, 1732, 1733
Shipe *v.* Renass, 1481
Shipley *v.* Fifty Assoc., 1202
Shipman *v.* Beers, 2223
 v. Horton, 1031
 v. Mitchell, 1274, 1315, 1317, 1319, 1330
Shippen's Appeal, 519, 520, 636, 746
Shipper *v.* Stokes, 2016
Shippey *v.* Derrison, 998, 1043
Shipwerth *v.* Steed, 1025
Shipwith's Exrs. *v.* Cunningham, 1601
Shirack *v.* Shirack, 1405
Shirey *v.* Postelthwaite, 353
Shirkey *v.* Hanna, 2147
Shirley *v.* Bunch, 2033
 v. Burch, 2060
 v. Jones, 2148
 v. Shirley, 1361, 1371, 1561, 2008
 v. Sugar Refining Co., 2006
 v. Terne, 2354
Shirras *v.* Craig, 2022, 2023, 2027, 2028, 2030,
 2036, 2123
Shirtz *v.* Shirtz, 791, 823, 841, 842, 845, 876
Shitz *v.* Dittenbach, 2004
Shivers *v.* Goar, 267
Shober *v.* Houser, 1703
Shoemaker *v.* Huffnagle, 416, 433
 v. Simpson, 113, 116
 v. Smith, 1613, 1651
 v. Walker, 679, 703, 781, 815
Shollenberger *v.* Brinton, 2253
 v. Filbert, 2251
Shone *v.* Larsen, 2366
Shonk *v.* Brown, 251, 257, 904, 1371, 1561
Shoofstall *v.* Powell, 414, 415, 1806
Shook *v.* Shook, 1885
Shoplane *v.* Royderer, 1022
Shore, Doe d., *v.* Porter, 1135, 1136, 1254, 1270,
 1290, 1301, 1308, 1334
Shores *v.* Carley, 604, 692, 693, 703
Shorey *v.* Farrell, 1270
Short *v.* Battle, 2012
Short *v.* McGruder, 1432
Short, Doe d., *v.* Prettyman, 1984
Shortall *v.* Hinckley, 588, 632, 633, 634, 635,
 641, 642, 643, 651, 1366
Shortz *v.* Unangst, 1730, 1385
Shote *v.* Tighe, 976
Shotwell *v.* Mott, 1659
 v. Sedam's Heirs, 923, 924
 v. Shotwell, 772
Shore *v.* Dow, 1918
 v. Sarsen, 2123
Shotwell *v.* Smith, 2067
Shouse *v.* Krusor, 2251, 2254, 2257, 2259
Shouton *v.* Kilmer, 1403
Shovelton *v.* Shovelton, 1629, 1633
Show *v.* Hussey, 536
 v. Show, 491
Shrank *v.* Zubler, 2299
Shreve *v.* Hankinson, 1036
Shrewsbury's Case, 570, 1277
Shrieker *v.* Field, 2145
Shrieve *v.* Stokes, 2233
Shroder *v.* Brennenman, 2220
Shropshire *v.* Burns, 2343
 v. Shepperd, 1244
Shroyer *v.* Nicknell, 1929
Shrunk *v.* Schuylkill Nav. Co., 69
Shryock *v.* Waggoner, 1622, 1748
Shubert *v.* Stanley, 2055
Shufelt *v.* Shufelt, 2083, 2111
Shulenberg *v.* Herriman, 1861
Shull *v.* Kennon, 1979, 1980
Shult *v.* Baker, 1153
Shultz *v.* Elliott, 1149
 v. Shultz, 323
 v. Sprain, 2249, 2251
Shumway *v.* Collins, 1050, 1058, 1073, 1115, 1129,
 1174
Shury *v.* Piggott, 2208
Shute *v.* Grimes, 2077, 2084
 v. Harder, 1579
Shutler's Case, 2204, 2352
Shutt *v.* Rambo, 346
Shuttleworth *v.* Greaver, 918, 944
Shutz *v.* Desenberg, 2052
Sibley *v.* Hoar, 983
 v. Johnson, 2346
 v. Williams, 706
Sicard *v.* Davies, 2338
Siceloff *v.* Redman's Admr., 118, 440
Side *v.* Hodley, 2241
Sidenberg *v.* Ely, 504, 2089
Sidle *v.* Maxwell, 2120
 v. Waters, 1588
Sidmouth *v.* Sidmouth, 682, 1640, 1647
Sidney *v.* Sidney, 664, 939, 963, 965
 v. Stevenson, 2002
Siefke *v.* Roch, 2264
Siemasen *v.* Bofer, 216
Siemon *v.* Schurck, 1622, 1962
Sientes *v.* Odier, 1213
Siewert *v.* Hamel, 2165, 2167
Siglar *v.* Van Riper, 1917
Sigmund *v.* Howard Barker, 1079
 v. Wilkins, 1067
Sigourney *v.* Eaton, 1918
 v. Munn, 824, 825, 1777, 2359
 v. Stockwell, 734
Silcock *v.* Farmer, 1141
Sill *v.* Worswick, 368, 719, 2057, 2288
Sillard *v.* Robinson, 305
Sillers *v.* Lester, 2018, 2019
Silloway *v.* Brown, 1403, 1405, 1425, 1449, 1503,
 1903, 1907, 1998
Silsbury *v.* McCoon, 62
Silsby *v.* Allen, 1264, 1300, 1301, 1312, 1322,
 1325, 1326, 1336, 1337
 v. Bullock, 635, 638, 650, 651, 657
Silva *v.* Cambell, 1139
Silver Lake Bank *v.* North, 1541, 2014, 2090,
 2136
Silvernail *v.* Cole, 55

- Silverstein *v.* Stern, 2260
 Silvester *v.* Ralston, 1022
 v. Wilson, 288, 1594, 1605, 1712
 Silvester ex d. Law *v.* Wilson, 299, 300
 Silvey's Estate, 918, 943
 Silvey *v.* Summer, 1164
 Sinar *v.* Canady, 708, 709, 712, 716, 725, 726,
 727, 797, 821, 879, 893, 922
 Simers *v.* Sallus, 47, 1125, 1172
 Simmons *v.* Brown, 1247
 v. Gooding, 675
 v. Hervey, 2340
 v. Johnson, 1504
 v. Lyles, 837, 884
 v. McElwain, 646, 648
 v. Norton, 543, 544, 559, 1227
 v. Palles, 1793
 v. Sines, 2217
 Simon *v.* Walker, 1425
 Simonds *v.* Powers, 1517
 v. Simonds, 250, 261, 263, 1682, 1862
 v. Turner, 1108
 Simons *v.* Farren, 1103
 Simonson's Estate, 2354
 Simonton *v.* Cornelius, 1932, 1933, 1940
 v. Gray, 783, 802, 808, 810, 1580, 2097
 v. Houston, 938, 948, 949
 Simpkin *v.* Ashurst, 1354
 Simpkins *v.* Rogers, 1267, 1268, 1280
 Simpson *v.* Ammons, 1969, 1971
 v. Downing, 2299
 v. Feltz, 1242, 1243
 v. Gutteridge, 1021, 1888
 v. Kelso, 75
 v. Leach, 787
 v. McAllister, 832
 v. Mundee, 2005, 2364
 v. Pearson, 1944, 2301
 v. Robert, 2025
 v. Savings Bank, 1518
 v. Seavey, 1897
 v. Simpson, 436
 Sims *v.* Dame, 1923
 v. Humphries, 1344
 v. Hundley, 2160
 v. Irvine, 2305
 v. McClure, 1034
 v. Ray, 1830
 v. Rickett, 645
 v. Thompson, 1425
 v. Walsham, 1430
 Simson *v.* Brown, 2072
 Sinclair *v.* Armitage, 2015
 v. Jackson, 1038, 1040, 1731, 2300
 v. Slawson, 2365
 Singer Manfg. Co. *v.* Sayre, 994, 1315, 1316,
 1317
 Singleton *v.* Bremer, 236, 282
 v. Huff, 1411
 v. Scott, 1667, 1755, 1758
 v. Singleton, 835, 836, 849, 860
 Singleton's Heirs *v.* Singleton's Exrs., 737, 859
 Singstack *v.* Harding, 1707, 1766, 1769
 Sinnet *v.* Herbert, 1872
 Sinnickson *v.* Johnson, 198
 Sip *v.* Lawback, 856
 Sir Ralph Bovy's Case, 1626
 Sisk *v.* Smith, 801, 927
 Sisson *v.* Donnelly, 281, 284, 286
 v. Hibbard, 117, 141, 143
 Sistare *v.* Sistare, 750, 774
 Siter *v.* M'Clanachan, 76, 2140
 Sitliff *v.* Forgey, 750
 Sitzler *v.* Jackson ex d., *v.* Waltermire, 712
 Skaggs *v.* Elkus, 1327, 1330
 v. Nelson, 2006
 Skally *v.* Shute, 1166, 1168
 Skeel *v.* Spraker, 520, 811, 1580, 2036, 2123, 2127,
 2131
 Skidmore *v.* Ramline, 1034
 Skillen *v.* Loyd, 346
 Skillman *v.* Temple, 2130
- Skinner *v.* Beatty, 1491, 1497, 2157
 v. Buck, 1999, 2076, 2146, 2151
 v. Crawford, 2296
 v. Dayton, 1870, 1871, 1872
 v. Harrison Township, 1657
 v. Hendrick, 2047
 v. Miller, 2047, 2052, 2168, 2169
 v. Reynick, 1488
 v. Wilder, 56, 57
 v. Young, 2169
 Skipwith's Exrs. *v.* Cunningham, 1600
 Skipworth *v.* Cunningham, 1789, 1791, 1794
 Skrine *v.* Walker, 1633
 Slater *v.* Breese, 2024
 v. Dangerfield, 423
 v. Jepherson, 210
 v. Nason, 216, 672, 673
 v. Rawson, 206, 601, 2297
 Slator *v.* Brady, 1031
 v. Trimble, 1031
 Slattery *v.* Wason, 1677, 1678
 Slaughter *v.* Foust, 839
 Slaymaker *v.* Gettysburgh Bank, 43
 Slayton *v.* Blount, 234
 Sledge *v.* Reid, 1247
 Slee *v.* Manhattan Co., 2016
 Sleight *v.* Strider, 411, 412
 Sleight *v.* Read, 234
 Slemmer *v.* Crampton, 479
 Slevin *v.* Brown, 1553, 1797
 Slice *v.* Derrick, 1976
 Sloan *v.* Coolbaugh, 1523
 v. Holcomb, 2061
 v. Whitaker, 947
 v. Whitman, 868
 Sloane *v.* McConahy, 1555
 Slocum *v.* Catlin, 811
 v. Hooker, 2343
 v. Marshall, 1593
 v. Seymour, 53, 55
 v. Slocum, 434
 Sloper *v.* Saunders, 1258
 Slowey *v.* McMurray, 2054
 Slowley *v.* McMurray, 2044, 2045
 Slughter *v.* Foust, 2106
 Small *v.* Clifford, 1882, 1912, 1914, 1968
 v. Marwood, 1713, 1788
 v. Nairne, 257
 v. Proctor, 211, 831
 Smalley *v.* Hickok, 2174
 Smallman *v.* Onions, 576
 Smart *v.* Allegaert, 2268
 v. Morton, 91, 92, 93, 2233, 2237
 v. Taylor, 756
 v. Whaley, 755, 756, 769, 770
 Smelting Co. *v.* Kemp, 2304
 Smiles *v.* Hastings, 2222
 Smiley *v.* Fries, 2301
 v. Van Winkle, 1122, 1159, 1160, 1164
 v. Wright, 781, 885, 923, 924
 Smilie *v.* Biffle, 75, 1723, 1784, 1785
 Smillie *v.* Titus, 2060
 Smith's Appeal, 414, 444, 788
 Smith, *Re*, 95, 1432
 Smith *v.* Ackerman, 729, 730, 1094
 v. Acton, 1782, 1783
 v. Adams, 781, 2230
 v. Addleman, 782, 822, 841, 842, 844
 v. Aiken, 1236
 v. Allen, 1481, 1956, 1962, 2012
 v. Allt, 1131, 1135, 1317
 v. Ankns, 1177
 v. Ankrum, 1126, 1175, 2269
 v. Atkins, 1050
 v. Ausborne, 1906
 v. Baldwin, 932
 v. Barrett, 1019, 1029
 v. Bell, 302, 339, 345, 419, 1131, 1132, 1806
 v. Benson, 56, 141
 v. Berry, 306, 308, 309
 v. Blaisdell, 1138, 1140, 1150
 v. Bowen, 1548, 1592, 1808, 1809, 1810

Smith v. Brannan, 1861
v. Brannon, 1849
v. Brinker, 1108, 2262
v. Bryan, 51, 52, 55
v. Bunn, 1466
v. Burnham, 1623, 1634
v. Burtis, 209, 210, 211, 212, 1917, 2297
v. Calloway, 1781
v. Carney, 1094, 1095
v. Carroll, 144
v. City of Rochester, 69, 70
v. Clark, 249, 1770, 2264
v. Clay, 872
v. Clayton, 1205
v. Coe, 1278
v. Coffin, 307
v. Collyer, 574, 577
v. Colson, 2250
v. Columbia Ins. Co., 2114, 2118
v. Colvin, 670, 679
v. Commonwealth, 135, 136
v. Cooke, 491
v. Cooper, 516
v. Countryman, 1110
v. Croom, 1456
v. Crosby, 2044
v. Cushing, 2303
v. Daniel, 552, 1759, 1764, 1777
v. Darby, 92, 93, 94
v. Day, 1040
v. Death, 1844
v. De Russey, 2301
v. Deschaumes, 1425
v. Dinsmoor, 2138
v. Dinsmore, 2136
v. Dodds, 974, 975
v. Doe, 1807
v. Dorr, 2283
v. Durell, 2132
v. Dyer, 1996, 2085, 2102, 2104
v. Eldridge, 1258
v. Elliott, 1194
v. Emerson, 1964
v. Estell, 974
v. Eustis, 2182
v. Evans, 2352
v. Fellows, 795
v. Floyd, 2191, 2194, 2250, 2273, 2287
v. Ford, 1592
v. Freeman 1000
v. Frost, 1620
v. Fulkinson, 338
v. Garland, 1791
v. Godfrey, 2056
v. Goodwin, 2186
v. Grant, 1253
v. Green, 2172
v. Hance, 498
v. Handy, 901, 902, 911
v. Harrington, 323, 1604, 1753
v. Harrison, 977, 1249, 2262, 2263, 2264
v. Heiskell, 107
v. Hitchcock, 2100
v. Hosmer, 2298
v. Houston, 1259, 2271
v. Howell, 903
v. Hoyt, 2157
v. Hunt, 2363
v. Hurst, 2083
v. Jackson, 801, 814, 818, 1963
v. Jewett, 541
v. Johns, 2077
v. Johnson, 46, 136, 2084
v. Jordan, 2126
v. Kehr, 1481
v. Kelley, 800, 2074, 2085, 2100, 2128
v. Kenrick, 2227, 2231
v. King, 1021, 1906
v. Kinkaid, 2271
v. Knight, 1924
v. Kniskern, 916, 934, 955
v. Knowlton, 523, 1786

Smith v. Lavitts, 1794
v. Lewis, 2080, 2091
v. Littlefield, 1130, 1132, 1135, 1317, 1346, 1347, 1350
v. Low, 1023
v. Lynne, 1791
v. Malings, 2268
v. Mallone, 1467
v. Manlings, 1174
v. Mapleback, 2252
v. Marrable, 1055, 1168, 1200
v. Marc, 1489, 1516
v. Matthews, 1589, 1592, 1692
v. Mayo, 1031
v. Maxwell, 645
v. McCampbell, 1093
v. McCann, 1709, 1711, 1750
v. McCarty, 765
v. McGregor, 61
v. Metcalf, 1553, 1709, 1797
v. Miller, 1047, 1479, 1506, 2198
v. Monmouth Ins. Co., 2115, 2116
v. Monmouth Mutual Fire Ins. Co., 240
v. Moore, 139, 253, 2080
v. Morehead, 660
v. Morrow, 2298
v. Mundy, 1159, 1212
v. Neale, 1000
v. Newton, 2059, 2161
v. Niel, 1625
v. Niver, 1162
v. North, 1076
v. O'Hara, 2238
v. Orton, 1746
v. Osborne, 316
v. Ostermeyer, 810
v. Otley, 1349
v. Pacard, 1518, 2157
v. Painter, 889, 890, 1773
v. Park, 1020
v. Parkhurst, 516
v. Parks, 1871, 2078, 2079
v. Pattom, 1634, 1646, 1647, 1648, 1651, 1700
v. Paysenger, 924
v. Pendergast, 1159
v. People's Bank, 2031, 2040
v. Pettie, 1248
v. Pollard, 2322
v. Porter, 2219
v. Poyas, 541
v. Price, 103, 104, 135
v. Pringle, 1134
v. Provin, 2160
v. Putnam, 1056, 1057, 1105, 1113
v. Quiggans, 1420, 1435, 1446
v. Raleigh, 1168, 1174
v. Rice, 1234
v. Roberts, 2097
v. Rowe, 1274
v. Rowland, 2005
v. Rumsey, 1481
v. Sanger, 2152
v. Schriver, 333
v. Shackleford, 744
v. Sharpe, 549, 552, 575
v. Shaw, 717, 1253
v. Shay, 2171
v. Shepard, 497, 1171, 1220
v. Sheperd, 2065
v. Simons, 983, 985, 990, 991, 1001, 1046
v. Sinclair, 2174
v. Smith, 300, 355, 469, 522, 712, 727, 731, 752, 769, 770, 772, 844, 848, 855, 857, 883, 912, 933, 953, 1219, 1393, 1606, 1627, 1634, 1651, 1718, 1883, 1906, 1933, 1947, 1956, 1975, 1979, 2005, 2007, 2104, 2134, 2164, 2229
v. Spencer, 690, 692
v. Stanley, 804, 829
v. Starr, 75, 317, 318, 329, 1673, 1674
v. Stewart, 1268, 1271, 1272, 1276, 1283, 1291, 2271

- Smith *v.* Stigleman, 1128
v. Strahan, 778, 779, 1613, 1615, 1639, 1640, 1646, 1647, 1651, 1658, 1703
v. Stuart, 1690
v. Surman, 54, 55
v. Tankersley, 2254
v. Taylor, 1027, 2063
v. Thomas, 2252, 2259
v. Thompson, 2012, 2013
v. Thurston, 1166
v. Townsend, 1703, 1727, 1735, 1745, 1772
v. Tritt, 49, 51, 52
v. Truslow, 2069, 2070
v. Union Ins. Co., 2116
v. United States, 3
v. Van Gilder, 1518
v. Van Ostrand, 344
v. Vincent, 2128
v. Waggoner, 141, 143
v. Watson, 1242
v. Wheeler, 1544, 1788
v. Whitebeck, 1060, 1154
v. Widlake, 1266, 1318, 1838
v. Wiggin, 2211
v. Wilkinson, 1691
v. Williams, 2301
v. Wooding, 1289
v. Wright, 1241
v. Zaner, 1657
 Smith ex d. Teller *v.* Burtis, 489, 518
 Smith d. Teller *v.* Lorillard, 517
 Smith's Heirs, *v.* Smith, 849
v. Stewart, 1213, 1268, 1272
 Smith, Jackson ex d., *v.* Adams, 672, 673, 1657
 Smith's Lessee *v.* Hunt, 1713
 Smith Paper Co. *v.* Servin, 133
 Smithdeal *v.* Smith, 203
 Smithdeal *v.* Gray, 1639, 1640, 1641, 1700, 1764
 Smithers *v.* Hooper, 76
 Smithurst *v.* Edmunds, 2018
 Smithwick *v.* Ellison, 80, 82, 1263
v. Jordan, 269, 1560
 Smoot *v.* Lecatt, 600, 664
v. Strauss, 2273
 Smyles *v.* Hastings, 2241, 2247
 Smyrna B. L. A. *v.* Worden, 1028
 Smyth *v.* Carlisle, 959
v. Tankersley, 1233, 1234
v. Mayor of New York, 96
v. Naugle, 1008
 Smythe *v.* North, 1114
 Snape *v.* Thourton, 1807
 Snavelly *v.* Pickle, 2046, 2176
v. Wagner, 485, 1773
 Snedecor *v.* Freeman, 1425
 Snedeker *v.* Warring, 103, 107, 113, 116, 133, 137, 1923
 Sneeld *v.* Ewing, 757, 758
 Sneed *v.* Atherton, 1990
v. Hooper, 1698
 Sneider *v.* Heidelberger, 1510
 Snelgrave *v.* Snelgrave, 942
 Snell *v.* Atlantic Fire & Marine Ins. Co., 2331
v. Kirby, 759
v. Young, 287
 Snelling *v.* Utterback, 1648, 1649, 1699, 1701
 Snoddy *v.* Kreutch, 2297
 Snodgrass *v.* Reynolds, 1245
v. Ricketz, 2302, 2305
 Snook *v.* Snook, 949
v. Sutton, 1022
 Snow *v.* Cutler, 1040
v. Orleans, 2021
v. Parsons, 2225
v. Perkins, 80
v. Stevens, 783
v. Tift, 829
 Snowden *v.* Craig, 132
v. Dunlavey, 1980, 1984
v. McKinney, 1286
 Snowden *v.* Dales, 253
v. Pales, 1576
 Snowdon *v.* Wilas, 72
 Snowhill *v.* Snowhill, 1810
 Snyder *v.* Kunkleman, 2273
v. Riley, 1120, 2258, 2259
v. Snyder, 783, 803, 810, 940, 2097
v. Stafford, 2153, 2154
v. Vaux, 62
v. Wolford, 1643
 Sobeys *v.* Brisbee, 997
 Society *v.* Clendinen, 1837
v. Haight, 983
 Society for Propagation of the Gospel *v.* Hartland, 297, 1548
v. New Haven, 1554
 Sock *v.* Suba, 1984
 Sockett *v.* Wray, 1836
 Soggins *v.* Heard, 1643, 1781
 Solier *v.* Massachusetts General Hospital, 2329, 2333
v. Trinity Church, 31, 39, 40, 41, 514, 2333
 Solary *v.* Hewlett, 1443, 1444
 Solme *v.* Bullock, 2197
 Solomon *v.* Congregation B'nai Jeshurun, 39
v. Fitzgerald, 1964, 1965
 Soltau *v.* Soltau, 682, 683
 Somers, Den ex d., *v.* Peirson, 412, 415
v. Pumphrey, 986, 987, 2345
 Somersset *v.* Fogwell, 982, 2198
 Somes *v.* Skinner, 2080
 Sommers *v.* Johnson, 1517
 Soper *v.* Guernsey, 2032, 2064
 Sorrels *v.* Self, 2309
 Souders *v.* Van Sickles, 2065
 Souland *v.* United States, 2, 3
 Soule *v.* Abbe, 2027
v. Barlow, 2297
v. Soule, 465
 South *v.* Thomas, 1723
 South Bridge Savings Bank *v.* Stevens Tool Co., 106
 South Cong. Meeting-House *v.* Hilton, 1001
 Southall *v.* Leadbetter, 1102
 Southard *v.* Central R. Co., 1849, 1855, 1861, 1867, 1972
v. Dorrington, 2089
 Southerin *v.* Mendum, 492, 1998, 2074, 2105, 2107, 2182
 South Scituate Savings Bank *v.* Ross, 1754
 Southsett *v.* Stowell, 1569
 South-Side Town M. & M. Co. *v.* Rhodes, 1689
 Southworth *v.* Smith, 1922
v. Southworth, 1912
v. Van Pelt, 799
 Souverby *v.* Arden, 1791
 South Wales R. Co. *v.* Wythe, 1083
 Southwestern R. Co. *v.* Thomason, 42
 Soutter *v.* McRea, 1999
 Souverbye *v.* Arden, 2354
 Sowers *v.* Vie, 1225
 Spaulding *v.* Shalmer, 1749
 Spangler *v.* Stanler, 225, 711, 784, 785, 788, 821, 823, 969, 974
 Spachius, Den ex d., *v.* Spachius, 450, 470
 Sparhawk *v.* Cloon, 253, 273
 Sparger *v.* Compton, 1513
 Sparhawk *v.* Bagg, 1998, 2064
v. Broome, 1114
v. Sparhawk, 1662
 Sparkman *v.* Gove, 2068, 2069
 Sparks *v.* State Bank, 138, 2124, 2126
 Sparrow *v.* Hoven, 2297
v. Kingman, 764, 870
v. Pond, 53
v. Shaw, 422
 Spaulding *v.* Brent, 2349
v. Chicago & N. W. R. Co., 568
v. Crane, 1443
v. Hallenbeck, 266
v. Warren, 2298
v. Woodward, 1972, 1973
 Speake *v.* Kinard, 890

- Spear *v.* Cutter, 1152
v. Fuller, 1058, 1143, 1150
v. Fulton, 1138
v. Lowell, 1034
v. Orendorf, 1316
v. Spear, 1715
Speckles *v.* Sax, 1084, 1086
Speidel *v.* Henrich, 1782
Speight, *Re*, 1664
v. Gaunt, 1713, 1714, 1720, 1724, 1728
Speiglemeyer *v.* Crawford, 2136
Speir *v.* Opier, 1032
Spelman *v.* Aldrich, 1428
Spence *v.* Spence, 300, 1606, 1693
v. Steadman, 1027, 2046, 2254
Spencer's Case, 982, 1070, 1071, 1074, 1075, 1077,
1078, 2250
Spencer *v.* Austin, 1908
v. Ayrault, 811, 1580
v. Carr, 1016
v. Chase, 370, 373
v. Chick, 412
v. Clarke, 436
v. Geissman, 1394, 1502
v. Godwin, 1624
v. Harford, 2157
v. Kunkle, 983
v. Lapsley, 2304
v. Lewis, 1360
v. Roper, 523
v. Spencer, 658, 795, 1734
v. Tobey, 1282
v. Waterman, 2085
v. Weston, 867, 875, 930
Spencer, Doe d., *v.* Clark, 436
Spendolmes *v.* Burritt, 1019
Spenesly *v.* Valentine, 2217
Sperring *v.* Rockfort, 1373
Sperry *v.* Pond, 259
v. Sperry, 1061, 1155, 1861, 1862, 1867
Sperry's Lessee *v.* Pond, 265, 266, 269, 478, 481,
1852
Spessard *v.* Rohrer, 289
Spicer *v.* Spicer, 769, 770
Spicer, Doe d., *v.* Lea, 1308
Spielmann *v.* Kliest, 2036
Spies *v.* Chicago & E. I. R. Co., 2019
Spillerb *v.* Spiller, 2151
Spindle *v.* Shreve, 1747, 1748
Spindler *v.* Atkinson, 1768, 1771, 1773
Spinning *v.* Spinnings, 837
Spirts *v.* Wells, 1975
Spoonier *v.* Brewster, 33, 60
v. Lovejoy, 302, 305, 308, 335, 341, 346,
348, 1593, 1632, 1684
v. Spooner, 1159
Sprague *v.* Barnard, 1684
v. Duel, 2345
v. Dull, 1034
v. Martin, 2142
v. Quinn, 1275, 1279, 1297
v. Spargue, 297, 1607
v. Woods, 1537, 1538
Spraker *v.* Cook, 2249
v. Van Alstyne, 340, 342
Sprange *v.* Barnhard, 347, 1627, 1632
Sprecker *v.* Wakeley, 1518
Spriggs *v.* Bank of Mt. Pleasant, 2046, 2048,
2049
Spring *v.* Hyde Park, 2260
Springer *v.* Arundel, 329, 336, 1673
v. Berry, 1539, 1647, 1658
v. Phillips, 2262
v. Shields, 730
v. Young, 1900
Springfield, City of, *v.* Norris, 2227
Springle *v.* Shields, 729, 841
Springstein *v.* Schermerhorn, 517
Spruill *v.* Moore, 322
Snurgeon *v.* Collier, 2051
Spurgin *v.* Adamson, 2074, 2171
Spurr *v.* Taimble, 522, 523
Squire *v.* Harder, 1612, 1635, 1700
Squires *v.* Clark, 1898, 1912
v. Huff, 1254, 1256, 1263, 1303, 1319, 1337
Stacey *v.* Elph, 1660, 1788
v. Rice, 1602
Stackable *v.* Stackable's Estate, 1891
Stackberg *v.* Mosteller, 997, 1013
Stacky *v.* Keefe, 1920, 1943
Stackpole *v.* Arnold, 2047
v. Beaumont, 270, 1848
v. Curtis, 2246
Stacy *v.* Vermont Central R. Co., 1292
Stadden *v.* Hazzard, 999
Staepier *v.* Knerr, 1945
Stafford, *In re*, 1719
v. Buckley, 24, 44, 435, 819
v. Coyney, 2206
v. Stafford, 2359
v. Van Rensselaer, 2005, 2125
Stagg *v.* Eureka Tanning & Currying Co., 1216,
1217
Stahl *v.* Stahl, 819
Stahle *v.* Spohn, 1217
Stainback *v.* Geddy, 2073, 2171
Staines *v.* Morris, 2263, 2265
Stainforth *v.* Fox, 1001
Stainsbury *v.* Matthews, 50
Stall *v.* Cincinnati, 1749
v. Wilbur, 821
Stambaugh *v.* Yeats, 47
Stamford Bank *v.* Benedict, 2136
Stamper *v.* Griffin, 1259
Stamps, Den ex d., *v.* Irwine, 1231
Stanard *v.* Eldridge, 2000
Stanberry *v.* Sillon, 2336
Stancer *v.* Roe, 1158
Stancliffe *v.* Hardwick, 1246
Standard Bank *v.* Stokes, 2235
Standen *v.* Christmas, 1120
v. Standen, 1823
Standish *v.* Dow, 2148
Stanfield *v.* Hobson, 2095
St. Andrew's Church's Appeal, 1076
Stanford *v.* Andrews, 2027
v. Hurlestone, 571
v. Kempton, 2103
Stanhope *v.* Suplee, 106
Stanley *v.* Beatty, 2147, 2148
v. Brunswick Hotel Corp., 998, 1017, 1019,
1043
v. Colt, 257, 1594, 1607, 1705, 1712, 1739,
1752, 1850
v. Gilmer, 1579
v. Greenwood, 1379, 1387, 1395, 1431,
1445
v. Leonard, 300
v. Stanley, 19, 315
v. Stocks, 2155, 2181
v. Towgood, 1098
v. Valentine, 2134
Stansbury, Jackson ex d., *v.* Farmer, 1356
Stansell *v.* Roberts, 1492, 2121
Stansfield *v.* Habbergham, 231, 1572, 1638
v. Mayor of Portsmouth, 1158
Stanton *v.* Hall, 1372, 1677
v. King, 1578
v. Lewis, 2
Stantons *v.* Thompson, 810, 2096, 2098, 2130
Stanwood *v.* Clappitt, 2177
v. Dunning, 765
v. Stanwood, 647
Staple *v.* Heyden, 2222
Staples, *Ex parte*, 492
v. Anderson, 1110, 1168, 1200
v. Brown, 635, 638, 650
v. Emery, 79, 106
Stapley *v.* Cowan, 2306
Starbird *v.* Barrons, 1247
Starin *v.* Mayor of New York, 1029
Stark *v.* Barnett, 1967
v. Cheatham, 2083
v. Hunton, 916, 934

- Stark *v.* McGown, 2325
v. Mercer, 2158, 2165
v. Stark, 2288
 Starke *v.* Etheridge, 2060
v. Harrison, 1364
v. Starke, 1782
 Starkweather *v.* Martin, 2363
 Starks *v.* Traydor, 223
 Starling *v.* Blair, 2024
v. Parker, 42
 Starr *v.* Ellis, 811, 2096
v. Jackson, 1252
v. Moulton, 1739
v. Pease, 632, 663, 769, 893
v. Peck, 751
 Starry *v.* Starry, 862
 State *v.* Atherton, 2206
v. Atwood, 671
v. Auditor, 671
v. Bank of Maryland, 1554, 2342
v. Batesm, 225
v. Beakmo, 215, 216
v. Bonham, 99, 125
v. Boston, C. & M. R. Co., 215, 216, 224
v. Brown, 2136
v. Burwell, 1237
v. Canatoo National Intelligencer, 87
v. Carver, 2206
v. Cincinnati, 1754
v. Collector of Bordentown, 1456
v. Crowell, 233
v. Curtis, 1287, 1288
v. Daniells, 1456
v. Diveling, 1422, 1424
v. Davis, 2068
v. Dawson, 2325
v. Doherty, 2324
v. Elliott, 115, 145, 1268
v. Ferguson, 671
v. Finn, 1397
v. Foy, 1247
v. Franklin Falls Co., 2325
v. Fry, 893
v. Geddis, 1524
v. Glen, 69
v. Goodwill, 5
v. Graton, 2335
v. Green, 2243
v. Guilford, 1732, 1734
v. Harden, 2203
v. Hayes, 1288
v. Heron, 2336
v. Hodgskin, 597
v. Horn, 2243
v. Huntly, 706
v. Jewell, 1234
v. Johnson, 878
v. Jones, 1237
v. Killian, 220
v. Lash, 1515
v. Lawson, 2083
v. Martin, 2262, 2263, 2264
v. McCauley, 1036, 2263
v. McKay, 1766
v. McM. & M. R. Co., 1036
v. McMinnville, 1268
v. McReynolds, 2192
v. Meagher, 1713, 1714, 1724, 1728
v. Metz, 976
v. Moore, 706, 1350
v. Murphy, 594, 596, 751
v. Nanert, 2061
v. Newark, 2332
v. North Carolina, R. & D. R. Co., 1019
v. Noyes, 4
v. Page, 981, 990, 1010, 1048
v. Patterson, 752
v. Peck, 501
v. Poor, 50
v. Pottmeyer, 68, 70, 71, 72
v. Preble, 221
v. Romer, 1514
 State *v.* Rood, 595, 597, 752
v. Rose, 2272
v. Samuel, 595, 752
v. Simons, 2324
v. Slater, 1399
v. Smith, 219
v. Spencer, 1399, 1452
v. Staten, 2324
v. Stewart, 1309
v. Sutcliffe, 706
v. Sutton, 1036
v. Tachanatah, 595
v. Titus, 2155
v. Traphagen, 498
v. Trask, 1568
v. Trinity Church, 29, 30, 31, 34, 35
v. Warren, 1659
v. Winkley, 596
v. Whaley, 596
v. Wheeler, 198
v. White, 597
v. Whitener, 976
v. Williams, 596
v. Wilson, 596
v. Wincroft, 725
v. Worthington, 596
v. Yopp, 5, 199
 State Bank *v.* Cox, 1746
v. Hinton, 926, 928
v. McCoy, 1033
v. Smith, 1599
 State Bank of Elizabeth *v.* Ayers, 2071
 State of Georgia *v.* Canatoo National Intelligencer, 86
 State Savings Bank *v.* Kircheval, 132, 133
v. Kirchenall, 2080
 State ex rel. Barton County *v.* Kansas City, F. & G. R. Co., 233, 522, 523
 State ex rel. Spencer *v.* Moore, 522, 523
 State Treasurer *v.* Summerville & E. R. Co., 98
 Stauffer *v.* Morgan, 1947
v. Eaton, 1291
 Stayton *v.* Morris, 2250
 St. Clair *v.* Morris, 782, 925, 928
v. Williams, 860, 966, 1072, 1115
 Steacy *v.* Rice, 1561, 1597, 1655, 1694, 1695, 1711
 Stead *v.* Nelson, 1035, 1562, 2012
v. Newdigate, 76
v. Platt, 1360
 Steadman *v.* Gassett, 1354
v. Pulling, 678
 Stearns *v.* Barnett, 2349
v. Godfrey, 1144
v. Harris, 1861
v. James, 2242
v. Palmer, 290, 1796
v. Quincy Mut. Ins. Co., 2118
v. Sampson, 1355, 1356
v. Swift, 822, 841, 844, 901
 Stears *v.* Hollenbeck, 2091
 Stebbins *v.* Hall, 2068, 2150
v. Peeler, 1503
v. Watson, 2060
 Stedman *v.* Fortune, 717, 835
v. Gassett, 1319, 1350
v. McIntosh, 1134, 1135, 1136, 1256, 1257, 1271, 1299, 1307, 1310, 1313, 1315, 1319, 1324, 1334, 1335, 1337, 1342
 Steed *v.* Hinson, 2250
v. Preece, 95
 Steedman *v.* Weeks, 1982
 Steel *v.* Cook, 407, 433
v. Frick, 1001, 1234, 1237
v. Galleatly, 930
v. La Framboise, 819
v. Sioux Valley Bank, 910
v. Steel, 1371, 1998, 2037, 2040, 2042, 2043
 Steele, *in re*, 506
 Steele, Matter of, 541
 Steele *v.* Babcock, 1708
v. Boone, 2125

Steele v. Carroll, 781, 782
 v. Fabre, 46
 v. Johnson, 2299
 v. Lowry, 1610
 v. Marks, 2353
 v. Magee, 893
 v. Mills, 2254
 v. Taylor, 2305
 v. Thompson, 302, 309, 332
 Steen v. Wardsworth, 1219
 Steeple v. Downing, 2336
 Steere v. Childs, 2153, 2154
 v. Steere, 1590, 1592, 1612, 1635, 1653,
 1690, 1691, 1696, 1700, 1701
 Steers v. City of Brooklyn, 2294
 Stees v. Kranz, 1158
 Steffens v. Earl, 1271, 1327, 1329, 1330, 1333,
 1335, 1337, 1339, 1340
 Steffy v. Carpenter, 2226
 v. Steffy, 882, 990
 Stegall v. Stegall, 773, 887, 894, 921
 Steifel v. Mitz, 2268
 Steiger v. Hillan, 875
 Stein v. Burden, 2292
 v. Jones, 2263, 2264
 v. Hanck, 2223
 Steinbach v. Relief F. Ins. Co., 2330
 Steinhauer v. Kuhn, 1144
 Steininger v. Williams, 997, 2273
 Steinle v. Bell, 2158
 Steinman v. Ewing, 1375, 1376
 Steinway v. Steinway, 1581
 Stell's Appeal, 1732
 Stetz v. Shreck, 1952, 1954
 Stemple v. Hemminghouser, 216, 774
 Stephen's Appeal, 2005
 Stephen v. Beald, 1775
 v. Beal, 2150
 Stephens v. Bridges, 1165
 v. Cornell, 2070
 v. Gibbes, 947
 v. Hume, 603, 605, 612
 v. James, 1677
 v. Martin, 199
 v. Reynolds, 1004
 v. Sherrod, 766
 v. Smith, 760
 v. Stephens, 918, 944
 v. Westwood, 197
 Stephenson's Trusts, *In re*, 271
 Stephenson v. Haines, 2266
 v. Hancock, 2259
 v. Osborne, 1510
 v. Thompson, 1646
 Sterlien v. Daley, 2365
 Sterling v. Baldwin, 54, 56, 2020
 v. Penlington, 607, 1911
 v. Warden, 1351, 1356, 2212
 Stern v. Florence Sewing Machine Co., 1117,
 2264
 Sterne, *Ex parte*, 490
 Sternfels v. Clark, 1247
 Sterrett v. Wright, 2260
 Sterrick v. Dickinson, 1617
 Sterry v. Arden, 959, 1062
 Stetson v. Day, 740, 744
 v. Gulliver, 2041, 2364
 v. Kempton, 37
 v. Massachusetts Ins. Co., 2080
 v. Massachusetts Mut. Fire Ins. Co., 2357
 v. Patten, 1041
 Stevens v. Bridger, 1165
 v. Brown, 1999
 v. Buffalo & N. Y. C. R. Co., 98
 v. Buffalo & N. R. Co., 113
 v. Campbell, 250
 v. Cooper, 2072, 2076, 2176, 2181, 2184
 v. Dedham Institution, 2176
 v. Dewing, 285, 1005
 v. Doe, 2346
 v. Dufour, 2157
 v. Enders, 706, 1982

Stevens v. Cage, 1725, 1728
 v. Hampton, 2123, 2364, 2366
 v. Hollingsworth, 1434
 v. Hollister, 2298
 v. Hunt, 729
 v. Kelley, 72
 v. Mayor, 2357
 v. McNamara, 522, 523
 v. Nashua, 2206
 v. Owens, 777, 807, 833, 900, 901, 911
 v. Paterson & N. R. Co., 20
 v. Reed, 868
 v. Smith, 508, 611, 748, 749, 759, 761, 766,
 779, 781, 797, 820, 821, 827, 831, 832,
 940
 v. Stevens, 737, 739, 740, 778, 844, 847,
 848, 953, 965, 1074, 1498, 1640, 1647,
 2212, 2213
 v. Stevens' Heirs, 811
 v. Thompson, 65, 1893
 v. Watson, 2124
 v. Winskip, 317, 318, 319, 356, 743
 v. Winslop, 536
 v. Winthrop, 333
 Stevens, Jackson ex d., v. Silvernail, 1103, 1113
 Stevenson v. Coffern, 1901, 1928
 v. Dunlap's Heirs, 236
 v. Gray, 752, 754
 v. Leslie, 1741
 v. Lombard, 1072, 1073, 1115, 1174, 2262
 v. Wallace, 2231, 2240
 Stevenson's Heirs v. McReary, 517
 Stewart v. Apel, 996, 1044, 1300, 1301, 1321,
 1322
 v. Appeal, 1980
 v. Barclay, 609, 611, 692, 700, 703
 v. Barow, 259, 263
 v. Barrow, 1997, 1998, 2076, 2077, 2079
 v. Beard, 927
 v. Brady, 259, 263, 1858
 v. Brand, 1457, 1459
 v. Brown, 1399, 1514
 v. Caldwell, 2009
 v. Chadwick, 88, 1577, 1622, 1741, 1753
 v. Clark, 497, 501, 531, 2266
 v. Crosby, 2085, 2128, 2132
 v. Doughty, 47, 48, 49, 51, 52, 53, 498, 537,
 538, 540, 1205, 1206, 1207, 1234, 1238,
 1239
 v. Fitch, 2270, 2271
 v. Hall, 1794
 v. Hartman, 2220, 2327
 v. Hutchings, 2040
 v. Jones, 2288
 v. Kenower, 424
 v. Long Island R. Co., 1122, 1123, 2262
 v. Mackey, 1450, 1458, 1460, 1468, 1469,
 1475, 1478, 1488, 1489, 1490, 1491, 1495
 v. Martin, 733, 734, 838, 942, 944
 v. Mellish, 1615
 v. Pearson, 841
 v. Pettus, 1663, 1730, 1855
 v. Putnam, 1201, 1202
 v. Reditt, 2353
 v. Roderick, 1220
 v. Rogers, 1625, 1626
 v. Ross, 587, 589, 592, 593, 606, 652, 653,
 658, 668, 670, 672, 688
 v. Sanderson, 1719
 v. Smiley, 2257
 v. State, 1758
 v. Stewart, 654, 759, 795, 914, 917, 918, 955
 v. Stokes, 1737
 v. Walker, 344
 v. Winters, 268, 1103, 1104, 1107, 1184,
 1185
 v. Wood, 2009
 Stewart, Den d., v. Johnson, 915
 Stewart, Jackson ex d., v. Kingsley, 1283
 Stewart's Lessee v. Stewart, 794, 913
 St. Felix v. Rankin, 1892
 St. Helen's Smelting Co. v. Tipping, 2240

- Sticklehorn *v.* Hatchman, 563
 Stidman *v.* Mathews, 896, 903, 1777
 Stierlin *v.* Daly, 2335
 Stiger *v.* Mahone, 2166
 Siles *v.* Japhet, 1948
 v. Looney, 2056, 2059
 v. West, 756
 Still *v.* Spear, 273
 Stille *v.* Folger, 898, 947, 957
 Stillman *v.* Flenniken, 107
 v. White River Mfg. Co., 2226
 Stillson *v.* Stillson, 719
 Stillwell *v.* Doughty, 505
 v. Pease, 1666
 Stilphen *v.* Houdlette, 771, 919
 Stimmel *v.* Waters, 2263
 Stimpson *v.* Batterman, 1969
 v. Bishop, 2107
 v. Fries, 1795
 v. Thomaston, 764
 Stinchfield *v.* Milliken, 2089
 Stine *v.* Wilkson, 1755
 Stinebaugh *v.* Wisdom, 599, 601, 603, 610
 Stiner *v.* Cawthorn, 850
 Stines *v.* Dorman, 259, 267, 269
 Stinson *v.* Dousman, 1292
 v. Richardson, 1421, 1422
 v. Roas, 2064
 v. Ross, 2063
 v. Sumner, 745, 792, 793, 905, 906, 927
 Stoakes *v.* Barrett, 87
 Stoaie *v.* Stoaie, 661
 Stockand *v.* Bartlett, 1949
 Stockard *v.* Stockard's Admr., 1600, 1601, 1613, 1791, 1795
 Stockbridge *v.* Stockbridge, 1608
 Stockbridge Iron Co. *v.* Cone Iron Works, 1139, 1142
 v. Hudson Iron Co., 283
 Stockett *v.* Holliday, 647
 Stockport Water Works Co. *v.* Potter, 2227
 Stocks *v.* Booth, 30, 33
 Stockton *v.* Dundee Manfg. Co., 2156
 v. Ford, 1585
 v. Martin, 433, 437
 Stockwell *v.* Campbell, 103, 110, 113, 120, 126, 135, 136
 v. Couillard, 283
 v. Hunter, 20, 64, 66, 507, 1015, 1176, 1180
 v. Marks, 115, 145, 1310, 1315, 1334, 1336
 v. National Bank of Malone, 1428
 v. Phelps, 47
 v. Sargeant, 724, 725, 738
 Stoddard *v.* Gibbes, 601, 609, 611, 692, 693, 703
 v. Hart, 2003, 2030, 2031, 2129
 Stoddart *v.* Cutcompt, 923
 Stoddert *v.* Newman, 2260
 Stoeber *v.* Stoeber, 308, 2037, 2039, 2164
 Stoffel *v.* Schroeder, 2322
 Stokoe *v.* Singers, 2224
 Stokes *v.* Cooper, 1173
 v. Dawes, 236
 v. Detrick, 76
 v. Hensinger, 2247
 v. McAllister, 838
 v. McKibbin, 611, 653, 654, 655, 656, 677, 680, 689, 699, 1216, 1372
 v. Moore, 998, 1017, 1044
 v. O'Fallon, 750, 775, 889, 927
 v. Payne, 1832
 v. Solomans, 2170
 v. Upton, 123
 Stokoe *v.* Lingers, 2245
 Stomfil *v.* Hicker, 1300, 1314
 Stone *v.* Bishop, 1707
 v. Bohn, 2272
 v. Cheshire, 1194
 v. Darnell, 1442, 1497
 v. Ellis, 1870, 1871
 v. Gazzam, 647
 v. Godfrey, 2074, 2170
 v. Griffin, 1599
 Stone *v.* Hackett, 1594, 1791, 1792
 v. King, 1598, 1787, 1789, 1790, 1791
 v. Lane, 2140
 v. McMullin, 418, 420
 v. Newman, 386
 v. Patterson, 2250, 2258
 v. Proctor, 78, 79, 135
 v. Sprague, 1282
 v. Stone, 795
 v. Theed, 519, 1832
 v. Wait, 970
 Stonehewer *v.* Thompson, 2073, 2136, 2171
 Stoner's Appeal, 328
 Stonestreet *v.* Doyle, 1684
 Stoney *v.* Schultz, 2155, 2180
 Stookey *v.* Carter, 1923
 v. Stookey, 841
 Stoolfoos *v.* Jenkins, 604, 612, 614
 Stoops *v.* Devlin, 1218, 1315, 1316
 Stoppanios *v.* Richards, 2264
 Stopplebein *v.* Schulte, 726, 784
 Stopplekamp *v.* Mangeot, 1300, 1327, 1328, 1329, 1330, 1331, 1334, 1340, 1343
 Storer *v.* Batson, 673, 1538
 v. Freeman, 99
 v. Hunter, 49, 125
 v. Steiner, 1148
 Storm *v.* Manchang Co., 72
 v. Mann, 571, 574
 Storms *v.* Storms, 2030
 Story *v.* Marshall, 778, 1947, 1949
 v. Odin, 2223
 v. Saunders, 1908, 1913
 Stose *v.* Heissler, 2260
 Stott *v.* Rutherford, 1081
 Stoughton *v.* Leigh, 88, 89, 561, 692, 703, 710, 742, 778, 779, 790, 801, 811, 814, 853, 860, 861
 v. Pasco, 2029, 2030, 2032
 Stout *v.* Curry, 1906
 v. Folger, 2025, 2026
 v. Kean, 1120, 2250
 v. Keyes, 118, 458, 706
 v. Merrill, 1172
 Stoutenburgh, Jackson ex d., *v.* Murray, 518
 Stoutz *v.* Rouse, 2168
 Stouvenal *v.* Stephens,
 Stovall *v.* Austin, 678
 v. Barnett, 2359
 Stovell *v.* Bennett, 2350
 Stover *v.* Bounds, 2170
 v. Cadwallier, 1013, 1305
 v. Cory, 1800
 v. Eycleshimer, 2017
 v. Herrington, 1625
 Stow *v.* Steel, 781, 782, 799
 v. Tift, 765, 766, 805, 818, 829, 830, 1492, 2358
 Stowe *v.* Bowen, 1732
 Stowell's Case, 773
 St. Paul's Church *v.* Ford, 31, 32
 Straat *v.* Uhrig, 1637
 Strachn *v.* Force, 1412, 1413
 v. Foss, 1522
 Strafford *v.* Wentworth, 497
 Strahan *v.* Smith, 1318, 1326
 Strang *v.* Allen, 2174
 Stratford *v.* Twynam, 1770
 Strathmore *v.* Bowes, 659, 794
 Stratton *v.* Gold, 2007
 v. Rogers, 645
 v. Staples, 1202
 Strauss' Appeal, 2004
 Strawbridge *v.* Cartledge, 2349
 Strawn Exrs. *v.* Strawn's Heirs, 736, 867, 875
 Strawns *v.* Strawn, 1397
 Streaper *v.* Fisher, 1071, 2216
 Street *v.* Beal, 2171
 v. Bell, 2074
 v. Sanders, 723, 724, 789, 846
 Streeter *v.* Streeter, 1080
 Streubel *v.* Milwaukee & M. R. Co., 1518

- Stribling *v.* Ross, 885
Stricker *v.* Mott, 1980, 1984
Strickland *v.* Aldridge, 1701, 1738
 v. Hudson, 1023
 v. Parker, 96, 137, 142
Strickland, Doe d., *v.* Spence, 1333, 1337
Strickler *v.* Todd, 2242, 2292
 v. Tracey, 853
Striker *v.* Kelly, 1515
 v. Mott, 299, 1607
Strimpfler *v.* Roberts, 517, 1552, 1576, 1638, 1639,
 1641, 1648, 1653, 1654, 1700
Stringer *v.* Young, 2304
Striplin *v.* Cooper, 1485
Strode *v.* Russell, 2084
 v. Swim, 47
Stroebe *v.* Fehl, 1364, 1366, 1369, 1370
Strong *v.* Blanchard, 2184
 v. Bragg, 717, 733, 735, 736, 739
 v. Clem, 651, 670, 711, 733, 734, 736, 839,
 803
 v. Colter, 1904
 v. Converse, 728, 806, 808, 809, 873, 925,
 928, 2068, 2069, 2134
 v. Crosby, 1321, 1323
 v. Dennis, 722
 v. Doyle, 78, 79, 81, 143
 v. Gregory, 1825
 v. Jackson, 2108, 2111
 v. Manfs. Ins. Co., 2089, 2113, 2114, 2115,
 2117
 v. Skinner, 990
 v. Smith, 2364
 v. Stewart, 2045, 2048
 v. Waterman, 196
Stronghill *v.* Auterey, 1832
Strother *v.* Butler, 1909
 v. Law, 1670, 2147
Stroud, *In re*, 1266
Stroud *v.* Morrow, 319
Stryker *v.* Lynch, 1979, 1980, 1981
Stuart *v.* Beard, 891
 v. Bute, 134
 v. Kissam, 1371
 v. Palmer, 2324
 v. Phelps, 2060
 v. Walker, 344, 534
 v. Worden, 2166
Stubblings *v.* Village of Evanston, 1171
Stubbs *v.* Kahn, 2363
 v. Sargon, 1638
Stuck *v.* Mackey, 75
Stuckey *v.* Keef's Exrs., 1887, 1939
 v. Keefe, 1931, 1933
Studdard *v.* Lemmond, 2302
Studebaker Bros. Mfg. Co. *v.* McCargur, 2107
Stukely *v.* Butler, 55, 249, 499
Stults *v.* Sale, 1403, 1405
Stultz *v.* Dickey, 1208
Stump *v.* Findlay, 461, 515, 516, 1142
 v. Henry, 517, 1751
Stephen *v.* Leebas, 1110
Sturges *v.* Crowninshield, 1512
 v. Knapp, 1574
Sturgis *v.* Corp, 1562
 v. Ewing, 711
 v. Holiday, 1900
 v. Hull, 671
 v. Morse, 1784
 v. Paine, 1824
 v. Warren, 108
Sturm *v.* Atlantic Mutual Ins. Co., 631
Sturtevant *v.* Jaques, 1637
 v. Norris, 721
 v. Sturtevant, 1576, 1590, 1701
Suzyvesant *v.* Davis, 1138
 v. Hall, 2027, 2113, 2120, 2153, 2154, 2184
 v. Mayor, 1856, 1972
 v. Mayor of N. Y., 1862, 1864
 v. Woodruff, 2215, 2242, 2244
Styers *v.* Robins, 2331
Style *v.* Rector, 997, 1039, 1733
Styles *v.* Wardle, 2256
Suarez *v.* Pumpelly, 1587, 1662
Succession of Christie, 1397, 1407, 1410
Succession *v.* Navarro, 770
Suffern *v.* Butler, 2352
 v. Townsend, 1256, 1282
Suffern, Jackson ex d., *v.* McConnell, 1024
Suffolk Ins. Co. *v.* Boyden, 2118
Sugg *v.* Tillman, 2023
Suggate *v.* Suggate, 1475
Suiter *v.* Turner, 2366
Sullins *v.* Richmond, 897, 958, 960, 964
 v. Sullings, 964
Sullivan *v.* Bishop, 2252
 v. Burnett, 216
 v. Carberry, 115, 145, 147, 1253
 v. Cary, 1300, 1307, 1315, 1316, 1322, 1336
 v. Enders, 1256, 1261, 1337
 v. Hendrickson, 1499, 1504, 1518
 v. Jones, 142, 1313
 v. La Crosse, 1514
 v. McLenaus, 778, 1638, 1640, 1642, 1646,
 1990
 v. Sullivan, 1983
 v. Toole, 2021
Sully *v.* Nebergall, 930
 v. Schmidt, 1196
Sulphine *v.* Duubar, 2302
Sulzbacher *v.* Dickie, 1193
Summer *v.* Waugh, 2153
Summerlin *v.* Livingston, 883
Summers *v.* Babb, 710, 713, 718, 731, 733, 734,
 735, 737, 739, 741, 790, 791, 792, 793,
 822, 838, 841, 842, 844, 891, 914
 v. Brownley, 2158
 v. Cook, 54
 v. Darne, 830
 v. Darnell, 1864
 v. Donnell, 855, 858
 v. Pumphrey, 1032
 v. Roos, 2030
Summersworth Savings Bank *v.* Roberts, 2027,
 2028, 2029
Sumner *v.* Bromilow, 1158
 v. Coleman, 2151
 v. Hampson, 787, 824, 1671
 v. Partridge, 675, 696, 697
 v. Stevens, 2303
 v. Williams, 449, 1989, 2361, 2362
Sunney *v.* Patton, 786
Sumwalt *v.* Tucker, 1998, 2077
Sunday *v.* Boon, 282
Sunderland *v.* Sunderland, 1642, 1647
Supervisors, etc., *v.* Patterson, 1856
Surget *v.* Byer, 1757
Surplice *v.* Farnsworth, 1065, 1201
Surrogate, *Re*, of Cayuga County, 1824
Sury *v.* Brown, 982, 983, 2250
Sussex *v.* Roth, 1040
Sussex Co. Mut. Ins. Co. *v.* Woodruff, 2118
Suter *v.* Hillaird, 1686
Sutherland *v.* Brush, 1888
 v. Carter, 1234, 1246
 v. De Leon, 1517
 v. Goodnow, 1053
 v. Sutherland, 765, 2330
Sutliff *v.* Atwood, 984, 1100, 2249, 2257, 2262,
 2263, 2264
 v. Forgey, 713, 731, 733, 734, 736, 739, 741,
 767, 774, 1929
Sutphen *v.* Cushman, 2045, 2047
 v. Seebass, 1054
 v. Ellis, 2102
Sutter *v.* First Dutch Reformed Church, 34
 v. San Francisco, 1925, 1978
Sutton *v.* Aiken, 1563, 1654
 v. Askew, 711, 721, 727
 v. Burrows, 719, 847
 v. Calhoun, 2335
 v. Jervis, 791, 799, 800
 v. Mandeville, 2270
 v. Mason, 1999, 2078

- Sutton *v.* Miles, 472
 v. Robertson, 338
 v. Rolfe, 785, 1911
 v. Stone, 2145, 2147, 2157
 v. Sutton, 1759
 v. Temple, 1055, 1200
 v. Warren, 753, 754
 Sutton, Doe d., *v.* Harvey, 1040
 Sutton Parish *v.* Cole, 224, 1541, 1555
 Suydam *v.* Barber, 920
 v. Bartle, 2082
 v. Jackson, 1176
 v. Jones, 1074
 v. Moore, 1195
 v. Williamson, 1516
 Swabey *v.* Palmer, 1195
 v. Swabey, 2098
 Swafford *v.* Ferguson, 2343
 v. Whipple, 2349
 Swaine *v.* Kennerlay, 2281
 v. Perine, 510, 519, 727, 746, 783, 792, 794
 795, 796, 802, 814, 840, 866, 867, 880,
 892, 900, 912, 913, 915, 918, 927, 929,
 932, 952, 953, 955, 963, 2182
 Swaineburn *v.* Milburn, 1009
 Swallow *v.* Swallow, 1904, 1906
 Swan *v.* Clark, 995, 1010, 1319, 2259
 v. Patterson, 2177
 v. Swan, 1892
 v. Yapple, 2103, 2109
 Swann *v.* Wilson, 1220
 Swanner *v.* Swanner, 2254, 2355
 Swansborough *v.* Coventry, 2223
 Swart *v.* Service, 2045, 2047
 Swartwout, Jackson ex d., *v.* Johnson, 489, 513,
 517, 589, 590, 592, 593, 598, 602, 603,
 604, 605, 607, 608, 612, 614, 621, 622,
 623, 624, 629, 630, 692
 Swartz *v.* Ballou, 2340
 v. Leist, 2147
 v. Page, 2192
 Swazey *v.* American Bible Soc., 1687
 v. Little, 2270
 Swearinger, *In re*, 1424, 1426
 Sweat *v.* Hall, 647, 2348
 Sweeney *v.* Garrett, 1062
 v. Mallory, 923, 924
 Sweet *v.* Dutton, 291, 1675
 v. Gloversville, 1193
 v. Jacobs, 1617, 1618, 1619, 1643, 1644,
 1738, 1771
 v. Parker, 2045, 2048
 Sweetapple *v.* Bindon, 598, 609, 611, 679, 695
 Sweetland *v.* Sweetland, 2038
 Sweetzer *v.* Jones, 96, 133, 138, 2069
 v. Lowell, 1028
 Swezey *v.* Thayer, 2164
 v. Willis, 363
 Swenson *v.* Moline Plow Co., 2148
 Sweny *v.* Meany, 1978
 Swetland *v.* Swetland, 2045, 2052
 Swett *v.* Horn, 2131
 v. Patrick, 1908
 v. Sherman, 808, 809, 2178
 Swezey *v.* Shady, 924
 Swift *v.* Dean, 1149
 v. Dewey, 1474, 1490
 v. Edson, 2142, 2149
 v. Goodrich, 983
 v. Kraemer, 1497
 v. Kromer, 2134
 v. Moseley, 984
 v. Mutual Ins. Co., 1668, 2113, 2117
 v. Thompson, 105, 108, 110, 112, 114, 116,
 1186
 v. Tyson, 1516
 Swigert *v.* Bank of Kentucky, 2164
 Swinburne *v.* Swinburne, 1621, 1622, 1760
 Swinfen *v.* Swinfen, 2098
 Swinnoek *v.* Lyford, 2172
 Swisher *v.* Swisher, 2349
 Switzer *v.* Skiles, 1617, 1738
- Sword *v.* Low, 116, 1085, 1139, 1198
 Syburn *v.* Skade, 1149
 Sykes *v.* Sykes, 786, 816, 825, 886, 974, 975
 Sylvester *v.* Downer, 1702
 v. Ralston, 1276
 Sym's Case, 1024
 Syme *v.* Sanders, 1219
 Symington *v.* Symington, 1464
 Symonds *v.* Hall, 1230, 1234, 1236
 v. Harris, 138
 Symondson *v.* Tweed, 1087
 Sympson *v.* Turner, 1553
 Syms *v.* Mayor, 1009
 Symson *v.* Turner, 299, 1583
 Syndor *v.* Syndor, 414
 Sypher *v.* McHenry, 1766
 Syracuse City Bank *v.* Davis, 671
 v. Tallman, 1027, 2065, 2066
 Syracuse Savings Bank *v.* Holden, 1808
 v. Porter, 1808, 1809

T.

- Tabb *v.* Baird, 1584
 Tabele *v.* Tabele, 818, 926
 Tabeville *v.* Ryan, 1029
 Tabler *v.* Wiseman, 702, 1975, 1980, 1981, 1982
 Tabor *v.* Bradley, 2211
 v. Robinson, 104, 120, 137
 Tadlock *v.* Eccles, 1408, 1413, 1414, 1472, 1486,
 1523
 Taffe *v.* Harteau, 1075
 v. Warnick, 105, 108
 Taft *v.* Kessel, 2009
 v. Stevens, 2085, 2102, 2103
 v. Taft, 1592
 Taggard *v.* Roosevelt, 1013, 1319, 1321, 1323
 Taggart's Appeal, 885
 Taggart *v.* Murray, 337
 Taintor *v.* Clark, 1599, 1663, 1787, 1788, 1832,
 1833, 1835, 1841, 1842, 1844
 Taintor *v.* Cole, 1026, 1924, 1925
 Tait *v.* Hannum, 2071
 Takeway *v.* Barrett, 211, 212
 Talamo *v.* Spitzmiller, 1323
 Talbot *v.* Braddil, 2010
 v. Bradhill, 2051
 v. Miller, 723, 724, 846, 1206
 v. Whipple, 130, 146, 1161, 1187
 v. Wilkins, 2177
 Talbott *v.* Armstrong, 722
 v. Grace, 2243
 v. Todd, 1574
 Talbott's Exrs. *v.* Bell's Heirs, 1759, 1764, 1777
 Taliaferro *v.* Barnewall, 780
 v. Burwell, 619, 690
 v. Gay, 2063, 2162
 Talley *v.* Alexander, 1192
 v. Giles, 1001
 Tallinger *v.* Mandeville, 647, 896, 897
 Tallmadge *v.* Sill, 1808, 1820, 1825
 v. The East River Bank, 268
 Tallman *v.* Coffin, 1071, 1078
 v. Ely, 2000, 2156
 v. Snow, 1860, 1866, 1867
 v. Wood, 1609, 1694
 Tally *v.* Redd, 1751
 Talmo *v.* Spitzmiller, 1284
 Talson *v.* Garner, 1032
 Tatarum's Case, 400
 Tamm *v.* Kellogg, 493
 Tamworth *v.* Ferrers, 544
 Taner *v.* Ivie, 1667
 Tanguay *v.* Felthousen, 2068
 Tanner *v.* Fowler, 266
 v. Hicks, 2007
 v. Hills, 1234, 1909
 v. Livingston, 333, 343
 v. Morse, 307
 v. Niles, 1985
 v. Skinner, 1587

- Tanner *v.* Volentine, 2212
v. Wise, 308, 311
Tantlinger *v.* Sullivan, 1184, 1233, 1234
Tapley *v.* Smith, 123
Tapner *v.* Merriott, 1564
Tappan's Appeal, 501
Tarbell *v.* Tarbell, 897, 964
v. West, 1962
Tardy *v.* Williams, 1017
Tarleton *v.* Goldthwaite's Heirs, 1781
Tarpley *v.* Gunnaway, 801
v. Hamer, 1518
Tardy *v.* Persing, 2272
Tarrant *v.* Swain, 1421, 1425
Tate *v.* Blackburn, 1187, 1224
v. Crowson, 1060, 1139, 1154
v. McClure, 1140
v. McCormick, 2262, 2265
v. Stoolfoos, 904
v. Stoolitzfoos, 671, 2332
v. Tally, 416
v. Tate, 727, 794, 912, 914
Tatem *v.* Chaplin, 1076
Tatom *v.* McLellan, 305, 497, 1773, 1776
Tator *v.* Tator, 322, 323
Tatro *v.* Tatro, 919
Tattersall *v.* Howell, 1850
Tatum *v.* Hunter, 1624
v. Thompson, 1192
v. Young, 2366
Taul *v.* Campbell, 227, 1919, 1920, 1930, 1931,
1932, 1933, 1940, 1942, 1951
Taunton *v.* Costar, 1347
v. Taylor, 4
Taverner's Case, 1178
Tawney *v.* Crowther, 1087
Tayleur *v.* Wildin, 1307
Tayloe *v.* Gould, 508, 600, 608, 692, 694, 703
Taylor, Matter of, 752
Taylor, *Re*, 596
Taylor *v.* Adams, 1028, 2152
v. Agricultural Assoc., 2100
v. Atlantic R. Co., 2031
v. Baldwin, 1892, 1893
v. Beebe, 982, 1029
v. Benham, 218, 1585, 1636, 1664, 1756
v. Birmingham, 939
v. Blake, 1984
v. Boulware, 1388, 1389, 1390, 1403, 1404,
1454, 1457, 1495
v. Boyd, 1662
v. Bradley, 223, 1220, 1235, 1245
v. Brodrick, 841, 844, 876
v. Buckner, 517
v. Burnsides, 2296
v. Carondelet, 1029
v. Carryl, 1516
v. Charv, 532
v. Collins, 117
v. Cornelius, 2030
v. Cox, 1882
v. De Bus, 977, 1249, 2263, 2264
v. Dickinson, 1731
v. Duestenberg, 1431
v. Dulwich Hospital, 1037
v. Eubanks, 1625
v. Fields, 1958
v. Fowler, 782, 891, 926, 928
v. George, 1629, 1630
v. Glazer, 501
v. Hampton, 2243, 2244, 2247, 2303
v. Hargous, 1378, 1386, 1406, 1407, 1442,
1448, 1451, 1460, 1461, 1463, 1466, 1495
v. Harwell, 501
v. Haygarth, 1638
v. Heideron, 1071
v. Henry, 1587, 1594
v. Hepper, 2362
v. Heriot, 1625
v. Hopkins, 2159
v. Horde, 207, 209, 210, 398, 399, 459
v. Hotchkiss, 2122
Taylor *v.* Inhabitants of Plymouth, 4
v. Kearn, 781
v. King, 1716, 1757
v. Langford, 314
v. Luther, 2046, 2048, 2049
v. Mason, 249, 265, 1857, 1863
v. Maule, 1159
v. Mayo, 1747
v. McClain, 2175
v. McCracken, 731, 783, 838, 940
v. Meads, 1807
v. Millard, 2218, 2240
v. Moore, 934
v. Mosely, 1760
v. Needham, 1073
v. Owen, 1076
v. Patrick, 1033
v. Perkins, 1925
v. Plumer, 1760, 1761
v. Porter, 197, 2074, 2170, 2323, 2324, 2325,
2327
v. Preston, 1063, 2069, 2362
v. Pugh, 653, 794, 795
v. Rhyne, 1502, 1519
v. Salom, 1644
v. Sample, 722, 723
v. Sangrain, 2300
v. Short, 2183
v. Shum, 1074, 2265
v. Smith, 616, 620, 629, 634, 679
v. Spader, 1047
v. Stearns, 1512
v. Stibbert, 1009, 1765
v. Sutton, 1848, 1855, 1857, 1859, 1860,
1867, 1872
v. Sweet, 757, 758
v. Taylor, 402, 418, 422, 423, 461, 888,
974, 975, 1517, 2207
v. Thomas, 2126
v. Townsend, 2067
v. Warnaky, 2217
v. Weld, 2040, 2042, 2049
v. Whitehead, 1153, 2208
v. Whitmore, 2069, 2072
v. Zamira, 1101
Tazewell *v.* Smith, 75, 76
Teacle's, *Re*, 657
Teaff *v.* Hewitt, 103, 109, 110, 111, 112, 113,
114, 116, 118, 133, 135, 138, 144
Teague *v.* Downs, 664
Teal *v.* Auty, 53, 54
v. Walker, 2066
Teasdale *v.* Reaborn, 1625
Tedford *v.* Wilson, 2018
Teed *v.* Caruthers, 2008
Tefft *v.* Munson, 2091, 2121
v. Tefft, 755
Telfair *v.* Howe, 1888
Telford *v.* Frost, 1161
Tellman *v.* Spann, 760
Tempest *v.* Rawling, 993
Temple *v.* Scott, 1515
Templeman *v.* Biddle, 1209
v. Gresham, 2272
Templeton *v.* Twitty, 593, 598, 611, 616, 619
Tenant *v.* Goldwin, 64, 507, 1891
Ten Eyck *v.* Caspard, 2087
v. Creig, 2080, 2086, 2155
Ten Eyck, Jackson ex d., *v.* Richards, 488, 1016
Tennant *v.* Stoney, 818, 924, 1794
Tennent *v.* Patton, 2333
v. Tennent, 1693
Tennessee *v.* Sneed, 1518
Tenney *v.* East Warren Lumber Co., 2013
Tenney d. Gibbs *v.* Moody, 1594, 1605
Tenney d. Whinnett *v.* John, 1743
Tenny *v.* Agar, 322
v. Moody, 299, 300, 1712
Terhune *v.* Oldis, 2033
Term *v.* Smart, 1141
Terrel *v.* Page, 326
Terrell *v.* Andrews Co., 2122, 2123

- Terrell *v.* Martin, 1882, 1900
 v. Matthews, 1732
 Terrett *v.* Taylor, 234, 235
 Terrill *v.* Murray, 1899
 Terrio *v.* Guidry, 1219
 Territory *v.* Lee, 220, 2014
 Terry *v.* Berry, 1426, 1432
 v. Briggs, 415
 v. Burnell, 736
 v. Ferguson, 1021, 1212
 v. Hopkins, 654, 794
 v. Rosell, 1997, 1998, 2076
 v. Tuttle, 2061
 v. Wiggins, 311, 337, 338
 Terry, Doe d., *v.* Collier, 1574, 1655
 Terry's Will, *In re*, 1627
 Tertelling, *Re*, 1391, 1446
 Terwilliger *v.* Brown, 1763
 Tevis *v.* McCreary, 950, 955, 956
 v. Steele, 760
 Tevis' Exrs., 898, 899, 936, 938
 Tew *v.* Jones, 1278, 1285
 v. Winterton, 666
 Tewksbury *v.* Magraff, 1212
 Texas Land and Loan Co. *v.* Blalock, 1409
 Texas Land Co. *v.* Truman, 1222
 v. Williams, 2365
 Teynham *v.* Mullins, 1626
 Tharp *v.* Allen, 974
 v. Beltz, 2085, 2087, 2088
 Thatcher *v.* Candee, 1660, 1778
 v. Omans, 1557, 1559, 1583
 v. Powell, 2335
 v. St. Andrew's Church, 1777, 2353
 Thaxter *v.* Williams, 829
 Thayer *v.* Campbell, 2103, 2104, 2111
 v. Clemence, 1093
 v. Crammer, 2000, 2078
 v. Rock, 45
 v. Smith, 2151
 v. Society of United Brethren, 1219
 v. Thayer, 727, 728, 773, 794, 795, 887, 891,
 912, 913, 914, 921
 v. Waples, 1144
 v. Wellington, 1683
 v. Wright, 20
 Theall *v.* Theall, 917
 Thebaud *v.* Schmerhorn, 1792
 Theibaud *v.* First Nat. Bk., 1135
 Thelluson *v.* Woodford, 618, 2280
 Thelussou *v.* Smith, 1092
 Theobald *v.* Duffy, 1361
 Theological Inst. *v.* Barbour, 226
 Theological Seminary *v.* Wall, 466
 Thetford *v.* Thetford, 1025
 v. Tyler, 1258
 Thiebaud *v.* First Nat. Bk., 1052, 1304, 1315,
 1335, 1338
 Thimes *v.* Stumpf, 1485
 Thobolds *v.* Duffy, 971
 Thomas' Appeal, 2134, 2140
 Thomas *v.* Allen, 1101, 2025, 2026
 v. Blackemore, 976
 v. Brinsfield, 1781
 v. Connell, 1108
 v. Cook, 1161
 v. Crout, 128, 145
 v. Davis, 123, 131, 132, 137
 v. De Baun, 1027, 1887, 1920, 1950
 v. Dickinson, 2071
 v. Evans, 504, 505
 v. Folwell, 1562, 1674, 1675
 v. Gammel, 908
 v. Garver, 1979
 v. Hanson, 804, 826
 v. Harris, 888
 v. Hatch, 1913
 v. Hesse, 721, 799, 857, 888, 889, 904, 908,
 927
 v. Howell, 1864
 v. Kapff, 1103
 v. Kelly, 1349
 Thomas *v.* Le Baron, 2363
 v. Marshfield, 2191, 2299
 v. Moody, 1267, 1269
 v. Nelson, 996, 1322, 1323
 v. Noel, 1205
 v. Packer, 1316, 1324
 v. Pemberton, 2266
 v. S. Co., 1273, 1275
 v. Scruggs, 1735
 v. Simpson, 733, 736, 741
 v. Standiford, 1622, 1646, 1648
 v. Stewart, 2138
 v. Stickle, 2301
 v. Thomas, 508, 600, 760, 763, 1785, 2226,
 2243
 v. Van Kapff, 1074
 v. Vanlieu, 2120
 v. Walker, 1623
 v. West Jersey R. Co., 2314
 v. Williams, 1457
 v. Wood, 434, 937, 939, 2324
 v. Wright, 1301, 1303, 1308, 1320, 1325,
 1333, 1335, 1336
 v. Zumbalen, 1141, 1316, 1317
 Thomas' Admr. *v.* Kelly, 2118
 Thomas' Exrs. *v.* Van Kaff's Exrs., 2119
 Thomas Iron Co. *v.* Allenton Mining Co., 198
 Thomas' Lessee *v.* Blackemore, 1225
 Thomason *v.* Anderson, 416, 447, 472
 v. Boyd, 1031
 Thompson, Matter of, 1456
 Thompson *v.* Barks, 2054
 v. Matter, 2047
 v. Blair, 1781
 v. Bostwick, 514
 v. Bowman, 1960
 v. Boyd, 764, 783, 803
 v. Branch, 1291
 v. Brower, 1291
 v. Brown, 1715
 v. Chandler, 2073, 2097, 2139
 v. Clark, 1223
 v. Cochran, 804, 813, 814, 818, 874
 v. Commissioners, 1951
 v. Craigmyle, 49, 51
 v. Davenport, 2168
 v. Davies, 1770
 v. Egbert, 932, 933
 v. Finch, 1732
 v. Gant, 267
 v. Garwood, 325
 v. Gerrish, 1903
 v. Gibson, 297
 v. Green, 651, 1366
 v. Gregory, 283, 2240
 v. Heywood, 805
 v. Hickery, 2059
 v. Hoop, 947
 v. Kenyon, 2100, 2103
 v. Ketcham, 1702, 2056
 v. Lawley, 1807
 v. Leach, 986, 987, 1786, 1788
 v. Lyon, 1781, 1827
 v. Maberly, 1335
 v. Madison, B. & A. Assoc., 2160
 v. Marrow, 791
 v. Mawhinney, 970, 1233, 1234, 1909
 v. May, 763
 v. McClenachan, 2358
 v. Mead, 2272
 v. Meek, 1788
 v. Miner, 2241
 v. Morrow, 789, 823, 841, 844, 845, 903,
 908
 v. Murray, 1827
 v. Murry, 761, 788, 820, 832
 v. Newton, 1889
 v. Pioche, 1687, 2297
 v. Rose, 1078
 v. Salmon, 1921
 v. Simpson, 1142
 v. Spencer, 2321

- Thompson *v.* Stacey, 719
v. Swoope, 346
v. Thompson, 468, 538, 595, 764, 781,
784, 1685, 1867, 2070, 2355
v. Vance, 780, 820, 821
v. Waters, 224
v. Wheatley, 1622
v. Willite, 51
- Thompson, Doe d., *v.* Gebron, 1549, 1550
v. Pitcher, 1687, 2307
- Thompson's Lessee *v.* Green, 517
v. Hoop, 306, 309
v. White, 1699
- Thoms *v.* Thoms, 1409, 1452, 1524
- Thomson's Estate, *Re*, 487, 1806, 1836
- Thomson *v.* Barkerville's Case, 2149
v. Guyon, 1157
v. Mackworth, 373
v. Peake, 1219, 1610, 1611, 1614
v. Sanborn, 2216
v. Shakespeare, 1689
v. Waterloo, 2211, 2216
v. Wilcox, 2121
- Thomson, Doe d., *v.* Amey, 1316
- Thorn *v.* Ingraham, 804
v. Ingram, 832
v. Thorn, 1425, 1438, 1964, 1988
- Thornbrough *v.* Baker, 2049
- Thornburg *v.* Jones, 1755
v. Thornburg, 731
- Thornike *v.* Burrage, 1097, 1106
v. Norris, 2100
- Thornidye *v.* City of Boston, 1455
- Thorne *v.* Deas, 1183, 1191
v. Newby, 2165
v. Thorne, 2063
- Thornhill *v.* Hall, 345
- Thornley *v.* Thornley, 1952, 1953
- Thorns *v.* Adams, 733
- Thornton, *In re*, 21
- Thornton *v.* Appleton, 1032
v. Boyden, 1388, 1419, 1450, 1479, 1506
v. Exchange, 1919
v. Gaillard, 1810
v. Irwin, 1766, 2163
v. Knapp, 691
v. Knox, 2005, 2006
v. Krepp, 689, 690
v. McGrath, 671
v. Mehring, 974, 975
v. Mulquinne, 201, 202, 311, 312
v. National Exchange Bank, 904
v. Payne, 992
v. Stokill, 1760
v. Strauss, 1292
v. Thornton, 1920, 1937, 1952
v. York Bank, 1912
- Thornton's Exrs. *v.* Kreeps, 656, 657
- Thorough's Case, 2354
- Thoroughgood's Case, 2352
- Thorp, *In re*, 1715
- Thorp, Davies, *In re*, 695
- Thorp *v.* Keokuk Coal Co., 2068, 2069, 2071,
2072, 2322
- Thorpe *v.* Dunlap, 2006, 2007
v. Fowler, 996, 2272
v. Goodall, 1825
v. Owen, 1587, 1824
v. Rutland, etc., Co., 4
v. Durbond, 2124
- Thortons *v.* Dick, 786
- Thrall *v.* Omaha Hotel Company, 989, 1213,
1222
- Thrash *v.* Bennett, 2020
- Thrasher *v.* Bettis, 1449
v. Pinkhard, 729, 844, 864
- Throgmorton *v.* Whelpdale, 1308
- Throop *v.* Field, 1157
v. Hatch, 1592
- Throp *v.* Johnson, 841, 844, 1849
v. Throp, 754, 1955
- Thrusby *v.* Plant, 2263
- Thunder d. Weaver *v.* Belcher, 1348
- Thurber *v.* Dwyer, 996, 1264, 1308, 1321, 1322,
1335, 1338
v. Townshend, 585, 651, 653, 670
- Thurber & Co. *v.* Connors, 976
- Thurbett *v.* Thurbett, 311
- Thurman *v.* Jenkins, 2023, 2024
- Thurston *v.* Dickinson, 514, 1891
v. Hancock, 2234, 2232, 2233
v. Maddocks, 1425
v. Masterson, 1882, 1990
v. Minke, 1911, 1984
v. Prentiss, 2140
- Thynn *v.* Duvall, 518
v. Thynn, 777, 779, 1701
- Tibbals *v.* Jacobs, 1016
- Tibbetts *v.* Percy, 1083, 1084, 1086
- Tibbitts *v.* Tibbitts, 347, 1630, 1631
- Tibbson *v.* ———, 773
- Tibbs *v.* Allen, 1986
v. Morris, 2045
- Tice *v.* Annin, 2126, 2150, 2272
- Tickner *v.* Wiswall, 2061
- Ticknor *v.* McLelland, 51
- Tidball *v.* Lupton, 416, 425
- Tidd *v.* Lister, 1371
- Tidswell *v.* Whitworth, 1102
- Tierman *v.* Hinman, 2051
v. Thurman, 2004, 2006
- Tiernan *v.* Binns, 960
v. Creditors, 1420
v. Johnson, 1319, 1324, 1334
v. Roland, 466
- Tift *v.* Horton, 116, 117, 122, 132, 141
- Tilden *v.* Barker, 668, 701
- Tiley *v.* Moyers, 983
- Tilford *v.* Fleming, 1120
v. Torrey, 1622, 1645, 1760
- Tilghman's Estate, 630
- Tilghman *v.* Little, 1217, 1220, 1222, 1291
- Tilley *v.* Simpson, 202, 306, 307, 326
- Tillinghast *v.* Bradford, 253, 274
v. Champlin, 1957, 1961
v. Coggsall, 645, 656, 678, 679, 680, 683,
684, 1372, 1609
- v.* Troy & Boston R. Co., 198
- Tillman *v.* Cowand, 2366
v. Delacey, 116, 133
v. Fuller, 997
- Tillotson *v.* Boyd, 2068
v. Doe, 1144
v. Kennedy, 2301
v. Millard, 1378, 1386, 1442, 1443, 1445,
1504, 1513, 1517
v. Smith, 2223, 2229
v. Wolcott, 1503
- Tillson *v.* Moulton, 2047
- Tilly *v.* Tilly, 1583
- Tilson *v.* Thompson, 865, 878
- Tilt, Doe d., *v.* Stratton, 1269, 1293, 1310
- Tilton *v.* Hunter, 2365
v. Vail, 641
- Tilyoun *v.* Gravesend, 1029
- Times Co. *v.* Siebrecht, 1157
- Timewell *v.* Perkins, 338
- Timlin *v.* Standard Oil Co., 1197
- Timmins *v.* Rawlinson, 1270, 1299, 1307, 1313,
1320, 1338, 1344
- Timms *v.* Shannon, 136, 1993, 1995, 1997
- Timothy *v.* Chambers, 1524
- Tinder *v.* Davis, 1316, 2271
- Tinicum Fishing Co. *v.* Carter, 2189, 2213, 2214
- Tinker *v.* Cobb, 2272
v. Van Dyke, 1518
- Tinnen *v.* Mebane, 1782
- Tinney *v.* Tinney, 955
- Tinsley *v.* Jones, 416, 447, 472
- Tinsman *v.* Belvidere, 2248
- Tippet *v.* Eyres, 1843, 1844
v. Jett, 1213
- Tippets *v.* Waller, 42, 43, 817
- Tippin *v.* Coson, 1537

- Tipping *v.* Cozzens, 1538
v. Eckersley, 1185
v. Robbins, 1026, 1926
 Tipton *v.* La Rose, 306
v. Martin, 1521
 Tisdale *v.* Harris, 817
v. Jones, 957
v. Risk, 832
v. Tisdale, 1766, 1770
 Titchenell *v.* Jackson, 1690
 Titcomb *v.* Morrill, 1537, 1586, 1637
 Titman *v.* Moore, 1449, 1454, 1459, 1461, 1462, 1467
 Titterton *v.* Cooper, 2266
 Titsworth *v.* Stout, 1890, 1990
 Titus *v.* Glens Falls Ins. Co., 2114
v. Miller, 730
v. Morse, 2302
v. Neilson, 689, 783, 800, 813, 814, 818, 940
 Titusville Novelty Iron Works *v.* Graham, 976
 Tobey *v.* McAllister, 2005, 2008
v. Moore, 266, 268
 Tobias *v.* Francis, 106, 108, 126
v. Ketchum, 917, 918, 942, 944, 955, 1227, 1592
 Tobin *v.* Young, 1227
 Toby *v.* County of Bristol, 1051
v. Reed, 2067
 Todd *v.* Austin, 2326
v. Baglow, 823
v. Beatty, 839, 843, 844, 890
v. Flight, 1194, 1198, 1199
v. Gordy, 1445
v. Hardie, 2054
v. Jackson, 1356
v. Lee, 1373, 2012
v. Moore, 1776
v. Outlaw, 2038
v. Oviatt, 692, 703
v. Pratt, 445
v. Sawyer, 217
v. Zachary, 1940
 Toker *v.* Toker, 1790
 Tolar *v.* Tolar, 307
 Toledo, P. & W. R. Co. *v.* Curtenins, 924
 Toler *v.* Seabrook, 2249, 2255, 2257
v. Sebrook, 2255
v. Slator, 1025, 1368
 Toleman *v.* Fortbury, 553, 1140, 1152
 Toll *v.* Hiller, 2130
 Toll Bridge *v.* Osborn, 43
 Tolle *v.* Orth, 969, 1131, 1135, 1304, 1315, 1316
 Tolles *v.* Wood, 1798
 Tollett *v.* Tollett, 1840
 Tolman *v.* Emerson, 207
v. Sparhawk, 2303
 Tolson *v.* Tolson, 1593, 1631
 Tom *v.* Daily, 924
 Tome *v.* Merchants and Builders' Loan Co., 2148
 Tomey *v.* Gerhart, 2165, 2167
 Tomkins *v.* Lawrence, 1300, 1301, 1306
 Tomlin *v.* Dubuque & M. R. Co., 69
v. Hilyard, 1421, 1426
 Tomlinson *v.* Dighton, 319, 337, 487
v. Monmouth Ins. Co., 2042, 2116
 Tompkins, Estate of, 1382, 1406, 1451
 Tompkins *v.* Elliot, 1853, 1855
v. Fonda, 733, 734, 735, 736, 741, 838
v. Snow, 1148, 1216, 1217
v. Wheeler, 1600, 1794
v. Wiltberger, 2153
 Tompson *v.* Mawhinney, 2254
 Toms *v.* Hoyes, 2080
v. Williams, 1592
 Tondre *v.* Cushman, 1214
 Tone *v.* Brace, 974, 1065, 1080
 Tonkins *v.* Ennis, 1626
 Tong *v.* Eifort, 1475
v. Marvin, 586, 587, 653, 1362, 1514
 Tongue *v.* Nutwell, 1224
 Tood *v.* Pratt, 466
v. Sands, 2106
 Tooke *v.* Hardeman, 717, 916, 935, 955
v. Hartley, 2157
 Tooker *v.* Smith, 1303
 Tooker's Case, 1911
 Toole *v.* Beckett, 1196
 Toombes *v.* Conset, 1034
 Tooney *v.* McLean, 764, 808
 Topham *v.* Portland, 1841
 Topping *v.* Sadler, 1024, 1919, 1941, 1945
 Torpy *v.* Grand Trunk R. Co., 1194
 Torrence *v.* Carberry, 766
v. Carby, 760, 764
v. Bank of Orleans, 1617, 1707, 1769
 Torrey *v.* Burnett, 122, 130, 142, 145, 146, 1224
v. Deavitt, 2100, 2110
v. Minor, 731, 733, 734, 736, 741, 838, 884
v. Torrey, 1025, 1344, 1920, 1931, 1932, 1951
v. Wallis, 1074, 1077
 Torriano *v.* Young, 563, 1153
 Torr's Estate, 1021, 2182
 Tottel *v.* Howell, 983
 Totten *v.* Stuyvesant, 785
 Totten, Jackson ex d., *v.* Aspell, 718, 733, 734, 736, 739, 741
 Touchard *v.* Crow, 2321
 Toulmin *v.* Austin, 2349
 Tourv *v.* Cassin, 2056
 Tourville *v.* Pierson, 1378, 1416, 1434, 1442
 Tousley *v.* Tousley, 2027, 2122
 Tower's Appropriation, 1773
 Tower *v.* Davys, 939, 965
v. Divine, 810
 Towery *v.* Henderson, 1212
 Towle *v.* Ayer, 206, 209, 211, 601
v. Palmer, 1853, 1855
v. Remsen, 1853, 1855
 Towles *v.* Burton, 1699, 1701
 Town *v.* Needham, 1892, 1900
 Town of Lemington *v.* Stevens, 1041
 Town of Pawlet *v.* Clark, 149, 234
 Towne *v.* Ammidown, 1734
v. Butterfield, 1149, 1213, 1282, 1297
v. Campbell, 1312
v. Fiske, 105, 108, 110, 123, 138, 139, 1224
 Towner *v.* McClelland, 2106, 2109, 2127
v. Wells, 2140
 Townley *v.* Gibson, 84
v. Rutan, 1319
v. Sherburne, 1732, 1733
 Townsend *v.* Ash, 44
v. Brown, 896
v. Downer, 1913
v. Empire Dressing Co., 2031
v. Gilsey, 979
v. Griffin, 661
v. Harwell, 1794
v. Isenberger, 1230, 2250
v. Jemison, 2299
v. Mathews, 645
v. Mayer, 2325
v. McDonald, 2226
v. Reed, 1124
v. Riley, 2057
v. Stansgroome, 554
v. Townsend, 671, 865, 910, 956, 960, 1517
v. Ward, 2070
v. Wilson, 1731, 1817, 1818
 Townshend *v.* Marquis Stangroom, 2048
v. Townshend, 1782, 1783, 1784, 1954
v. Windham, 1626, 1820, 1825
 Townson *v.* Tickell, 1786, 1788, 1780, 1844
 Trabue *v.* McAdams, 1116, 2262, 2264, 2270
v. Ramage, 1220, 1223
 Tracy *v.* Albany Exchange Co., 1087, 1088, 1091, 1092, 1320
v. Atherson, 2291
v. Atherton, 1913, 2219, 2238
v. Colby, 1620
v. Craig, 1620

- Tracy *v.* Dutton, 1025
v. Hereford, 509, 572
v. Jenks, 2061
v. Kelley, 1622, 1760
v. Kilborn, 305, 311
v. Murray, 937
v. Norwich, 2298
v. Suydam, 1902
v. Tracy, 1502
- Trade Ins. Co. *v.* Barracliff, 632
- Trader *v.* Lowe, 646, 895, 1938
- Traders' Ins. Co. *v.* Newman, 632
- Trafford *v.* Boehm, 1721
- Trafton *v.* Homes, 2316, 2317, 2318
v. Howes, 2315
- Train *v.* Boston Disinfecting Co., 4
- Trammall *v.* Trammall, 63
- Trammell *v.* Harrell, 1884
- Transportation Co. *v.* Chicago, 2232
- Traphagen *v.* Burt, 1652
- Trapnall *v.* Brown, 1586, 1590, 1637, 1645
- Trappes *v.* Harter, 125
v. Meredith, 253
- Trash *v.* White, 2094
- Trask *v.* Donoghue, 1598
v. Ford, 2292
v. Patterson, 1364, 1365, 1367
v. Wheeler, 1849
- Traote *v.* White, 2235
- Travellers *v.* Noland, 707
- Travis *v.* Bishop, 2125
- Trawick *v.* Harris, 1405
- Traynor *v.* Palmer, 1110
- Trayser *v.* Trustees of Indiana, 2146
- Treackle *v.* Coke, 2265
- Treadway *v.* Sharon, 123
- Treadwell *v.* McKeon, 1621
v. Salisbury Mfg. Co. 2342
v. Williams, 1962
- Treat *v.* Pierce, 2077
v. Reilly, 1901
- Trelawney *v.* Booth, 94, 434
- Tremmel *v.* Kleiboldt, 654, 655, 678, 679, 682, 683, 1372
- Tremmouth *v.* City of San Francisco, 2308
- Trench *v.* Harrison, 1623
- Trent *v.* Hanning, 1594
- Trenton *v.* Water Power Co., 1866
- Trenton Banking Co. *v.* Woodruff, 1371
- Treon's Lessee *v.* Emerick, 1924
- Tress *v.* Savage, 1136, 1310, 1321
- Treves *v.* Townsend, 1725
- Trevivan *v.* Lawrence, 2301
- Trevor *v.* Trevor, 1693
- Trible *v.* Anderson, 2254
v. Frame, 1356
- Trickey *v.* Schlader, 2205
- Trim *v.* Marsh, 2295
- Trimble *v.* Trimble, 597
- Trimmi *v.* Marsh, 1903, 1904, 2000, 2078, 2085
- Trimpston *v.* Hamill, 2184
- Tripe *v.* Marcv, 2077, 2093, 2094, 2095, 2126, 2146, 2175
- Triplett *v.* Graham, 1428
- Tripp *v.* Brownell, 2020
v. Hasceig, 46
v. Riley, 1909
v. Tripp, 1697
- Triscony *v.* Orr, 982
- Tritt *v.* Calwell, 1311
- Tritton *v.* Foote, 1009
- Trivillo *v.* Tilford, 50
- Trollope *v.* Linton, 2344
- Tromans *v.* Mahlman, 1383, 1445, 1446
- Troth *v.* Hunt, 745, 923, 2149
- Trott *v.* City Ins. Co., 1051
- Trotter *v.* Blocker, 1670
v. Cassidy, 517
v. Dobbs, 1499
v. Howard, 1625
v. Hughes, 266, 2068, 2069
- Trough's Estate, 1739
- Troughton *v.* Troughton, 1825
- Troup *v.* Haight, 2121
v. Sherwood, 625
v. Wood, 1770
- Trousdale *v.* Darnell, 1337
- Trout *v.* McDonald, 1025, 1041
v. Rumble, 1440
- Trow *v.* Berry, 2041
- Trowbridge *v.* Cushman, 2028
v. Sypher, 802
- Trowbridge, Jackson ex d., *v.* Dunsbagh, 1566
- Trower *v.* Chadwick, 2232
- Troy *v.* Troy, 536
- Trucks *v.* Lindsay, 2052
v. Lindsey, 2054
v. Lindsay, 2053
- True *v.* Haley, 2150, 2169
v. Morrill, 31, 1378, 1419, 1420, 1433, 1483, 1514, 1515
v. Nicholls, 294, 411
v. Ranney, 504
- Truebody *v.* Jackson, 2006
v. Jacobson, 2004
- Truesdell *v.* White, 1881
- Trull *v.* Eastman, 1063
v. Fuller, 117, 138, 143
v. Granger, 971, 978, 997, 1092, 1111, 1245
v. Skinner, 2041, 2053, 2055, 2158
- Trullinger *v.* Webb, 45
- Truman *v.* McCallum, 2033
- Trumble *v.* Trumble, 1521
- Trumbull, Den ex d., *v.* Gibbons, 323
- Truscott *v.* King, 2023, 2027
- Truss *v.* Old, 1022
- Trust & Loan Co. *v.* Covert, 2301
- Trust National Bank of Tama City *v.* Hayzlett, 2120
- Trustees *v.* Center, 1375
v. Dickinson, 2294
v. Dickson, 2077, 2181
v. Kirk, 1898
v. Pratt, 777
v. Spencer, 1043
v. Watson, 2305
- Trustees, etc., *v.* Peaslee, 1555
- Trustees for Support of Public Schools *v.* Anderson, 2166
- Trustees of Bridgewater Acad. *v.* Gilbert, 1670
- Trustees Concord Township *v.* Miller, 1029
- Trustees of Farmington Academy *v.* Allen, 1670
- Trustees First Baptist Church of Ithaca *v.* Bigelow, 31, 32, 36, 83
- Trustees of Frazier *v.* Centre, 826
- Trustees of Green Tp. *v.* Robinson, 1017, 1213
- Trustees of Hawesville *v.* Hawes, 89
- Trustees of Limerick Acad. *v.* Davis, 1671
- Trustees of Louisville *v.* Gray, 2014
- Trustees of McIntyre *v.* Zanesville Canal & Manf. Co., 1684
- Trustees of Methodist Episcopal Church in Pulteney *v.* Stewart, 1706
- Trustees New York Prot. Epis. Public School, *Re*, 1517
- Trustees South Baptist Church *v.* Yates, 1557, 2150
- Trustees, etc., Town of E. Hampton *v.* Kirk, 1916
- Trutch *v.* Bunnell, 233
- Trutt *v.* Spotts, 1063, 2362
- Trutton *v.* Foote, 1088
- Tryon *v.* Munson, 2036, 2076, 2077
v. Sutton *v.* 2023
- Tscheider *v.* Biddle, 1086, 1089
- Tubb *v.* Fort, 2250, 2257
- Tucker *v.* Adams, 1276, 1282
v. Andrews, 654, 658, 794
v. Baldwin, 1701
v. Buffum, 2090
v. Burrow, 1647
v. Campbell, 1901
v. Cox, 2255

- Tucker *v.* Crowley, 805, 806, 808, 810
v. Fenno, 2014
v. Field, 800, 2024
v. Fields, 2022
v. Fitts, 876
v. Kenniston, 1440, 1502, 1519
v. Moorland, 985, 986
v. Moreland, 1031, 2342
v. Palmer, 1704
v. Tucker, 292, 293, 914, 1721, 1722, 1808
v. Vance, 733, 736, 739
v. Whitehead, 2259, 2267
Tucker, Doe d., *v.* Morse, 1325
Tudor *v.* Samyue, 1361
Tufts *v.* Adams, 729, 1095
v. Tufts, 1770, 2314
Tuffnal *v.* Page, 203
Tuick *v.* Ludborough, 1844
Tuite *v.* Stevens, 2125
Tulk *v.* Moxhay, 267, 2214
Tull *v.* David, 1735
Tuller, *Re*, 671
Tullett *v.* Armstrong, 252, 257, 270, 1361, 1373, 1561
Tulley *v.* Alston, 827
Tullis' Admr. *v.* Young, 1035
Tullit *v.* Tullit, 77, 95
Tulloch *v.* Hailley, 719
v. Hartley, 368, 2057, 2289
Tumlinson *v.* Swinney, 1378, 1386, 1439, 1442, 1447, 1448, 1457, 1458
Tunis *v.* Grandy, 2268
Tunno *v.* Roberts, 2031
Tuno *v.* Trezevant, 959
Tunstall *v.* Christian, 2223, 2233
v. Jones, 1497
Tuolumne Redemption Club *v.* Sedgwick, 2171
Tupper *v.* Fuller, 1920
Turbett *v.* Turbett's Exrs., 201, 202
Turbeville *v.* Gibson, 784
Turing, *Ex parte*, 661, 756
Turing *v.* Turing, 316
Turk *v.* Funk, 2125
Turley *v.* Massengill, 336, 499, 1709
Tuttl *v.* Fuller, 103
Turly *v.* Rodgers, 1217
Turnage *v.* Greene, 1577
Turnbull *v.* Rivers, 2207
Turner *v.* American Baptist Union, 2307
v. Bissell, 1241, 1242, 1244
v. Cool, 45
v. Eford, 1612
v. Fowler, 259
v. Jenny, 795
v. Johnston, 2160
v. Ivie, 1709
v. Kerr, 2044, 2052
v. Lowe, 1213, 1220
v. Meymott, 1347
v. Meyers, 594
v. Morgan, 1973
v. Peck, 1611
v. Pettigrew, 1623
v. Quincey Mut. F. Co., 2119
v. Richardson, 1115
v. Rusk, 2345
v. Steep, 2364
v. Street, 1764
v. Teddult, 1855
v. Thomas, 1290
v. Thompson, 2223, 2241
v. Timberlake, 1806
v. Tuolumne Water Co., 1099
v. Turner, 24, 1361
v. Watkins, 1997, 1998, 2083
v. Whitem, 1398
v. Williams, 2268
v. Wright, 231
Turner, Doe d., *v.* Bennett, 1293, 1296
Turney *v.* Smith, 870, 876
v. Sturges, 845
Turnipseed *v.* Cunningham, 2052
Turnure *v.* Hohenthal, 2267
Tuthill *v.* Scott, 2228
Turrill *v.* Northrup, 414
Tuttle *v.* Amstead, 2166
v. Bean, 1151, 1344
v. Burlington & M. R. R. Co., 733
v. Reynolds, 1214, 1309
v. Strout, 1509
v. Wilson, 872, 931
Twelves *v.* Nevill, 292, 293
Twinnings' Appeal, 1792
Twitchell *v.* McMurtie, 2102
Twombly *v.* Cassidy, 2136, 2137, 2172
Twomey *v.* Crowley, 1700
Twopeenny *v.* Peqton, 274
Twort *v.* Twort, 576, 1903, 1969
Twyman *v.* Pickard, 1072
Tyler *v.* Aetna F. Ins. Co., 1912
v. Beecher, 2326
v. Carlton, 1698
v. Disbrow, 1168
v. Hammond, 2243
v. Heidorn, 252, 1108, 1139, 2262
v. Lake, 1371
v. Taylor, 1905
v. Tyler, 1689
v. Wilkinson, 2224, 2291, 2292, 2334
Tyrrel's Case, 299, 1559, 1564, 1582
Tyrrell *v.* Marsh, 1845
v. Ward, 2136, 2138, 2150
Tyrringham's Case, 547, 2199
Tyrwhitt *v.* Tyrwhitt, 2098
Tyson *v.* Blake, 344
v. Harrington, 799
v. Post, 106, 107
v. Postlethwaite, 2286
v. School Directors, 671

U.

- Udall *v.* Kenney, 1757, 1758
Udell *v.* Peak, 1214
Uelker *v.* Hochn, 2011
Uhler *v.* Hutchinson, 2126
v. Sample, 694, 824
Uhlig *v.* Garrison, 684, 1035
Ullman *v.* Herzburg, 1132
Ulp *v.* Campbell, 909
Underhill *v.* Collins, 1159, 1161
v. Harwood, 2356
v. Saratoga, 1848, 1854, 1855, 1856, 1862
Underwood *v.* Birchard, 1079, 1080
v. Birchwood, 1037
v. Campbell, 501, 2319
v. Carnig, 2218
v. Hitchcox, 1087, 1758
v. Lilly, 671, 904, 905
v. Stoney, 1870
v. Stevens, 1733
v. Sutcliffe, 1652
Unfried *v.* Heberer, 291
Unger *v.* Bamberger, 1304
v. Leiter, 715, 818
v. Mooney, 2296, 2297
v. Smith, 2166
Unjacke, *In re*, 1786
Union Bank *v.* Emerson, 103, 104, 132, 138
v. Meeker, 1701
v. State, 42
Union Banking Co. *v.* Gittings, 996, 1010, 2260
Union Canal Co. *v.* Young, 370, 390, 2297
Union Gold Mining Co. *v.* Rocky Mountain Nat. Bank, 1042
Union Mut. Ins. Co. *v.* Campbell, 1592
Union Mut. Life Ins. Co. *v.* Levitt, 1999
v. Slee, 2100, 2106
v. White, 2169
Union Nat. Bank *v.* Matthews, 225
Union Pac. Co. *v.* De Busk, 198
v. Durant, 1661, 1697, 1698, 1768, 1782
Union Savings Bank *v.* Pool, 2040

- Union Water Co. *v.* Crary, 2238, 2239
v. Murphy's Fluming Co., 2017, 2021
 Unitarian Soc. *v.* Woodbury, 1590, 1691
 United States *v.* Amedy, 1540, 1554, 1555
v. Appleton, 2223, 2234, 2241
v. Arredondo, 2304
v. Athens Armory, 1999
v. Bostwick, 1067, 1068, 1152, 1153, 1228
v. Cambuston, 196
v. Castillero, 88
v. Crosby, 368, 720, 2057, 2058, 2288, 2289
v. Cutts, 2003
v. Duncan, 955, 956
v. Fitzgerald, 2306
v. Gratiot, 970, 983, 2249, 2254, 2314
v. Hall, 1428
v. Harmon, 5
v. Hooe, 2030
v. Kimmull, 1199
v. King, 2357
v. Lambert, 596
v. McCormick, 596
v. McRae, 1036
v. New Orleans, etc., R. Co., 2018
v. Parrott, 98
v. Railroad Bridge Co., 2307
v. Reese, 370, 390
v. Reid, 1516
v. Schuler, 53, 58
v. Shinn, 2309
v. State Nat. Bank of Boston, 1761
v. Sturges, 2028
v. Sturgis, 2170
 United States Bank *v.* Bavary, 1605
v. Covert, 2105
v. Huth, 2342
 United States ex rel. Van Hoffman *v.* City of Quincy, 1512
 United States Ins. Co. *v.* Shriver, 2120
 Universities of Oxford *v.* Richardson, 572
 University *v.* Bank, 1783
 University of North Carolina *v.* Nat. Bank, 1781
 University of Oxford *v.* Clifton, 424
 University of Vermont *v.* Joslyn, 1118, 2268
v. Reynolds, 1881
v. Reynold's Exrs., 517
 Updegraff *v.* Edwards, 2106
 Updegraph *v.* Commonwealth, 1603, 1604, 1681
 Upham *v.* Archer, 2341
v. Bradley, 1979, 1981
v. Varing, 1579
v. Varney, 1597, 1604, 1796
 Upjohn *v.* Richland Board of Health, 41
 Upman *v.* Second Ward Bank, 1504
 Upshaw *v.* Hargrove, 2006
v. Upshaw, 947, 948
 Upton *v.* Ferrers, 60
v. Greenlees, 1174
v. Townend, 1166, 1168, 1173, 1174
v. Tribilcock, 1581
 Upton, Doe d., *v.* Witherwick, 1206
 Urann *v.* Coates, 1587, 1689, 1690
 Uray *v.* Davenport, 1448
 Ulrich's Appeal, 1815
 Urch *v.* Walker, 1786
 Uridias *v.* Morrell, 1317, 1351
 Usher *v.* Moss, 1300, 1315, 1336
v. Richardson, 901
 Usina *v.* Wilder, 2024
- V.**
- Vail *v.* Foster, 2008
v. Vail, 300, 1605
v. Weld, 1196
 Valentine *v.* Ford, 2346
v. Havener, 2147
v. Jackson, 2273
v. McCue, 2158
v. Piper, 2290, 2291
 Vallance *v.* Bausch, 670, 679
 Valle *v.* Obenhouse, 590
 Vallette *v.* Bennett, 1739, 1998
 Valley Falls Co. *v.* Dolan, 2242
 Valliant *v.* Dodemedo, 2265
 Valpey *v.* Rea, 1032
 Valton *v.* National Life Assurance Co., 1110
 Vanables *v.* Morris, 1583
 Van Aken *v.* Clark, 1958
 Van Allen, Jackson ex d., *v.* Rogers, 1270
 Van Alstyne *v.* Spraker, 340, 535
 Van Amee *v.* Jackson, 1633
 Van Arsdale *v.* Drake, 515
v. Van Arsdale, 918, 940, 955
 Van Arsdall *v.* Fauntelroy, 517, 607, 608, 610, 612
 Van Blarcom *v.* Kip, 1268, 1271
 Van Bracklin *v.* Fonda, 1199
 Van Bramer *v.* Cooper, 1031
 Van Brocklin *v.* Corporation of Brantford, 1245
 Van Brunt *v.* Pope, 1961, 2082, 2266
 Van Buren *v.* Olmstead, 2073, 2184
v. St. Joseph Co. Ins. Co., 2114
 Vance's Heirs *v.* McNairy, 1773
 Vance *v.* Campbell, 271, 1858
v. Johnson, 1215, 1284, 1998, 2076, 2077
v. McNairy, 2365
v. Vance, 950, 954, 956, 963, 1739
 Van Cleaf *v.* Barnes, 919
 Van Cleave *v.* Wilson, 1409, 1523, 1524
 Van Cortland *v.* Laidley, 221, 222
 Van Cortlandt *v.* Tozer, 492
 Van Cortlandt, Jackson ex d., *v.* Parkhurst, 1135, 1270, 1271, 1335
 Van Cott *v.* Prentice, 1690
 Vandecourt *v.* Gould, 1035
 Van Denburgh, Jackson ex d., Bradt, 1270, 1271
 Vanderbilt *v.* Schreyer, 2166
 Vanderburgh *v.* Hull, 1241, 1242
 Tandercook *v.* Baker, 2106
 Vandergrift's Appeal, 976
 Vanderheyden *v.* Crandall, 300, 359, 471, 601, 1605
 Vanderhorst *v.* Bacon, 1399, 1402
 Vanderhuel *v.* Storrs, 2270
 Vanderkar *v.* Reeves, 2263
 Vanderkarn *v.* Neuderkan, 2362
 Vanderkemp *v.* Shelton, 811, 2097, 2126, 2147, 2149
 Vanderplank *v.* King, 1693
 Vanderpool *v.* Allen, 110
v. Van Allen, 108, 113
 Van der Volgen *v.* Yates, 297, 1538, 1551, 1564, 1586, 1610, 1637
 Vanderwerker *v.* Vanderwerker, 342, 1980, 1984
 Van Derzee *v.* Van Derzee, 332, 536
 Van Deusen *v.* Young, 543, 557
 Vandever's Admrs. *v.* Freeman, 1697, 1759
 Vandever's Appeal, 1731
 Vandever *v.* Baker, 890
 Vandike's Appeal, 1923
 Van Diver *v.* Stickney, 1283, 1286
 Van Doren *v.* Everitt, 1022, 1023, 1209
v. Todd, 2005
v. Van Doren, 789, 823, 841, 843
 Van Duyne *v.* Thayre, 783, 801, 803, 940
v. Vanduyne, 346, 1593, 1632
 Van Duzer *v.* Van Duzer, 635, 646, 637, 642
 Van Dyck *v.* Van Buren, 1915
v. Johns, 1611, 1613, 1707, 1767, 1769, 1776
v. Johnson, 1776
 Vane *v.* Barnard, 544, 559, 569, 572
 Van Epps *v.* Van Epps, 1617, 1707, 1769
 Van Etta *v.* Evanson, 2341
 Van Every *v.* Ogg, 1084, 1086
 Van Gelder *v.* Post, 841, 843
 Van Gilder *v.* Park, 823
 Van Gordon *v.* Jackson, 518
 Van Groder *v.* Smith, 1821
 Van Guidler *v.* Justice, 955
 Van Horn *v.* Goken, 2272

- Van Horn *v.* Harrison, 1564
v. Keenan, 2013
 Van Horne *v.* Campbell, 344, 345, 349
v. Crain, 1072, 1074, 1076, 1077
v. Fonda, 1617, 1738, 1990
 Van Horne's Lessee *v.* Dorrance, 852, 1853,
 1854, 1855, 1857, 1863, 1869
 Van Houten *v.* First Reformed Dutch Church,
 38, 39
 Van Husan *v.* Kanouse, 2137, 2144
 Van Keuren *v.* Central R. Co. of N. J., 96
v. Corkins, 2109, 2110
 Van Kirk *v.* Skillman, 2012
 Vanleer *v.* Vanleer, 761, 762, 815
 Van Meter *v.* McFadden, 2004
 Vann *v.* Rouse, 1166
 Vanmeter *v.* Vanmeter, 2028
 Vannatta *v.* Brewer, 1118, 1150, 1151
 Van Ness *v.* Hyatt, 782
v. Pacard, 118, 119, 122, 123, 130, 458, 707,
 1187, 1209
 Van Nest *v.* Latsom, 2150
 Vannice *v.* Bergen, 2134
 Van Nostrand *v.* Wright, Hill & D., 985
 Van Note *v.* Downey, 1362, 1363, 1364, 1366,
 1368, 1369, 1370, 1376
 Van Orden *v.* Van Orden, 916, 918, 935, 944, 946,
 947
 Van Pelt *v.* McGraw, 2186
 Van Rensselaer *v.* Akin, 1798
v. Ball, 251, 1049, 1139, 1849, 1852, 1859,
 1861
v. Barrington, 2262
v. Bradley, 1071, 1072, 1108, 1116, 2262
v. Chadwick, 1116, 1227
v. Clark, 2365
v. Dennison, 249, 252, 2015, 2262
v. Gallup, 1115, 1116, 1120, 1121
v. Galop, 2267
v. Hays, 194, 252, 1004, 1071, 2262, 2273
v. Jewett, 1051, 1138, 1150, 1154, 1155
v. Jones, 1072, 1116, 2252, 2259
v. Kearney, 401, 471, 1516, 2300, 2301,
 2358
v. Poucher, 20, 203, 205, 206, 228, 402,
 447, 471
v. Radcliff, 547, 548, 2190, 2193, 2195,
 2196, 2200, 2201, 2262
v. Read, 1076
v. Smith, 1067, 1071, 1076, 1098, 1099,
 1108
v. Snyder, 1139, 1517
v. Van Rensselaer
v. Whitbeck, 1139
 Van Rensselaer, Jackson ex d. *v.* Andrew,
 565
 Van Rensselaer, Jackson ex d. *v.* Collins, 488,
 1146, 1148
 Van Reynegan *v.* Revalk, 1489, 1454
 Vansant *v.* Alleman, 1998
v. Allman, 2106
v. Allmon, 2157
 Van Schaick, Jackson ex d. *v.* Davis, 1108
 Van Schaik *v.* Third Ave. R. R. Co., 1108,
 1109
 Van Schaik, Jackson ex d. Vincent, 1140, 1144,
 1146, 1149
 Van Schuyver *v.* Mufford, 1982
 Van Sickle *v.* Haines, 2224
 Van Thormley *v.* Peters, 2038, 2126
 Vantilberg *v.* Shann, 2203
 Van Tuyl *v.* Van Tuyl, 506, 752
 Van Vetchen *v.* Keator, 76
 Van Voorhis *v.* Brintnall, 753, 754, 756
 Van Voorhiss *v.* Hyatt, 782
 Van Vronker *v.* Eastman, 744, 803, 814, 891, 922
v. Van Vronker, 778
 Van Wagenen *v.* Brown, 810, 2097
v. Van Wagener, 2029
 Van Wagner *v.* Nan Nostrand, 1094, 2258
 Van Wert *v.* Benedict, 1837
 Van Wickle *v.* Landry, 1489, 1506
 Vanzant *v.* Vanzant, 1405, 1450, 1462, 1472, 1473,
 1475, 1479, 1506
 Van Wicklen *v.* Paulson, 2251, 2252
 Varick *v.* Edwards, 1781
v. Jackson, 210, 211
v. Smith, 197, 2323, 2324, 2327, 2328
 Varner *v.* Rice, 2272
 Varney *v.* Howes, 2040
v. Stevens, 489, 504, 505, 740, 744
 Varnum *v.* Abbott, 1925, 1967, 1919
v. Leek, 1894
v. Meserve, 2083, 2164
 Vartie *v.* Underwood, 818
 Vasey *v.* Board of Trustees, 1450, 1460, 1469,
 1478
 Vason *v.* Ball, 1993, 1999, 2063, 2078
 Vasquez *v.* Ewing, 2192
 Vass *v.* Wales, 1051, 1052
 Vassar *v.* Camp, 1243
 Vasser *v.* Vasser, 1697
 Vauduyn *v.* Hepner, 977
 Vaughan *v.* Bacon, 1912, 1913
v. Blanchard, 1166, 1167
v. Dickes, 414, 418
v. Menlove, 2232
v. Nurfeesboro. 3
v. Thompson, 1481
v. Tracy, 1047
v. Vanderstegen, 1821, 1825, 1826
 Vaughan, *in re*, *v.* Thomas, 1687
 Vaughn *v.* Haldeman, 109, 121, 134, 138, 139
 Vaughn *v.* Atkins, 830
v. Hancock, 46
v. Locke, 2250
v. Lovejoy, 271
v. Parr, 2344
 Vaux *v.* Parke, 254, 300, 500, 1577, 1606, 1675,
 1753
 Veale *v.* Pryor, 982
 Veasey *v.* Graham, 2013
 Veeder *v.* Fonda, 2158
 Vegely *v.* Robinson, 1316, 1322, 1324, 1327, 1330,
 1345
 Veghte *v.* The Raritan Water Power Co., 2212,
 2213, 2240
 Vehue *v.* Moser, 78
 Veile *v.* Blodgett, 1622, 1761
 Venable *v.* Beauchamp, 1738, 1973, 1974, 1990;
 1991
v. McDonald, 1290, 1294
 Vendever Admrs. *v.* Freeman, 1703
 Vennum *v.* Babcock, 2055
 Ventress *v.* Collins, 1425
 Venus, The, 1456
 Verdier *v.* Youngblood, 502, 532
 Vermilya *v.* Austin, 1174
 Vermont *v.* Society for the Propagation of the
 Gospel, 1862
 Vermont Mining Co. *v.* Windham Bank, 2354
 Vernam *v.* Smith, 1080, 1213, 1221
 Vernon's Case, 854, 936, 951, 956, 957, 958, 960
 Vernon *v.* Bethell, 2054
v. Smith, 1074, 1075, 1076, 1077, 1082,
 2118
v. Valk, 2333
v. Vernon, 898, 936, 940, 941, 954, 955,
 1629
 Verplank *v.* Sterry, 959, 1625, 2315
v. Wright, 1076
 Vertner *v.* Humphrey, 720
 Verry *v.* Robinson, 925
 Vetter's Appeal, 2250, 2257
 Vick *v.* Ayers, 1292
v. Vicksburg, 1985
 Vickery *v.* Dickson, 2060
 Vicksburg, etc., R. R. Co. *v.* Ragsdale, 1247
 Vidal *v.* Commagere, 2282
v. Gerard's Exrs., 2348
v. Girard's Exrs., 1604, 1657, 1658, 1681
v. Girard, 266, 1541, 1555
 Viele *v.* Judson, 2108, 2109
v. Osgood, 31, 35, 38

Viele *v.* Troy, etc., R. Co., 1697
 Viely, Jackson ex d., *v.* Cuerden, 1273
 Villa *v.* Rodriguez, 2169
 v. Rodriguez, 1661
 Village of Brooklyn *v.* Smith, 68, 70
 Village of Delhi *v.* Youmans, 2230
 Villen *v.* Beaumont, 1025
 Villers *v.* Beaumont, 1791
 Villiers *v.* Villiers, 288, 1563, 1594
 Villines *v.* Norfleet, 1621
 Vincent *v.* Bishop, 1831
 v. Bishop of Sodoer, etc., 1831
 v. Corbin, 1006, 1300, 1335
 v. Ennys, 1844
 v. Hallowell, 2272
 v. Spooner, 897, 933, 951, 956
 Viner *v.* Vaughn, 495, 561
 Vinety *v.* Abbott, 1791, 1792, 1798
 Vintner *v.* Bix, 271
 Violet *v.* Brookman, 267
 Visager *v.* Schofield, 1036
 Visard *v.* Longden, 955
 Viscount *v.* Morris, 2127, 2128
 Voe *v.* Handy, 2132
 Voegt *v.* Resor, 1164
 Voelckner *v.* Hudson, 737, 836, 837
 Vogle *v.* Brown, 1890
 v. Ripper, 2133
 Vogler, *Re*, 1483
 v. Geiss, 2245
 v. Montgomery, 1415, 1481, 1502
 Voight *v.* Resor, 2260
 Voisey, *Ex parte*, 1027
 Vole *v.* Handy, 2076
 Volentine *v.* Johnson, 1922
 Voller *v.* Carter, 417, 423, 424, 444
 Voltz *v.* Harris, 2207
 Von *v.* Brashead, 2358
 Voohees *v.* McGinnis, 111, 112, 113, 114, 117,
 127, 144, 1186
 v. Presbyterian Church, 31, 38, 39, 40,
 990, 1549, 1551, 1619, 1644
 v. Presbyterian Church of Amsterdam,
 646, 970, 1617
 Voorhis *v.* Freeman, 104, 106, 111, 113, 114,
 126, 127, 130, 133, 135, 138, 2022
 Vorebeck *v.* Rowe, 53, 54, 55
 Voris *v.* Renshaw, 1867
 Vornberg *v.* Owens, 1381, 1515
 Vose *v.* Handy, 2100, 2105, 2107, 2132, 2357
 Voss *v.* King, 1214
 Vost *v.* Handy, 799
 Vredenburg *v.* Morris, 975, 1225
 Vreelan *v.* Jacobus, 728, 818
 Vreeland *v.* Blarcom, 2166
 v. Van Blarcom, 2068
 v. Vreeland, 596, 1361
 Vroom *v.* Van Horn, 1835
 Vrooman *v.* McKaig, 1213, 1315, 1316
 Vyvyan *v.* Arthur, 1070, 1071, 1075, 1078

W.

Wabash Canal *v.* Brett, 983
 Wade's Case, 1865, 1996
 Wade *v.* American Colonization Society, 1555
 v. Baker, 1022, 1023
 v. Beldmeir, 2130, 2134
 v. City of Newborn, 996, 1029, 1042
 v. Colbert, 1033
 v. Coope, 2172
 v. Greenwood, 2005
 v. Halligan, 1067, 1080, 1081
 v. Howard, 805, 2128
 v. Johnston, 117
 v. Jones, 1514
 v. Lauber, 920
 v. Malloy, 504, 509
 v. Miller, 731, 949
 v. Paget, 164, 1579, 1580
 v. Wade, 1420, 1433

Waddell *v.* Cook, 1246
 v. Glassell, 1698, 1701
 v. Hewett, 2165
 Waddingham *v.* Loker, 1665, 1690
 Wadham *v.* Marlowe, 2263
 Wadhams *v.* Swan, 2301
 Wadleigh *v.* Janvrin, 103, 104, 124, 127, 131,
 132
 Wadley *v.* Janvin, 79
 Wadman *v.* Calcraft, 1871
 Wadsworth *v.* Lorangu, 2045
 v. Lyon, 2068
 v. Tillotson, 2224, 2225, 2226
 v. Wadsworth, 214, 215, 672, 673, 1657,
 2014
 v. Wendell, 501
 v. Williams, 805, 808, 2130, 2134
 Wadsworth, Jackson ex d., *v.* Wendell, 501
 Wadsworthville School *v.* Meetze, 1144, 1309
 Wafer *v.* Mocato, 1158, 1871, 1872
 v. Pratt, 2291
 Wagar *v.* Stone, 1999, 2076
 Wager *v.* Wager, 344, 345
 Waggener *v.* Waggener, 1729
 Waggoner *v.* Jermaine, 1199
 v. Speck, 1284
 Wagner *v.* Bissell, 118, 458
 v. Cleveland, 111
 v. Cleveland & I. R. Co., 116
 v. Hanna, 2211, 2215, 2218
 v. Varner, 2282
 v. White, 1168
 Wagstaff *v.* Smith, 1562, 1655, 1656
 Wahl *v.* Barroll, 1164
 Wain *v.* Warlters, 2267
 Wainborough *v.* Schank, 522
 Wainer *v.* Milford Mutual Ins. Co., 631, 2113
 Wainwright *v.* Elwell, 1574
 Wainscott *v.* Silvers, 1181, 1183, 1281, 1284
 Wainwright *v.* Hardesty, 511
 Wait's Appeal, 1023
 Wait *v.* Belding, 335, 342
 v. Day, 1549
 v. Maxwell, 986, 987, 1032, 2344, 2245
 v. Wait, 711, 712, 713, 725, 748, 749, 767,
 771, 772, 773, 919, 920, 1359, 2341
 Waite *v.* Bowee, 1919
 v. Paget, 2096
 Wake *v.* Hall, 61
 v. Wake, 946
 Wakefield *v.* Buccleuch, 91, 92
 v. Duke of Buccleuch, 2238
 v. Mining Co., 1151
 Wakeman *v.* Roach, 891, 927
 v. Walker, 1040
 Walbridge *v.* Pruden, 2274
 Walcot *v.* Botfield, 265
 v. McKinney, 1999, 2078, 2084
 Walcott *v.* Sullivan, 2110
 Walden *v.* Bodley, 1144, 1293, 1296
 v. Karr, 1783
 v. Sherburne, 1242
 v. Skinner, Exrs., 1611
 Waldman *v.* Broder, 1902
 Waldo *v.* Hall, 1077, 2262
 v. Rice, 2075, 2094, 2175
 Waldrum *v.* Cheek, 782
 Wale *v.* Hill, 842
 Wales *v.* Bowdish, 1820
 v. Coffin, 591, 901, 911, 1886, 1919, 1931,
 1932, 1935, 1940, 1941
 v. Mellen, 2032, 2063, 2077, 2079
 v. Sherwood, 2167
 v. Webb, 2071
 Wales' Admrs. *v.* Bowdish Exr., 1677
 Walker's Case, 640, 1117, 2268
 Walker *v.* Atwater, 2056
 v. Baxter, 811, 2097
 v. Beal, 1658
 v. Burrows, 1626
 v. Carrington, 1621
 v. Coltrane, 2365

- Walker *v.* Crowder, 1795
v. Deaver, 721
v. Denne, 202
v. Dilworth, 641
v. Doane, 717
v. Dunshee, 415, 2288
v. Ellis, 1309, 1337
v. Engler, 1138, 1156
v. Fitts, 1001, 1233, 1234
v. Furbush, 1275, 1307, 1328, 1342, 1343
v. Gatlin, 197
v. Gilbert, 2366
v. Giles, 1275
v. Grand Rapids Flouring Mill Co., 116
v. Griswold, 2074, 2182
v. Hall, 1593, 1632, 1990
v. Harper, 1213
v. Jarvis, 2149, 2156
v. Johnson, 2000, 2078
v. Kee, 2107
v. Keile, 2363
v. King, 2078, 2127, 2130, 2138, 2172
v. Lincoln, 2322
v. Locke, 1589, 1591
v. Matthers, 2124
v. Milne, 42
v. Paine, 2021
v. Physick, 1069
v. Pitts, 1231
v. Pritchard, 1815
v. Quiggs, 1810
v. Richardson, 983
v. Schindel, 143
v. Schreiber, 2106
v. Schuyler, 776, 806, 823, 841, 842, 844
v. Sherman, 78, 97, 104, 108, 109, 110, 112, 113, 117, 133, 135, 1186
v. Sharpe, 1335, 1339
v. Symonds, 1733
v. Tipton, 982
v. Tucker, 1152
v. Vincent, 249, 348, 1858
v. Walker, 334, 745, 762, 792, 853, 856, 857, 905, 955, 1538, 1616, 1781, 2035
v. Wheeler, 1870, 1871
v. Whiting, 1614
v. Williams, 2007
v. Wilson, 1280
- Wall *v.* Colshead, 76
v. Fife, 1890
v. Goodenough, 1140, 1146
v. Hickey, 2035
v. Hill, 841, 844
v. Hill's Heirs, 986
v. Hinds, 110, 120, 121, 122, 128, 129, 130, 140, 146, 563, 564, 1084, 1086, 1108, 1117, 1901, 2263, 2264
v. Lee, 33, 35, 36
v. Maguire, 414, 415, 423
v. Mason, 2128, 2129
v. Shindler, 2297
v. Wall, 2316
- Wallace *v.* Blair, 811, 2097
v. Bowens, 779, 1647
v. Carpenter, 985, 986, 1030, 1031
v. Coston, 1376, 1562, 1674
v. Duffield, 518, 1615, 1623, 1648, 1649, 1651, 1697, 1698, 1699, 2295
v. Fletcher, 1913, 2291
v. Furber, 2166
v. Goodhall, 2104
v. Hall, 718, 733, 734, 735, 739, 741, 834, 838
v. Harmstad, 2253
v. Harmstead, 156, 163, 195, 226, 1004, 1227
v. Headley, 983, 985
v. Lent, 1109, 1110, 1168, 1200
v. Lewis, 1031
v. Long Island R. Co., 1019
v. McCullough, 1044
v. Wainwright, 1574, 1590, 1592
- Wallace, Jackson ex d., *v.* Carpenter, 985, 986, 1030, 1031
Wallach *v.* Chesley,
v. Van Riswick, 236, 278
Waller *v.* Mardus, 731, 734, 735, 741
v. Spots, 2099
v. Waller's Admrs., 885, 1314
Walley's Heirs *v.* Kennedy, 2324
Walling *v.* Aiken, 2140
v. Burgess, 1956
Wallingsford *v.* Allen, 647, 648, 2345
Wallis *v.* Doe, 741
v. Harrison, 2213
v. Hodson, 2213, 2280
v. Manhattan, 2345
v. Wallis, 236, 2314, 2316, 2317, 2319, 2349, 2359
v. Wilson, 1662
Walls *v.* Atcheson, 1163
v. Bard, 2132
v. Preston, 970, 992, 1230, 1231, 1233, 1234, 1238
Wallwyn *v.* Coutts, 1793
Walmesley *v.* Jewett, 1844
v. Milne, 112, 117, 120, 126, 132, 133, 137, 1186
Walphal *v.* Heath, 1026
Walsh *v.* Horine, 1503
v. Kelly, 773, 920, 956, 960
v. Matthews, 1858
v. Pemberton, 2250
v. Philadelphia F. Assoc., 2113, 2114
v. Phillips, 2103
v. Powers, 2011
v. Reiss, 855, 881, 1411
v. Rutger's Fire Ins. Co., 2088
v. Whitcomb, 1843
v. Wilson, 840, 843, 844, 891
v. Young, 1365
Walsingham's Case, 204, 205, 370, 372, 384, 386, 387, 391, 457, 627
Walston *v.* Buyan, 1230
Walter *v.* Alexander, 1139
v. Bould, 455
v. Dewey, 2253, 2256
v. Greenward, 1893
v. Hedge, 648
Walters *v.* Jordan, 773, 887, 892, 894, 895, 921
v. People, 1386, 1416, 1419, 1438, 1442, 1443, 1444, 1445, 1454, 1456, 1457, 1458, 1495
Walthall *v.* Goree, 1933, 1951
v. Rives, 2091
Waltham Bank *v.* Waltham, 43
Waltmeyer *v.* Baughman, 2296
Walton's Estate, 938
Walton *v.* Cronly, 800, 1117, 2042
v. Cronly's Admrs., 1116
v. File, 1271, 1281, 1290, 1357
v. Hargroves, 804, 832, 2006
v. Hollywood, 2089
v. Johnson, 2081
v. Jordan, 51
v. Tims, 1500
v. Walton, 473, 661
v. Waterhouse, 1068, 1107, 1176, 1179, 1183
v. Withington, 2088
v. Wray, 122, 126
Walz *v.* Rhodes, 1083, 1191, 1201
Wamble *v.* Battle, 2005
Wamburzee *v.* Kennedy, 1782
Wanamaker *v.* McCaully, 1157
Wansborough *v.* Maton, 123
Waples *v.* Harman, 415, 418
v. Marsh, 2333
Warburton *v.* Sands, 1663
Ward *v.* Amory, 344, 486, 1553, 1583, 1597, 1796, 1815
v. Arch, 1783
v. Armstrong, 1610, 1648
v. Bull, 1126, 1175

- Ward** *v.* Carter, 2095
v. Crotty, 647
v. Eden, 2109
v. Egmont, 2359
v. Fagin, 1196, 1197
v. Fuller, 208, 209, 492, 764
v. Hugh, 1426
v. Kelsey, 992, 1084, 1086
v. Kilpatrick, 105, 106, 109, 111, 112, 114
v. Kitchen, 1721
v. Krum, 1931
v. Lewis, 1600, 1734
v. Mayfield, 1425
v. Neal, 2223
v. New York, 1248
v. Peloubet, 1631
v. Seymour, 2136, 2138
v. Shallett, 934
v. Sheppard, 550, 553, 555, 556, 558, 743
v. Thurston, 1039
v. Ward, 1024, 1834, 1945, 2247, 2303
v. Warren, 1913
v. Wilson, 2267
Warden *v.* Adams, 2102, 2105, 2111
v. Enslin, 2175
v. Richards, 1662, 1814, 1885
v. Southern Ry. Co., 224
Wardner *v.* Hardwin, 1544
Wardwell *v.* Bassett, 237
v. Barrett, 2319
Ware *v.* Cann, 249
v. Cowles, 1698
v. Hall, 2252, 2259
v. Murph, 76
v. Owens, 721, 846
v. Polhill, 95, 1811
v. Richardson, 292, 294, 1534, 1550, 1551, 1561, 1565, 1566, 1574, 1654, 1797
v. Washington, 760, 784, 821, 823
Warfield *v.* Fisk, 2041
v. Lindell, 1913, 1914, 1997
v. Warfield, 845
Waring *v.* King, 1290, 1317
v. Louisville & N. R. Co., 1318, 1326
v. Middleton, 309, 331
v. Slinguff, 2273
v. Smyth, 2000, 2076
v. Smythe, 2063
v. Somborn, 2069
v. Waring, 1753
Wark *v.* Willard, 2080, 2364
Warley *v.* Warley, 511
Warn *v.* Brown, 293
Warnecke *v.* Lembca, 1670
Warner *v.* Abbey, 1230, 1231
v. Bacon, 1290
v. Bates, 346, 1627, 1629
v. Bennet, 259, 266, 269, 1849, 1860, 1870
v. Blakeman, 2161
v. Brooks, 2027
v. Caulk, 59
v. Crosby, 1479, 1506
v. Crouch, 2345
v. Hale, 996, 1327, 1329, 1334, 1340, 2270
v. Gouverneur, 2108
v. Hitchens, 1068, 1107, 1181
v. Hoisington, 1237
v. Howell, 1837
v. Kenning, 142
v. Tanner, 475, 478, 481
v. Van Alstyne, 777, 802, 804, 2005, 2006
v. Willard, 1824
v. Willington, 1000
Warner *Doe d., v.* Browne, 1307, 1308, 1313, 1320, 1336
Warrall *v.* Jacobs, 648
Warren *v.* Aller, 1247
v. Blake, 2207, 2241, 2244
v. Chambers, 2293
v. Childs, 207, 211
v. Fenn, 2004, 2006
v. Fredericks, 1976
Warren *v.* Henshaw, 1904, 1922
v. Homestead, 2102, 2103
v. Jenninson, 2128, 2129
v. Leland, 53, 54, 55, 537
v. Lewis, 2038, 2054
v. Lynch, 501, 2339, 2363
v. Lyons, 1049
v. Morris, 918, 944
v. Prescott, 1338
v. Rudall, 573
v. Sennett, 2154
v. Torney, 2273
v. Twiller, 785
v. Van Alstyne, 832
v. Wagner, 1168, 1175
v. Warren, 2097, 2127, 2164
v. Webb, 318, 534
Warrender *v.* Warrender, 753
Warriner *v.* Rogers, 1587
Warrington *v.* Warrington, 1939
Wartenby *v.* Moran, 1004, 1138
Warter *v.* Hutchinson, 1596, 1607, 1797
Warwick *v.* Bruce, 50, 51
v. Warwick, 1621, 1759
Washabaugh *v.* Entriken, 2293
Washburn, *Re*, 2266
Washburn *v.* Burnham, 1047
v. Burns, 1024, 1944, 1945
v. Cutter, 2295, 2296, 2297, 2298
v. Gilman, 2225
v. Merrills, 2035, 2046
v. Sproat, 62, 63, 123, 565, 1367
Washington *v.* Conrad, 1140
Washington's Exrs. *v.* Abraham, 76
Washington, A. & G. R. Co. v. Alexandria & N. R. Co., 1599
Washington Ice Co. v. Shortall, 68, 70, 71, 2224
Washington Ins. Co. v. Kelley, 2115
v. Kelly, 2113, 2117
Wass *v.* Buckman, 590, 603, 607, 608
Wassell *v.* Tunnah, 1379, 1380, 1483, 1514
Watefall *v.* Penistone, 125
Waterford *v.* People, 706
Waterman *v.* Clark, 1139
v. Curtis, 2060
v. Greene, 305, 310
v. Matterson, 2077
v. Matteson, 688, 1998, 2186, 2187
v. Soper, 56, 57
Waters *v.* Gooch, 822, 841, 845, 864, 866, 867, 874, 875, 876, 877, 878
v. Margerum, 443, 445
v. Taxewell, 645, 1561
Watertown *v.* Mayo, 4, 5
Water Street, *Re*, 1129
Waters *v.* Groom, 2163
v. Hubbard, 2072
v. Lilley, 2213, 2214
v. Stewart, 2000
v. Tazewell, 1857
v. Randall, 2050, 2054, 2055, 2159, 2168
v. Young, 1006, 1335
Waterson *v.* Devol, 1999
v. Kirkwood, 2175
Waterworks Co. v. Burkhart, 73
Watkins, *In re*, 864
Watkins *v.* Blatschinski, 1503
v. Eaton, 1921
v. Gregory, 2040, 2053, 2083
v. Holman, 278, 279, 1291, 2091, 2092, 2224, 2333
v. Holman's Lessee, 368
v. Overby, 1499
v. Peck, 2225, 2226, 2227, 2229, 2242
v. Quarles, 315
v. Sears, 401, 418, 447
v. Specht, 1785, 1797, 1885
v. Thornton, 598, 599, 603, 615, 703
v. Wassell, 2300
v. Watkins, 767, 773, 920
v. Wyatt, 2018, 2020

- Watris *v.* First Nat. Bank of Cambridge, 122,
130, 145, 147, 1137, 1187, 1188, 1189
- Watson, *Ex parte*, 1240, 1244
- Watson *v.* Bioren, 2218
- v.* Bondruant, 2119
- v.* Clendenin, 802, 925, 2365
- v.* Dickens, 2039, 2078
- v.* Donnelly, 221, 222
- v.* Doyle, 1437
- v.* Dundee, 2107
- v.* Erb, 1620
- v.* Fletcher, 1156
- v.* Gray, 2235
- v.* Gregg, 517, 1916, 2358
- v.* Hayes, 1637
- v.* Hill, 1901
- v.* Hunter, 573
- v.* Hunsworth Hospital, 1037
- v.* James, 1832
- v.* Jones, 1658
- v.* Le Row, 2036, 2123
- v.* Master, 1008
- v.* Mercer, 2333
- v.* Mayrant, 1614
- v.* McEachin, 1287
- v.* Mercer, 671, 904
- v.* O'Hern, 1002
- v.* Pearson, 1797
- v.* Penn, 2250
- v.* Pennsylvania, 2252
- v.* Powell, 331, 333
- v.* Spence, 2149, 2151
- v.* Spratley, 817
- v.* Thompson, 1623
- v.* Watson, 580, 581, 589, 591, 624, 628,
629, 634, 636, 637, 652, 672, 804, 867,
868, 869, 874, 1360
- v.* Wells, 2005
- Watt's Appeal, 2300
- Watt *v.* Watt, 2152
- Watt, Doe d., *v.* Morris, 1347
- Watts *v.* Ainsworth, 999
- v.* Ball, 598, 611, 679, 689, 1577, 1741
- v.* Clardy, 411, 413, 415
- v.* Coffin, 1083, 2065, 2191
- v.* Cole, 443, 445, 464, 465
- v.* Corey, 920
- v.* Gordon, 1424
- v.* Kinney, 2177
- v.* Miller, 1469
- v.* Symes, 2127
- v.* Waddle, 368, 2058, 2289
- Waugh *v.* Carver, 1242, 1243, 1244
- v.* Riley, 673, 2014
- Waugh's Exrs. *v.* Waugh, 281
- Wauson *v.* Hawkins, 2157
- Way *v.* Holton, 2251
- v.* Raymond, 1292
- v.* Reed, 1050, 1069, 1072, 1115
- v.* Way, 840
- Way's Trust, *In re*, 1791, 1792
- Wayman *v.* Cochrane, 2106
- v.* Jones, 1734
- v.* Southard, 1516
- Wayne *v.* Hanham, 2159
- v.* Middleton, 1832
- v.* Steamboat General Pike, 1209
- Wealde *v.* Lower, 214
- Weare *v.* Linnell, 1652
- v.* Van Meter, 1883
- Weare *v.* Pierce, 2025, 2059
- Weatherbee *v.* Bennett, 730
- Weatherby *v.* Baker, 1010, 2259
- v.* Slack, 2179, 2180
- Weatherhead's Lessee *v.* Baskerville, 201
- Weathersby *v.* Sleeper, 117, 122, 131
- v.* Weathersby, 2053
- Weaver *v.* Barden, 1746
- v.* Belcher, 2065
- v.* Crenshaw, 717, 838
- v.* Cregg, 714, 725, 785, 796, 828, 886, 893
- v.* Jones, 1259, 2271
- Weaver *v.* Leiman, 1781
- v.* Sturtevant, 716, 717, 731, 732, 733, 736,
739, 741
- v.* Toogood, 2154
- v.* Wible, 1990
- v.* Wood, 999
- Webb, Estate of, 1593
- Webb, *Ac*, 2266
- Webb *v.* Bird, 2291
- v.* Boyle, 718, 734, 741
- v.* Byng, 324, 411, 412
- v.* Cowley, 1398
- v.* Danforth, 1905
- Webb, Doc d., *v.* Dixon, 1008
- v.* Earl of Shaftesbury, 1693
- v.* Evans, 955, 965
- v.* Fairman, 1005, 2256
- v.* Holt, 1428
- v.* Hoselton, 1999, 2012, 2078
- v.* Lexington First Colored Baptist
Church, 689, 690
- v.* Meloy, 811
- v.* Mexan, 2147
- v.* Pond, 1101
- v.* Portland Co., 2225
- v.* Richardson, 2295
- v.* Robinson, 2005, 2007
- v.* Russell, 1028, 1069, 1100
- v.* Seekins, 1281
- v.* Shaftesbury, 1845
- v.* Smith, 711
- v.* Townsend, 552, 807, 833, 845
- v.* Woods, 1629
- Webber, Jackson ex d., *v.* Harsen, 981
- v.* Sherman, 1132, 1254
- Webbs *v.* Hynes, 517, 2292
- Weber *v.* Anderson, 2298
- v.* Short, 1398
- v.* Weber, 1655
- Webster *v.* Blodgett, 996
- v.* Bowman, 2309
- v.* Calden, 2084
- v.* Clark, 999
- v.* Cooper, 1655, 1710, 1711, 1796, 1797,
1849, 1860, 1866
- v.* Ellingsworth, 692
- v.* Ellsworth, 703
- v.* Hall, 2364
- v.* Howe Machine Co., 2056
- v.* King, 1620
- v.* Nichols, 1143, 1156, 1316, 2261, 2262,
2272
- v.* Parker, 974, 975
- v.* Potter, 141
- v.* Stevens, 2236
- v.* Upton, 1581
- v.* Vandeventer, 1662, 1878, 1885, 1900,
1966, 1969, 2101, 2146
- v.* Vandewater, 1881
- v.* Webster, 478, 541, 545, 546, 547, 549,
550, 552, 555, 557, 559, 564, 566, 662
- v.* Woodford, 1032
- v.* Zielly, 45
- Wedderburn *v.* Wedderburn, 76, 1621, 1715,
1782, 1783, 1784, 2081
- Wedge *v.* Moore, 728, 764
- Weed *v.* Beebe, 2149
- v.* Crocker, 2255
- v.* Lindsay, 994, 1281
- v.* Panama R. Co., 1195
- Weed Sewing maching Co. *v.* Emerson, 2068,
2070, 2152, 2301, 2345
- Weekly *v.* Weekly, 42, 44
- Weeks *v.* Bowerman, 1054
- v.* Cornwell, 1689
- v.* Eaton, 2100, 2103
- v.* Haas, 1651
- v.* Hull, 2256
- v.* Sego, 257
- v.* Tones, 2152
- v.* White, 2308
- Weetjen *v.* Vibbard, 1731, 1734

- Weeton *v.* Woodcock, 131, 145, 146, 1224
 Wegg *v.* Villers, 1571
 Weichselbaum *v.* Curlett, 1214, 1222
 Weide *v.* Gehl, 2045, 2047
 Weidman, Jackson *ex d.*, *v.* Hubble, 1074
 Weidner *v.* Foster, 2054
 Weigall *v.* Waters, 1182
 Weight *v.* Freeman, 2303
 Weil *v.* Golden, 2056
 v. Raymond, 975
 Weill *v.* Lucerne, 2303
 v. Thompson, 123
 Weimar *v.* Fath, 1842
 Weiner *v.* Heintz, 2151
 Weinstein *v.* Harrison, 1901
 Weir *v.* Groat, 2012
 v. Humphries, 615, 703, 776, 777, 778, 826
 v. Simpson, 1083
 v. Smith, 487
 v. St. Paul, S. & T. F. R. Co., 197, 2325,
 2326, 2327
 v. Tate, 598, 760, 762, 763, 778, 790, 814,
 877, 885
 Weisbrod *v.* Daenicke, 1483, 1484
 Weise *v.* Welsh, 633, 641
 Weiser *v.* Weiser, 1971, 1089, 1991
 Weisinger *v.* Murphy, 590, 591, 628, 651, 702,
 1366, 1369, 1370
 Welch *v.* Adams, 1220
 v. Agar, 1080
 v. Allen, 289, 1594, 1596, 1655, 1796
 v. Anderson, 941, 947, 1981
 v. Beers, 2181, 2183
 v. Chambers, 699
 v. Chandler, 658, 689, 701
 v. Clark, 1247
 v. Duckins, 760, 783, 826, 893
 v. Dutton, 2322
 v. Foster, 2318
 v. Meyers, 2266
 v. Nash, 57
 v. Priest, 2100, 2103
 v. Rice, 1407, 1462, 1463, 1472, 1473, 1475,
 1482
 v. Welch, 1371
 Welch's Heirs *v.* Chandler, 601
 Welcome *v.* Hess, 1160, 1161
 Weld *v.* Oliver, 1905
 v. Sabin, 810, 2136
 v. Traip, 993
 v. Williams, 402, 418, 443, 447
 Weldon, Jackson *ex d.*, *v.* Harrison, 1104, 1107,
 1155
 Welford *v.* Beasley, 998
 Wellborn *v.* Williams, 2007
 Weller *v.* Baker, 1366, 1368, 1369, 1370
 v. Rolason, 289, 290
 v. Snover, 190
 v. Weller, 690, 691, 781, 815, 820, 826,
 889, 1411
 Welles *v.* Cowles, 42, 43, 44, 1023
 v. Olcott, 401, 411, 412, 448
 Wellford *v.* Beasley, 1043
 v. Chancellor, 1643
 Welling *v.* Ryerson, 2173
 Wellington *v.* Wellington, 373, 418
 Wellock *v.* Hammond, 1848
 Wells *v.* Bannister, 123, 142
 v. Beall, 866
 v. Calnan, 1099
 v. Castles, 1066, 1084, 1086, 1107, 1126,
 1127, 1166, 1167, 1175, 1604, 1753
 v. Caywood, 646, 895, 1938
 v. Deming, 2260
 v. Evans, 1042
 v. Hart, 2004
 v. Heath, 1594, 1597
 v. Jackson, 2298
 v. Lewis, 1663, 1842
 v. Mason, 1079, 1149, 1172, 1220, 1291
 v. McCall, 500, 1673
 v. Moore, 831
 Wells *v.* Morrow, 2007, 2047
 v. Morse, 2176
 v. Newbold, 447, 463, 471
 v. Prince, 207
 v. Robinson, 1644, 1760
 v. Sheerer, 1140, 1212
 v. Thompson, 603, 605, 612, 613, 633, 641,
 658, 664, 665, 686, 689, 690
 v. Wilmington, 1247
 Wells, Jackson *ex d.*, *v.* Well, 536
 Welp *v.* Cunther, 2067
 Welsh *v.* Foster, 236, 2317, 2319
 v. Phillips, 1993, 2102
 v. Usher, 2003
 v. Wilson, 1797
 v. Woodbury, 1815
 Welton *v.* Devine, 779, 1647
 Wendell *v.* Crandall, 226, 227, 228, 471, 601
 v. Jackson, 2357
 v. Johnson, 1283
 v. Moulton, 211
 v. New Hampshire Bank, 2147
 Wentworth *v.* First Parish of Canton, 31, 35,
 36, 37, 38, 39, 40
 v. Miller, 1236
 v. Philpot, 2242
 v. Portsmouth, etc., R. Co., 1234
 v. Remick, 1920, 1936
 v. Wentworth, 523, 956, 1639, 1652, 1699,
 1763
 Wertz's Appeal, 2126
 Wescott *v.* Delano, 144
 v. Edmunds, 1655, 1744
 Wesley University *v.* Troy Conference Acad-
 emy, 1019
 West *v.* Barney, 1843, 1844
 v. Fitz, 1797
 v. Flannagan, 1307
 v. Fritche, 1266
 v. Hart, 1106
 v. Hendrix, 2044, 2053, 2054
 v. Jones, 1733
 v. Kelly, 1698, 1701
 v. Moore, 724
 v. Randall, 2365
 v. Stewart, 62
 v. Ward, 1426, 1427
 West Cambridge *v.* Lexington, 212
 West Coast Lumber Co. *v.* Apfield, 1188
 West Cumberland Iron Co. *v.* Kenyon, 200
 West Transportation Co. *v.* Lansing, 1075
 West Virginia Trans. Co. *v.* Ohio R. P. L. Co.,
 2214
 West River Bank *v.* Gale, 1431, 1434, 1457, 1499
 West River Bridge Co. *v.* Dix, 2327
 West Side Savings Bank *v.* Newton, 1166,
 1168
 Westbrook *v.* Eager, 49, 50, 51, 52
 v. Gleason, 2125
 Westcott *v.* Campbell, 841, 844
 Westerfield *v.* Bried, 2060
 Western *v.* Macdermott, 267
 v. Russell, 1758
 Western Bank *v.* Kyle, 1059
 Western Bank of Scotland *v.* Tallman, 2014,
 2016
 Western Ins. Co. *v.* Riker, 2116
 Western Mfg. Co. *v.* Peytonia, 2301
 Western National Bank's Appeal, 2235
 Western N. C. R. Co. *v.* Deal, 122, 129
 Western R. Co. *v.* Babcock, 1697
 Western Transportation Co. *v.* Lansing, 1003,
 1006, 1087, 1088, 1307, 1320, 1336
 Western Union Tel. Co. *v.* Caldwell, 2082
 v. Fain, 996, 1262, 1263, 1274, 1283, 1304,
 1329
 Westervelt *v.* Cregg, 2324
 v. Matheson, 1697
 v. People, 486
 v. Pinckney, 50
 Westfall *v.* Hintz, 928
 v. Jones, 2109

- Westfall *v.* Lee, 900
 Westgate *v.* Wixon, 2021, 2022
 Westgate *v.* Wixon, 139, 140, 141
 Westlake *v.* De Crawl, 1054, 1175
 v. Wheat, 1689
 Westmeath *v.* Westmeath, 648
 Westmoreland *v.* Foster, 2250
 v. Porter, 2267
 Westmoreland & Cambria Natural Gas Co. *v.*
 De Witt, 83, 84, 100, 1139
 Westmoreland Coal Co. Appeals, 494, 495
 Westmoreland, Doe d., *v.* Smith, 1314
 Westn Univ. *v.* Robinson, 2191
 Weston *v.* Alden, 2225
 v. Arnold, 2236
 v. Barker, 1600, 1672
 v. Hunt, 234
 v. Metropolitan Asylum District Man-
 agers, 1141
 v. Weston, 104
 v. Wilson, 2331
 Westover *v.* Chapman, 1715
 Wetherbee *v.* Bennett, 1095
 v. Ellison, 79
 Wetherell *v.* Howells, 1223
 Wetherby *v.* Slack, 2154
 Wethersby *v.* Sleeper, 123
 Wetmore *v.* Kissam, 898, 957
 v. Laird, 2365
 v. Porter, 1798
 Wetz *v.* Beard, 1378, 1459
 Wetzel *v.* Mayer, 2272
 Whale *v.* Booth, 1667
 Whalen *v.* Cadman, 1400, 1401
 Whaley & Others *v.* Jenkins, 309
 v. Whaley, 1150, 1348, 1349
 Whalin *v.* White, 1125, 1169, 1219, 2156
 Whalley *v.* Eldridge, 2175
 v. Small, 2123
 Wharf *v.* Howell, 2031, 2044, 2168
 Wharton *v.* Moore, 2067
 v. Taylot, 1509
 v. Wharton, 445
 Whatman *v.* Gibson, 267, 2214
 Whyman, Doe d., *v.* Chaplin, 1027
 Wheatland *v.* Dodge, 417, 424
 Wheatley *v.* Baugh, 2226, 2230
 v. Calhoun, 766, 767, 787, 830, 1671
 v. Purr, 1587
 v. Thomas, 277
 Wheatley's Heirs *v.* Calhoun, 803, 804, 805, 818
 Wheaton *v.* Address, 320, 333, 535
 v. East, 985, 2343
 v. Gates, 32, 35
 v. Peters, 149, 777
 Whedon *v.* Gorham, 1516
 Wheeland *v.* Swartz, 2168
 Wheeldon, Doe d., *v.* Paul, 1154
 Wheeler *v.* Atkins, 257
 v. Bedell, 123
 v. Caryl, 1626
 v. Clark, 2236
 v. Clutterbuck, 2286
 v. Conrad, 996, 998
 v. Cowan, 1274, 1304
 v. Crawford, 1083
 v. Dunlap, 2
 v. Earle, 1141
 v. Factors & Traders' Ins. Co., 2119
 v. Frankenthal, 996, 998, 1013, 1323
 v. Gorham, 486
 v. Hamey, 1903
 v. Hill, 1121
 v. Hotchkiss, 592, 624, 661, 662, 670
 v. Hughes, 2110
 v. Kirkendall, 1205
 v. Kirtland, 532, 726, 797, 818, 893, 921,
 922
 v. Montefiore, 978
 v. Morris, 799, 800, 926, 2173
 v. New Brunswick C. R. Co., 2302
 v. Perry, 1720
 Wheeler *v.* Redding, 1512
 v. Reynolds, 1590, 1702
 v. Sage, 1586, 1645
 v. Stone, 2091, 2092
 v. Thoroughgood, 980
 v. Walker, 1847, 1850, 1852, 1855, 1856, 1862
 v. West, 995
 v. Wheeler, 1021
 v. Whittall, 1870
 v. Willard, 2136, 2138
 Wheelock *v.* Dozzens, 706
 v. Warschauer, 1126, 1169, 1172, 1220
 Wheelwright *v.* Wheelwright, 465, 1016, 2035,
 2354
 Whelan *v.* Reilly, 2161
 v. Whelan, 959, 1696, 2350
 Whelpdale *v.* Cookson, 1767
 Wheatmore *v.* Kissam, 985
 Whetstone *v.* Bury, 1558, 1559, 1583
 v. Davis, 1314
 v. Saintbury, 299
 Whett *v.* Whetstone's Exrs., 1783
 Whichcote *v.* Lyle, 1674
 Whilden *v.* Whilden, 916, 918, 934, 936, 944
 Whilton *v.* Whilton, 1924
 Whipple *v.* Dewey, 146, 1138
 Whipple *v.* Adams, 1632
 v. Farrar, 1751
 v. Foote, 48, 49, 50, 51, 52, 2334
 Whiskon *v.* Clayton, 338
 Whistler *v.* Hicks, 729, 730, 1094
 v. Newman, 1035
 v. Webster, 948
 Whitaker *v.* Brown, 88, 2241
 v. Cawthorne, 1268
 v. Greer, 867, 875
 Whitbank's Appeal, 1581
 Whitbeck, Jackson ex d., *v.* Deyo, 1282
 v. Whitbeck, 1698
 Whitbread, *Ex parte*, 2002
 Whitcomb *v.* Cardell, 1592, 1690
 v. Reid, 2288
 v. Taylor, 317, 417, 418
 v. Towers, 984
 White's Appeal, 122
 White *v.* Albertson, 1707
 v. Arndt, 115, 145, 146
 v. Barker, 299, 1606
 v. Bass, 2208
 v. Bayley, 1287
 v. Baylor, 1796
 v. Bond, 2073, 2074, 2170
 v. Briggs, 347, 1630, 1632, 1693
 v. Brooks, 1923
 v. Brown, 2089, 2114
 v. Cannon, 1586, 1645
 v. Carpenter, 1634, 1635, 1649
 v. Chapin, 2226, 2244
 v. Chitty, 501
 v. Clark, 2328
 v. Clarke, 736, 737, 1460, 1463
 v. Cox, 1033
 v. Crawford, 2208, 2217, 2218, 2245
 v. Cutler, 541, 542, 543, 545, 546, 552, 557,
 724, 738, 807, 833
 v. Denman, 2126, 2364
 v. Dougherty, 2008
 v. Downs, 2007
 v. Dresser, 2233
 v. Drew, 761, 763, 1622
 v. Elwell, 1280
 v. Fisher, 2150
 v. Fitzgerald, 1592, 1964
 v. Flora, 1758
 v. Foster, 53, 55, 56
 v. Givens, 1481
 v. Graves, 902
 v. Grifing, 1114, 1164, 2266
 v. Hampton, 810, 1599, 1786, 1788, 2096,
 2097, 2171
 v. Hart, 1512
 v. Hicks, 1837

- White v. Holland*, 1013, 1323
v. Howard, 368, 2058, 2289
v. Hunt, 1114
v. Hussey, 1626
v. Hutchinson, 1280
v. Hyatt, 2024
v. Knapp, 811
v. Leslie, 2364
v. Livingston, 1001
v. McGannon, 1697
v. Middlesex R. Co., 1051
v. Miller, 1247
v. Molyneux, 1083, 1126, 1175, 1177
v. Montgomery, 1083, 1192
v. Moore, 2121
v. Mosely, 1247
v. Nashville, 713, 738, 2325
v. Osborn, 1246
v. Parker, 695
v. Perkins, 630
v. Polleys, 1494, 2164
v. Reid, 210
v. Rittenmeyer, 688, 1997, 1999, 2062, 2084, 2103, 2112
v. Samson, 1626
v. Sayre, 1876, 1911
v. State, 506
v. Story, 853, 859
v. Sutherland, 2106
v. Trotter, 1773
v. Trustees Methodist Episcopal Church, 35, 40
v. Wager, 1938
v. Wagner, 552, 553, 563, 568, 570, 646, 647, 895, 1152, 1153
v. Warner, 1157
v. Watts, 1758, 2146
v. Williams, 1888, 2007, 2146
v. Williamson, 532
v. Willis, 807
v. White, 216, 220, 236, 274, 500, 509, 519, 846, 862, 881, 882, 884, 888, 893, 896, 908, 909, 912, 916, 918, 919, 941, 944, 1456, 1781, 2327, 2331
v. Whitney, 688, 1095, 2062, 2112
White, Doe d., v. Simpson, 1595, 1596
White, Jackson ex d., v. Cary, 1557
White's Admr. v. White, 1520, 1521
White's Contract, Re, 1693
White River Turnpike Co. v. Vermont Cent. R. Co., 2327
Whiteacre v. Rector, 1403, 1503
Whitcomb v. Jacob, 1761
Whitefield v. McLeod, 1758
Whitehead v. Clifford, 1162
v. Cummings, 886
v. Foley, 2366
v. Hellen, 2163
v. Mallory, 792, 821, 822, 915
v. Tapp, 1398
Whitehead, Doe d., v. Pittman, 1141
Whiteman v. Field, 1466
Whiteside v. Jackson, 1268, 1272
v. Miller, 1690
Whiteside et al. v. Jackson ex d. Mumford, 1282
Whitesides v. Cannon, 1373, 1562
Whitewater Valley Canal Co. v. Vallette, 2342
Whitfield v. Bewit, 495
v. Prickett, 260, 272
v. Taylor, 964
Whitham v. Osburn, 2328
Whithers v. Yeadon, 1021
Whiting v. Brastow, 131, 147, 1137, 1187
v. Dewey, 2025
v. Edmunds, 1144, 1145
v. Gould, 1635, 1646
v. Griffing, 2266
v. Nicholl, 523
v. Ohlert, 997
v. Pittsburgh Opera House, 996, 998, 1305
v. Salter, 512
v. Stevens, 2343
Whiting v. Street, 2258
v. Whiting, 457, 780, 914, 1885
Whitley v. Davis, 2353
Whitlock's Case, 1039, 2361
Whitlock v. Duffield, 1009, 1087, 1088, 1089
v. Gosson, 1471, 1474
v. Hale, 1975
v. Horton, 1162
Whitmarsh v. Cutting, 1205, 1207, 1210, 1267
v. Walker, 54, 56
Whitmire v. Wright, 823
Whitmore v. Gibbs, 1266
v. Learned, 1635, 1648
v. Russell, 534
v. Shiverick, 1999
v. Weld, 437
v. Whitmore, 661
Whitney v. Allaire, 971, 978, 979, 1111
v. Allen, 2156
v. Batchelder, 2045
v. Buckman, 2015, 2016, 2024, 2031
v. Closson, 646, 648
v. Cochran, 1291
v. Dutch, 986, 1031, 2343
v. French, 211, 1995, 2038, 2039
v. Gordon, 1275, 1307, 1328, 1342, 1343
v. McKinney, 2147, 2150
v. Meyers, 1162
v. Morrow, 574
v. Salter, 490, 505
v. Stevens, 750
v. Swett, 1262, 1264, 1265, 1284, 1295, 1303, 1305, 1329
v. Union R. Co., 268
Whitridge v. Barry, 1878
Whitsell v. Mills, 662, 770, 771, 919, 920
Whitt v. Mayor of New York, 1321
Whittaker v. Hawley, 982, 983, 1126, 1176, 1177, 1178, 1180
Whittemore v. Farrington, 2071, 2330
v. Gibbs, 1998
v. Moore, 1316
Whitten v. Whitten, 647, 1975, 1982
Whitter v. Cochecho, 2247
Whitthaus v. Shack, 933
Whittick, Jackson ex d., v. Deigo, 1309
Whittier v. Whittier, 779
Whittingham's Case, 1031
Whittington v. Wright, 2298
Whittle v. Samuels, 1483
Whittlesey v. Fritter, 1920, 1934
v. McMahon, 1625
Whitton v. Whitton, 1911
Whitwell v. Harris, 1050, 1141
v. Warner, 1621
Whitworth v. Gangain, 2003
v. Stuckey, 416, 417
Whyte v. Nashville, 506, 710, 723, 731, 737, 740
Wickersham v. Bills, 284
v. Irwin, 1108
Wickes v. Clarke, 635, 642
v. Jordan, 539, 1206
Wickham v. Berry, 299, 1037, 1606, 1675
v. Hawker, 90, 93
Wickliffe v. Lexington, 1781
Wickman v. Robinson, 2009
Wickoff v. Davis, 2068
Wicks v. Mitchell, 896, 2012
v. Scribens, 2173
Widdowson v. Duck, 1721
Widger v. Browning, 1344
Wiedler v. Farmers' Bank, 890
Wien v. Simpson, 1109
Wier v. Humphries, 693
v. Michigan Stove Co., 305
v. Simmons, 1867
v. Tate, 600
Wiesner v. Zann, 2301
Wigg's Case, 1026
Wiggin v. Berry, 1850
v. Buzzell, 1445
v. Chance, 1502, 1519

- Wiggin *v.* Heywood, 2082, 2083
 Wiggins *v.* Holley, 210, 211, 2297
 v. Keizer, 961
 v. McCleary, 2303
 v. New York, 2268
 v. Peters, 1005
 v. Wiggins, 64, 65, 507, 1278, 1876, 1891,
 2270, 2271
 Wiggins Ferry Co. *v.* Ohio & M. R. Co., 370,
 390, 1071
 Wigglesworth *v.* Dallison, 1205, 1208, 1209, 1210
 v. Steers, 1032, 1033
 Wight *v.* Gray, 133
 v. Shaw, 591
 v. Thayer, 252, 396, 411, 412, 427, 448, 449,
 450
 Wightman *v.* Gray, 2165
 v. Pettis, 678
 v. Wightman, 660, 661, 751, 753, 754, 755,
 756, 757
 Wigley *v.* Beauchamp, 837, 938, 949
 Wikoff *v.* Davis, 2154, 2179, 2180
 Wilber *v.* Wilber, 793, 910
 Wilbraham *v.* Snow, 1969
 Wilbur *v.* Almy, 1731
 v. Tobey, 660, 673
 Wilce *v.* Wilce, 310
 Wilcox *v.* Bates, 2046
 v. Danforth, 2235
 v. Hawley, 1514, 1515
 v. Heywood, 405, 416, 447, 472
 v. Morris, 1993, 2001
 v. Randall, 797, 940
 v. Smith, 1769
 v. Wheeler, 289, 1797
 v. Wilbur, 1280
 v. Wilcox, 1957, 1963, 1964
 v. Wood, 1006
 Wilcoxon *v.* Bowles, 2254
 Wilcoxon *v.* Donnelly, 2251
 Wild's Case, 324, 325
 Wild *v.* Deig, 2327, 2328
 v. Milne, 1980
 Wild's Lessee *v.* Serpell, 1144, 1160, 1220
 Wilde *v.* Cantillon, 1346, 1347, 1356
 v. Waters, 145
 Wilden *v.* Bodley, 1709
 v. Brooks, 648
 v. Ewbank, 1156
 v. Haughey, 1421, 1475, 2144
 v. Houghton, 2066
 v. House, 1357
 v. St. Paul, 2245
 v. Whittimore, 2032, 2033
 v. Whirtmore, 1666
 Wildermuth *v.* Koenig, 1499
 Wildes *v.* Van Voorhis, 902, 1910
 Wildey *v.* Barney's Lessee, 1976
 v. Bonney, 1928
 v. Collier, 2059
 Wilding *v.* Richard, 1793
 Wildman *v.* Taylor, 1058
 v. Wildman, 43
 Wilds *v.* Layton, 549, 572, 576
 Wild's Case, 2199
 Wiles *v.* Peck, 2364
 Wiley's Appeal, 975
 Wiley *v.* Collins, 1794
 v. Ewing, 2073, 2135, 2171, 2174
 v. Knight, 1624, 2061
 v. Fenson, 2148, 2150
 v. Smith, 415, 1694
 v. Wiley, 900
 Wilford *v.* Grant, 706
 Wilgus *v.* Commonwealth, 974
 v. Lewis, 1316, 1335, 1340
 v. Whiteheart, 2255
 Wilhelm *v.* Lee, 1908
 v. Mertz, 1025, 1047
 Wilhelmi *v.* Leonard, 810, 2096
 Wilhite's Admr. *v.* Boulware, 1957
 Wilkerson *v.* Adams, 2281
 Wilkerson *v.* Rust, 1211
 Wilkins *v.* Aulton, 1884, 1907
 v. Fry, 1065
 v. French, 688, 802, 1921, 1998, 2063, 2084,
 2103, 2169, 2173
 v. Irvine, 1268
 v. Taliaferro, 2255
 v. Taylor, 76
 v. French, 2062
 v. Varshbinder, 46, 52
 Wilkinson *v.* Adams, 2281
 v. Barry, 1778, 1787
 v. Bewick, 120
 v. Clauson, 1110
 v. Deming, 1464
 v. Dent, 918, 944
 v. Flowers, 2094, 2140
 v. Hall, 1327, 1328, 1329, 1338, 1901
 v. Jett, 1244
 v. Kettler, 2271
 v. Leland, 671, 2324, 2328, 2329, 2333
 v. Malin, 1731
 v. Merrill, 1403, 1404, 1454
 v. Nelson, 1840
 v. Parrish, 785, 886, 887
 v. Pearson, 1034
 v. Proud, 93
 v. Rogers, 1141
 v. Scott, 1538, 1700
 v. Wilkinson, 265
 Willan *v.* Willan, 1089
 Willard *v.* Benton, 1154, 1155
 v. Eastham, 2012
 v. Finnegan, 2159, 2170, 2171
 v. Harvey, 2131, 2251
 v. Henry, 1860, 1869
 v. Reas, 2005
 v. Tillman, 1179, 2251, 2258
 v. Ware, 1837
 v. Worsham, 2072
 v. Winnelly, 1996, 2051
 Willet *v.* Beatty, 804, 813, 814, 817
 v. Brown, 694, 786, 824, 825
 Willets *v.* Burgess, 2050, 2168
 Willey *v.* Haley, 464
 Willi *v.* Dryden, 1108, 2262
 William's Case, 519
 William *v.* Farwell, 1812
 v. Roberts, 2005
 William and Mary College *v.* Powell, 934
 Williams' Appeal, 329, 336, 1561, 1604, 1655, 1664,
 1707, 1753
 Williams' Case, 2146
 Williams, *Ex parte*, 1831
 Williams' Exrs., 526
 Williams *v.* Ackerman, 1134, 1125, 2260
 v. Ackerson, 1322
 v. Allen, 294
 v. Allison, 1758
 v. Angell, 1864
 v. Arkle, 1638
 v. Bagnall, 90
 v. Baker, 638, 639, 924
 v. Bartlett, 2087
 v. Beasley, 440, 441
 v. Bennett, 873, 1334
 v. Brown, 1653
 v. Bosanquet, 979, 2262
 v. Briggs, 2017, 2018, 2020
 v. Burrell, 1063, 1065, 1074, 1080, 1190,
 2362
 v. Carle, 658, 794
 v. Cash, 1212, 1297, 1308
 v. Castor, 489, 521
 v. Chitty, 953, 955, 957
 v. Cincinnati Ins. Co., 2089
 v. Claiborne, 645
 v. Cleaver, 970
 v. Coade, 1638
 v. Conrad, 489, 514
 v. Countney, 803
 v. Cowden, 270, 1858

- Williams v. Cox, 816
 v. Dakin, 1868
 v. Dawson, 914
 v. Deriar, 1255, 1275, 1281, 1301, 1307,
 1319, 1324, 1339
 v. Dickerson, 321, 322
 v. Dorris, 1442, 1444
 v. Downing, 1047, 1225
 v. Dwinelle, 1703
 v. Earle, 1076, 2264
 v. Engelbrecht, 2060
 v. Everett, 1600
 v. First Presbyterian Soc., 1596, 1684,
 1723, 1796
 v. Garrison, 1159, 1222, 1579
 v. Gibbs, 1665
 v. Gray, 1383
 v. Groucott, 89
 v. Hall, 1419
 v. Hensley, 1309
 v. Hichborn, 417
 v. Hilton, 2027, 2089, 2090
 v. Hodge, 1282, 1292
 v. Hollingsworth, 1631, 1639, 1641, 1642,
 1644, 1700
 v. Holmes, 1249, 1820
 v. Howard, 984
 v. Inabnet, 1033
 v. James, 2220
 v. Jekyll, 1553
 v. Jenkins, 1906
 v. Johnson, 671
 v. Jones, 351, 1497
 v. Kershaw, 1638
 v. Lake, 999
 v. Lanier, 578
 v. Latourette, 648
 v. Leech, 1674
 v. McCall, 1724
 v. McConico, 300, 1606
 v. Milton, 2089
 v. Morancy, 2105
 v. Moore, 2344
 v. Morgan, 1367
 v. Nelson, 72, 2247
 v. Nixon, 1733
 v. Nolan, 1233
 v. Oliphant, 1246
 v. Otey, 1782, 1785
 v. Owens, 2044, 2055
 v. Parisiene, 769
 v. Perry, 2153
 v. Potter, 1139
 v. Roberts, 2008
 v. Robinson, 2066
 v. Robson, 900, 903, 909
 v. Roger Williams Ins. Co., 632
 v. Rogers, 1153
 v. Sheldon, 1029, 1033
 v. Sharman, 1132
 v. Starr, 1450, 1473, 1475, 1478, 2133
 v. Steele, 2023
 v. Stratton, 2003
 v. Sweetland, 1407, 1444, 1485
 v. Tatnall, 1226
 v. Teachy, 2100, 2101
 v. Turner, 1622
 v. Terrall, 2151
 v. Thomas, 209
 v. Thorn, 273
 v. Tipton, 2177
 v. Townsend, 2086, 2146, 2155
 v. Vosanquet, 1117
 v. Waters, 299, 1558
 v. Wethered, 1425
 v. Whiting, 1456
 v. Williams, 347, 407, 596, 755, 1627, 1628,
 1632, 1633, 1647
 v. Winsor, 2018
 v. Wood, 2006
 v. Woods, 814, 832
 v. Woodward, 233, 1114, 1119, 1832
- Williams v. Worthington, 1591, 1593
 v. Young, 1497, 1501, 1502, 2009
 Williams, Doe d., v. Cooper, 1309
 Williams, Doe d., v. Matthews, 1039
 Williams, Jackson ex. d., v. Miller, 1108, 1113,
 1148, 1348, 1586, 1638, 1645, 1696
 Williams, Doe d., v. Pasquale, 1309
 Williams, Doe d., v. Smith, 1336
 Williams' College v. Mallett, 1911
 Williamson v. Adams, 2281
 v. Ball, 1751
 v. Beekham, 1375
 v. Berry, 1516, 1751, 2154
 v. Champlin, 2082
 v. Daniel, 408, 414, 416
 v. Farrell, 1838
 v. Field, 2147, 2151
 v. Field's Exrs., 315, 317
 v. Fountain, 1965
 v. Grank Trunk R. Co., 1195
 v. Mason, 813
 v. New Albany R. Co., 2067
 v. New Jersey S. R. Co., 61, 77, 98
 v. Parisen, 883
 v. Paxton, 1292, 1318, 1319, 1326
 v. Perry, 2159
 v. Richardson, 2250
 v. Steele, 2024
 v. Suydam, 1661, 1754
 v. Wickersham, 336, 1799
 v. Wilkins, 491, 1741
 v. Williamson, 936
 Williamson, Den ex d., v. Snowhill, 1319
 Williamson's Admx. v. Richardson, 974
 Williard v. Williard, 544, 1690
 Willman v. Holmes, 1561, 1655, 1672, 1673,
 1797
 Willink v. Morris Canal Co., 2018
 Willing v. Brown, 1981
 Willington v. Gale, 2062
 Willink v. Morris Canal, 2019
 Willings v. Consequa, 2057
 Willion v. Berkly, 374, 375, 398, 399, 437, 452
 Willis v. Astor, 1088, 1089
 v. Bucher, 340, 415, 417
 v. Doe, 838
 v. Farley, 2090, 2104
 v. Freeman, 786, 825
 v. Gay, 1778
 v. Hiscox, 1858
 v. Matthews, 1425, 1426
 v. Sherrall, 1843
 v. Twombly, 2109
 v. Valette, 2104
 v. Willis, 1648, 1700
 v. Wozencraft, 1276, 1290
 Willis, Doe d., v. Martin, 1559
 Willis, Lessee v. Bucher, 424
 Willison v. Watkins, 1144, 1146, 1148, 1150,
 1160, 1214, 1222, 1294, 1309, 1913, 1914
 Willmarth v. Pratt, 2272
 Willmerding v. Mitchell, 1996
 Wills v. Cowper, 367, 720, 1164, 1835, 2057, 2288
 v. Gas Co., 1151
 v. Sayers, 1371
 v. Slade, 515
 Wills, Jackson ex d., v. Stiles, 1148, 1213, 1218
 Willson v. Cleveland, 1159
 v. Glossop, 774
 v. Phillips, 1138
 Wilmarth v. Bancroft, 2186
 v. Bridges, 533, 761, 815
 v. Cutting, 538
 Wilmerding v. Mitchell, 1996
 Wilmington Star Min. Co. v. Allen, 1130, 1158
 Wilms v. Jess, 91, 92, 93, 94, 1743, 2033, 2237
 Wilson, *Ex parte*, 28
 Wilson v. Abbott, 1331
 v. Arentz, 580, 624, 632
 v. Bennett, 1818, 2160
 v. Boyce, 2024
 v. Branch, 853, 858, 884

- Wilson v. Brett, 1191
 v. Burton, 2072
 v. Chalfant, 2212, 2213
 v. Chesshire, 298, 1558, 1582
 v. Christopherson, 1479, 1480
 v. City of Bedford, 2230
 v. Cochran, 1384, 1397, 1400, 1401, 1420,
 1427, 1433, 1445, 1507
 v. Cox, 916, 935, 955
 v. Crook, 2333
 v. Davisson, 804, 829, 830, 832, 858, 2009
 v. Delaplaine, 1120, 2250, 2257
 v. Dent, 1691
 v. Douglas, 978
 v. Drumrite, 2001, 2037, 2168
 v. Duguid, 1628
 v. Edmonds, 506, 563
 v. Finch, 1200
 v. Fleming, 1883, 1920, 1936
 v. Forbes, 69
 v. Gaines, 1814
 v. Greenwood, 260, 272
 v. Galt, 1855, 1867
 v. Graham, 2008
 v. Hart, 267, 1778
 v. Harvey, 2060
 v. Hatton, 1055, 1056
 v. Hayward, 2104, 2147
 v. Henry, 2297
 v. Herbert, 2012
 v. Hill, 596, 2116
 v. Hodges, 1258
 v. Hooper, 2078
 v. Hubbell, 1213, 1219
 v. Hunter, 2021
 v. Jones, 1157, 1158
 v. Lester, 1160
 v. Lyon, 2004, 2005
 v. Madison, 1502
 v. Maltby, 2187
 v. Mayor, 1627
 v. Mayor of New York, 5
 v. McCullough, 1764
 v. McEvan, 2298, 2301
 v. McEnaghghan, 733, 931
 v. McNeal, 46
 v. Merrill, 1280
 v. Moore, 1783
 v. Oatman, 822, 841, 842
 v. O'Connell, 533
 v. Oldham, 1034
 v. Page, 2158
 v. Pearson, 2303
 v. Peelle, 1882
 v. Prescott, 1274
 v. Reed, 1246
 v. Rodeman, 1333
 v. Russell, 1698, 1700
 v. Scruggs, 1189
 v. Shoenberger's Exrs., 2039, 2120
 v. Smith, 806, 1128, 1129, 1144, 1148, 1168,
 1335
 v. Spring, 2147
 v. Stillwell, 2025, 2026
 v. Taylor, 1327, 1329, 1343
 v. Taylor's Exrs., 730
 v. Towle, 1599
 v. Troup, 688, 799, 800, 1708, 1775, 1806,
 1826, 1830, 1843, 1844, 2099, 2100, 2101,
 2104, 2105, 2111, 2160
 v. Unsell, 2151, 2157, 2158
 v. Wall, 1763, 1765
 v. Wallani, 2266
 v. Weatherby, 1160
 v. Wilson, 311, 489, 1848, 1862, 1872, 1935,
 2015
 Wilson, Doe d., v. Phillips, 1150
 Wilson, Den ex d., v. Small, 411, 415, 426, 428
 Wilt v. Franklin, 1538, 1786, 1789
 Wilton v. Tazwell, 1896
 Wiltshire v. Cottrell, 107
 Wiltshire v. Sidford, 2235, 2236
 Wimberly v. Bailey, 487
 Wimfish v. Tarlbois, 433
 Winans v. Peebles, 646, 647
 v. Wilkie, 2068, 2069
 Winbish v. Willoughby, 249
 Winchell v. Edwards, 2302
 Winchelsea v. Wentworth, 1570
 Winchester v. Tilgham, 331
 Wind v. Jekyl, 20
 Winder v. Little, 841
 Windham v. Portland, 718, 739, 797, 819, 834
 Windle v. Brandt, 1466
 Windsor v. Simpkins, 1982
 Windt v. German Reformed Church, 41
 Winebrinner v. Weisiger, 646, 895, 1938
 Wing v. Burgis, 2357
 v. Cooper, 1992, 2048, 2050, 2053, 2160
 v. Cropper, 1407, 1408, 1443, 1489
 v. Gray, 118
 v. Hayden, 1450, 1479, 1502
 v. McDowell, 2139
 Winkfield v. Brinkman, 1622
 Winkler v. Winkler, 587, 588, 593, 626, 633, 667,
 675, 1372
 Winland v. Holcomb, 1436
 Winn v. Dillon, 1643, 1707, 1769
 v. Elliott, 781, 820
 v. Ingilby, 120, 126, 127
 v. Murehead, 2256
 v. State, 1049
 Winne, *in re*, 1377
 Winne, Matter of, 274, 585, 587, 588, 590, 592,
 617, 620, 624, 632, 633, 635, 637, 641,
 651, 670, 678, 1366
 Winne v. Littleton, 2084, 2148
 Winningham v. Crouch, 974
 Winona & St. Peter R. Co. v. St. Paul & Sioux
 City R. Co., 1622
 Winship v. Bass, 1684
 v. Pitts, 544, 565
 Winslow v. Chiffelle, 1961
 v. Clark, 2147, 2151
 v. Merchants' Ins. Co., 96, 97, 103, 105,
 106, 109, 112, 117, 121, 123, 128, 130,
 131, 132, 133, 134, 142, 146, 1187
 v. Minnesota & P. R. Co., 1746, 1747
 v. Rand, 2250
 v. Winslow, 2297, 2299
 Winstead v. Bingham, 2108
 Winstell v. Hehl, 1025
 Winsthoff v. Dracourt, 534
 Winston v. Jones, 1754
 v. Franklin Academy, 1043, 1141, 1213
 Winter v. Anson, 832, 2008
 v. Brockwell, 2246
 v. Henderson, 2154, 2179, 2180
 v. Stevens, 1296, 1352, 1354, 1356
 Winterbottom v. Ingham, 1276
 Wintermute v. Light, 45, 46, 47
 Winters v. Cherry, 995
 v. McGhee, 1901
 Winthrop v. Benson, 210
 v. Fairbanks, 2361
 v. Farrar, 5
 Winton v. Barnum, 647
 v. Cornish, 983, 1015, 1176
 Wintour v. Clifton, 918, 944
 Wire v. Mitchell, 108
 Wirth v. Bransom, 2308, 2310
 Wiscot's Case, 433, 446, 1024
 Wise v. Faulkner, 2257
 v. Metcalf, 108, 109, 110, 563, 1068
 v. Old, 2274
 v. Wise, 1786, 1787
 Wiseley v. Findlay, 919, 1973, 1975, 1979
 Wiseman v. Beekman, 893
 v. Hutchinson, 1777
 v. Lucksinger, 2212, 2213
 v. Macy, 890
 v. Wiseman, 773, 887, 891
 Wiser v. Lockwood, 756
 Wisler v. Hershey, 2217

- Wislon *v.* Patrick, 2054
 Wisner *v.* Farnham, 1523
 v. Ocumpaugh, 2272
 Wistar *v.* Mercer, 2263
 Wiston *v.* Mowlin, 2106
 Wiswall *v.* Stewart, 1768
 v. Wilkins, 1882, 1883, 1906
 Wit *v.* Mayor, 1042
 Witczinski *v.* Everman, 2030
 Witham *v.* Brooner, 1607
 v. Perkins, 589, 591, 624, 628, 659
 Withaus *v.* Schock, 737, 838, 894, 934
 Withers' Appeal, 95
 Withers *v.* Allgood, 1693
 v. Jenkins, 587, 679, 690
 v. Larrabee, 997, 1251, 1269, 1270, 1274,
 1275, 1286, 1293, 1294, 1304, 1328
 v. Withers, 1646
 v. Yeadon, 1614, 1737
 Witherspoon *v.* Duncan, 2307
 v. Dunlop, 533, 1973, 1977, 1979
 Withington's Appeal, 1806
 Withnell *v.* Petzold, 1305, 1327, 1330, 1331
 Witman *v.* Watry, 1161, 1162
 Witmer's Appeal, 138, 2022
 Witt *v.* Mayor, 1020, 1130, 1134, 1135, 1136,
 1300, 1315, 1317, 1329, 1334, 1338,
 1339, 1342
 Witte *v.* Dawkins, 1035
 v. Witte, 1338
 Witter *v.* Briscoe, 901, 911, 912
 v. Dudley, 1777
 v. Witter, 1090, 1091
 Witthaus *v.* Shack, 715, 957
 Witty *v.* Matthews, 1054, 1083, 1100, 1182, 1191,
 1196, 1201
 Wixon's Estate, Matter of, 1382
 Wixon *v.* Bear River & Auburn Water & Min-
 ing Co., 2239
 Woford *v.* Gaines, 1513, 1517
 v. McKenna, 2357
 Woglam *v.* Cowperthwaite, 2273
 Wolcott *v.* Schenck, 1058, 1139, 1140, 1154
 v. Winchester, 2105, 2107, 2108
 Wolf *v.* Banning, 2151
 v. Bassett, 823
 v. Doser, 998, 1013, 1323
 v. Driggs, 2033
 v. Fogarty, 2364
 v. Frost, 2244
 v. Mitchell, 993
 v. Smith, 2134
 Wolfe *v.* Doe ex d. Dowell, 1349
 v. Fleischacker, 1426
 v. Frost, 2211, 2212, 2213, 2215
 Wolffe *v.* Wolf, 1131, 1132, 1315, 1316, 1317
 Wolford *v.* Baxter, 123, 132
 Wollaston *v.* Hakewill, 1072, 1112
 v. Tribe, 1790, 1795, 1801
 Wolstenholme, *Re*, 499
 Wolveridge *v.* Steward, 1063, 1073, 1098
 Wolverson *v.* Collins, 2035
 Wolz *v.* Sanford, 1131, 1316, 1317
 Womack *v.* McQuarry, 1015, 1176, 1178, 1180
 v. Whitmore, 1982
 v. Womack, 2278
 Wood's Appeal, 2119, 2122
 Wood *v.* Ash, 982
 v. Bayard, 461, 465
 v. Beach, 2318
 v. Brown, 1734
 v. Burnham, 1609, 1694
 v. Chambers, 1223, 1480, 1481
 v. Chapin, 2318, 2364, 2365
 v. Cheshire, 1972
 v. Cox, 1590, 1630, 1638
 v. Day, 1148
 v. Dummer, 1671
 v. Fleet, 1976, 1988
 v. Foster, 982
 v. Fowler, 69, 74
 v. Gaynor, 740
 v. Goddridge, 1805
 v. Goodrich, 1043, 1044, 1832
 v. Goodwin, 2170
 v. Griffin, 553, 1682
 v. Hibbard, 2136
 v. Hill, 306, 333
 v. Hubbell, 971, 978, 993, 997, 1016, 1175,
 1180, 1181
 v. Humphrey, 1051, 1052
 v. Hyatt, 1355
 v. Independent School District of
 Mitchell, 1193
 v. Jackson, 959
 v. Keyes, 857
 v. Krebbses, 1778
 v. Leadbitter, 2213
 v. Lee, 856, 861, 916, 935
 v. Little, 1988
 v. Lord, 1407, 1461, 1462
 v. Mather, 300, 1606
 v. Mitcham, 2286
 v. Morgan, 841
 v. Morton, 1308
 v. Oakley, 2149
 v. Partridge, 1119, 1171, 2265
 v. Patterson, 1038
 v. Phillips, 1356, 1914
 v. Rabe, 1643
 v. Robertson, 1821, 1822
 v. Saunders, 2243
 v. Seeley, 924
 v. Seward, 1593, 1632
 v. Smith, 2150
 v. Southampton, 1863
 v. Sullens, 2004
 v. Summons, 771
 v. Tate, 1320, 1331
 v. Terry, 2158
 v. Trask, 688, 1006, 1996, 2000, 2063
 v. Turner, 1217, 1285
 v. Warren, 648
 v. Weimer, 2023
 v. Wheeler, 1403, 1404
 v. Whelen, 132, 133, 2085
 v. White, 1754
 v. Wilcox, 1255
 v. Williams, 2147
 v. Wood, 299, 918, 944, 945, 955, 1607,
 1680
 Wood, Jackson ex d., *v.* Salmon, 1135, 1307
 Wood, Jackson ex d., *v.* Swart, 1063
 Wood's Lessee *v.* Pindall, 1280
 Woodberry *v.* Materson, 708
 Woodburn's Admr. *v.* Stout, 1180
 Woodbury *v.* Bowman, 1600, 1601
 v. Luddy, 1455
 v. Manlove, 2125
 v. Parshley, 2212
 v. Swan, 2068, 2069
 Woodcock *v.* Bennett, 1697, 2324
 v. Estey, 2361
 v. Roberts, 1052
 Woodcock, Doe d., *v.* Barthrop, 1597, 1605
 Wooden *v.* Shotwell, 2349
 Wooden, Doe d., *v.* Shotwell, 5
 Woodford *v.* Higby, 1933, 1940
 Woodhill *v.* Great Western R. Co., 1194, 1195
 Woodhouslee *v.* Dalrymple, 2282
 Woodhull *v.* Rosenthal, 1107, 1109, 1115, 1121,
 1122
 Woodlawn Cemetery *v.* Everett, 41
 Woodliff *v.* Drury, 1566
 Woodman *v.* Blake, 1870, 1871
 v. Coolbroth, 492, 2353
 v. Good, 1707
 v. Pitman, 69, 70
 v. Smith, 2355
 Woodmeston *v.* Walker, 252, 257, 270
 Woodrow *v.* Michael, 1262, 1274, 1281, 1329,
 1335, 1340, 1341
 Woodruff *v.* Adams, 1230, 1231, 1232, 1233
 v. Erie R. Co., 1020

- Woodruff *v.* Johnson, 1747, 1748
v. King, 2107
v. North Bloomfield Gravel Mining Co., 199
v. Trenton Water Power Co., 2214
v. Woodruff, 1659
- Woods *v.* Bailey, 2004
v. Buie, 1511
v. Davis, 1403, 1405
v. Doherty, 1049
v. Hildebrand, 2063, 2092
v. Hilderbrand, 1999
v. Naumkeag Steam Cotton Co., 1054, 1055
v. Spaulding, 2154
v. Wallace, 511, 522, 802, 803, 2001, 2037, 2043, 2053
- Woodson *v.* Good, 574
v. Skinner, 1157
v. Smith, 489, 514
- Woodward *v.* Blanchard, 2295
v. Brown, 1146, 1297, 1309
v. Cone, 1154, 1155
v. Cowdery, 2113
v. Dowse, 774, 887, 892
v. Lasar, 105, 108, 110
v. Leiby, 1211
v. McReynolds, 211, 212
v. Murray, 1398, 1457
v. Pickett, 2040, 2041, 2042, 2044, 2067
v. Seeley, 2212, 2213
v. Spurr, 646
v. Wilson, 638
v. Wood, 2147
v. Woodward, 2006
- Woodworth *v.* Campbell, 1026
v. Comstock, 1400
v. Guzman, 2001, 2037, 2126
v. Paige, 792, 793, 915, 926, 928
v. Payne, 32
- Woolen *v.* Hillen, 1701
Wooler *v.* Attorney-General of Victoria, 85
Woolfolk *v.* Ricketts, 1462
Woolscroft *v.* Norton, 1076
Woolley *v.* Holt, 1993, 2065
v. Magoie, 821
Woolman *v.* Garringer, 2238
Woolmore *v.* Burrows, 1693
Woolcombe *v.* Ouldridge, 30
Woolridge *v.* Lucas, 625, 767
v. Planters' Bank, 1785
v. Wilkins, 761, 766, 786, 823, 824, 841, 842
- Woolsey *v.* Seeley, 61
Woolston *v.* Woolston, 1839
Wooster *v.* Hunt & Layman Ins. Co., 717
Wooten *v.* Billinger, 2065
Worcester *v.* Clark, 890, 927
v. Eaton, 985, 986, 987
v. Great Falls Mfg. Co., 1247, 1248
- Worcester National Bank *v.* Cheeney, 810, 2106, 2108, 2136
- Worcester *v.* Lord, 2296
- Word *v.* Trask, 2078
- Work *v.* Byayton, 976
v. Harper, 2364
- Workan *v.* Miffin, 1127, 1129, 1167
- Workman *v.* Greening, 2168
v. Guthrie, 2295
v. Miffin, 2269
- Workel *v.* Munn, 2354
- Wormley *v.* Wormley, 645, 1752, 1765, 1766, 1767, 1769, 1770
- Worrall's Appeal, 1721
- Worrell *v.* Munn, 1042
- Worril *v.* Barnes, 2272
- Worsham *v.* Callison, 782
- Worsley *v.* Granville, 347, 1632
v. Worsley, 955, 956
- Worth *v.* Hill, 2155, 2181
v. McAden, 1732, 1734
- Worthen *v.* Pearson, 941, 942, 943, 955
- Worthing *v.* Webster, 2335
- Worthington *v.* Cook, 2259, 2261, 2263, 2264
v. Gimson, 2211, 2216
v. Lee, 1003, 1009
v. Middleton, 909
v. Parker, 198
v. Roberts, 889
v. Staunton, 1906
v. Young, 1025
- Worthy *v.* Johnson, 1723, 1766, 1775, 1776, 1784, 1785
- Wortly *v.* Bukgad, 2139
- Wortman *v.* Guthrie, 1923
- Wotton *v.* Healy, 1025
v. Shirt, 2268
- Wragg *v.* Comptroller-General, 2005
- Wray *v.* Feddecke, 2125
v. Steele, 1651
- Wren *v.* Bradley, 269
v. Kirton, 1719, 1720
- Wriggins *v.* Holley, 2295
- Wright's Appeal, 95
- Wright *v.* Atkyns, 97. 1627, 1629, 1631, 2081
v. Barlow, 1831
v. Barrett, 54
v. Bates, 2046, 2055
v. Bircher, 2018
v. Briggs, 2068, 2166
v. Brown, 1375, 1376, 1675, 1799
v. Bundy, 2026, 2060, 2148
v. Burroughes, 1862
v. Cartwright, 970, 1570
v. Dane, 2005
v. Delafield, 1796
v. Denn, 331
v. Ditzler, 1420, 1435
v. Douglass, 21, 1592, 1691
v. Dowley, 285
v. Dunning, 1413, 1416, 1454, 1457, 1458, 1460, 1464, 1465, 1495
v. Eaves, 2095, 2150
v. Evans, 2105
v. Gelvin, 725
v. Gordon, 234
v. Hays, 1484, 1485, 1486, 1487
v. Henderson, 2000, 2063, 2078
v. Herron, 401, 690, 691
v. Hicks, 327
v. Holbrook, 1194
v. Jennings, 705
v. Kelley, 1108
v. King, 1653
v. Langley, 2089
v. Lattan, 1127, 1168
v. Miller, 1675
v. Morgan, 2060, 2061
v. Morley, 2172
v. O'Brien, 116
v. Page, 23
v. Pierson, 300, 424, 1609, 1693
v. Pratt, 1399
v. Roberts, 1278
v. Rose, 2063
v. Saddler, 1920, 1940
v. Sadler, 221, 1931, 1951
v. Scott, 417, 420, 427
v. Searles, 1906
v. Shumway, 2080
v. Sperry, 2091
v. Stanard, 1757, 1758
v. Tallmadge, 1809, 1828, 1829, 1830
v. Thayer, 402
v. Trustees of M. E. Church, 2257. 2259
v. Tuttle, 1850
v. Wakeford, 1831
v. West, 918
v. Wilkins, 1850
v. Williams, 2238, 2252, 2259
v. Wright, 595, 681, 682, 910, 941, 944, 959, 1363, 1364, 1366, 1369, 1591, 1904, 2002
- Wright, Den d., *v.* Page, 304, 305, 309, 311, 331, 339, 344

Wright, Doe d., *v.* Gordon, 234
 Wright, Doe d. Plumptre, *Re*, 651, 1366
 Wright ex d. Shaw *v.* Russell, 320, 321, 331
 Wurt's Exrs. *v.* Page, 76
 Wusser *v.* Farnham, 144
 Western Union Tel. Co. *v.* Fain, 1327, 1329
 Wyant *v.* Deiffendafer, 574
 Wyatt, Doe d., *v.* Byron, 1108
 v. Harrison, 2230, 2231, 2232, 2233
 v. Sadler's Heirs, 331, 334
 v. Simpson, 1368
 v. Stewart, 2042, 2125
 v. Watkins, 2020
 Wyble *v.* McPheters, 1594
 Wych *v.* East India Co., 1785
 Wycherley *v.* Wycherley, 1697
 Wyckoff *v.* Noyes, 2138
 v. Gardner, 1024
 Wyeth *v.* Stone, 2283
 Wykham *v.* Wykham, 288, 299, 1594, 1606, 1712
 Wylde *v.* Wylde, 1939
 Wylie *v.* McMakin, 2148
 Wylly *v.* Collins, 1562
 Wyman *v.* Babcock, 2046, 2048, 2049
 v. Brigden, 278
 v. Brown, 237, 1569, 2319
 v. Dorr, 982
 v. Farrar, 1014, 1015, 1183
 v. Fox, 792
 v. Wyman, 719
 Wymans *v.* Richardson, 717, 875
 Wyncook *v.* Burger, 2206
 v. Cowing, 2168
 Wyndham *v.* Way, 119
 Wyne *v.* Styan, 2074
 Wynehamer *v.* People, 1517, 2324
 Wynkoop *v.* Burger, 2208
 v. Cowing, 2045, 2050, 2055
 Wynn *v.* Story, 414, 415, 416
 Wynne *v.* Fletcher, 265
 v. Hawkins, 347, 1627, 1632
 v. Newborough, 1036
 v. Styan, 2172
 v. Wynne, 327, 1517
 Wyse *v.* Damdridge, 1763
 Wythe *v.* Thurlston, 1828
 Wyther *v.* Casson, 2358

Y.

Yale *v.* Dederer, 896, 1374, 1562
 Yancy *v.* Smith, 935
 Yandell *v.* Pugh, 889, 927
 Yandes *v.* Wright, 91, 92, 2233, 2237
 Yarrowborough *v.* Newell, 2037, 2175
 v. Wood, 2005
 Yard's Appeal, 249, 252, 257
 Yard *v.* Yard, 1034
 Yarnall's Appeal, 1656, 1673, 1694
 Yarnold *v.* Moorhouse, 260, 272, 1056, 1113,
 1677
 Yates *v.* Boen, 1032, 1034
 v. Crompton, 1811
 v. Houston, 752
 v. Joyce, 2187
 v. Kinney, 1315, 1317
 v. Mallen, 2259
 v. Mullen, 99, 1010
 v. Paddock, 865
 v. Woodruff, 2154
 v. Yates, 1549, 1603
 Yates County National Bank *v.* Carpenter,
 1427
 Yeackel *v.* Litchfield, 1768
 Yeager *v.* Weaver, 1246
 Yeaker's Heirs *v.* Yeiker's Heirs, 216
 Yeakle *v.* Jacob, 55
 Yeatman *v.* Woods, 1905
 Yeaton, *In re*, 1115
 Yelland *v.* Fichs, 1845
 Yellow Jacket S. M. Co. *v.* Stevenson, 1278

Velverton *v.* Steele, 2297
 Velverton *v.* Velverton, 1541, 1552
 Vesler *v.* Hochstetler, 1948
 Voe *v.* Dyer, 1285
 v. Mercerau, 781
 York *v.* Jones, 1120, 1165
 Yost *v.* Devault, 1450, 1473, 1476, 1484, 1485,
 1487
 Youle *v.* Richards, 2050
 Youmans *v.* Caldwell, 46
 v. Wagener, 804, 902
 Youn *v.* Flinn, 1583, 1640
 Young, *In re*, 399
 Young *v.* Adams, 1882, 1912
 v. Boston, 22
 v. Boyd, 945
 v. Bradley, 1797
 v. Carler, 794
 v. Carter, 794
 v. Clark, 1758
 v. Clippinger, 2321
 v. Dake, 971, 997
 v. Davis, 591
 v. De Bruhl, 1909, 1917, 1919
 v. Frost, 1086
 v. Gammel, 1922
 v. Gregory, 772, 920
 v. Hargrave, 1081
 v. Hughes, 1621
 v. Ingle, 1278, 1291
 v. Keighley, 1671
 v. Langbein, 689
 v. Mackall, 1781
 v. Marshall, 285
 v. Martin, 347, 1632
 v. McIntyre, 703
 v. McKee, 2011
 v. McKenzie, 2324
 v. Millar, 2103, 2105, 2107, 2108
 v. Naylor, 883
 v. Northern Illinois Canal & Iron Co.,
 2066
 v. Peachy, 1616, 1633
 v. Polack, 1893
 v. Radford, 1024, 1361
 v. Ringo, 2349
 v. Smith, 1125, 1271, 1310, 1350
 v. Spencer, 564
 v. Tarbell, 783, 801, 820, 847, 861, 868
 v. Vough, 2177
 v. Waterpark, 1783
 v. Williams, 20, 3, 2172
 v. Wolcott, 721
 v. Wood, 2008
 v. Young, 1274, 1277, 1285, 1296, 1304,
 1317, 1319, 1324, 1336, 1537, 1593,
 1594, 1662
 Youngblood *v.* Eubank, 128, 130
 Younghusband *v.* Gisborne, 253
 Youngman *v.* Elmira & W. R. Co., 98, 1998,
 2077
 Youngs *v.* Carter, 727, 912
 v. Trustees Public Schools, 2072
 Youngworth *v.* Jewel, 1936
 Yunker *v.* Nichols, 2241

Z.

Zabriskie *v.* Cleveland, C. & C. R. Co., 1041
 v. Morris, 1576
 v. Morris & E. R. Co., 1595, 1596
 v. Salter, 2180, 2197
 v. Smith, 719, 839
 Zabriskie's Exrs. *v.* Wetmore, 1739
 Zacharias *v.* Zacharias, 1781
 Zaegal *v.* Kuster, 948, 2170
 Zamboco *v.* Cassavetti, 1814
 Zane *v.* Kenedy, 1816, 2011
 Zebach *v.* Smith, 1663, 1810, 1813, 1841, 1843
 Zebach's Lessee *v.* Smith, 1730, 1815
 Zeissweiss *v.* James, 1603, 1604, 1681

Zeiter <i>v.</i> Bowman, 1027, 2152	Zinc Co. <i>v.</i> Franklinit Co., 92, 2233, 2237
Zell <i>v.</i> Reame, 1357	Zirkle <i>v.</i> McCue, 1980
Zellers <i>v.</i> Beckman, 1409, 1524	Zoller <i>v.</i> Ide, 2013
<i>v.</i> Eckert, 1782	Zorntlein <i>v.</i> Bram, 1932
Zeller's Lessee <i>v.</i> Eckert, 1150, 1917, 2093, 2095	Zottman <i>v.</i> San Francisco, 1029
Zentmyer <i>v.</i> Mittewar, 2005	Zouch <i>v.</i> Parsons, 985, 1030, 1827, 2341
Ziegler <i>v.</i> Grim, 1981	<i>v.</i> Woolston, 1806, 1843
Zimmer <i>v.</i> Paulry, 1500	Zuchtman <i>v.</i> Roberts, 2301
Zimmerman <i>v.</i> Anders, 312	Zule <i>v.</i> Zule, 770, 883, 984, 1116
<i>v.</i> Marchland, 1159	Zuver <i>v.</i> Lyons, 1592, 2045
<i>v.</i> Schoenfeldt, 588, 670	

BOOK I.

INTRODUCTORY.

CHAPTER I.

PRELIMINARY.

- SEC. 1. Property—Generally.
- SEC. 2. Same—Classes of property.
- SEC. 3. Same—Blackstone's definition—Exclusive ownership
- SEC. 4. Same—Austin's definition—Restricted property.
- SEC. 5. Early history of property.
- SEC. 6. Same—Evolution of private property.
- SEC. 7. Rights of property and hereditary patrimony.
- SEC. 8. Same—Recognition of right of private property.
- SEC. 9. Same—Alienation and devise.
- SEC. 10. Same—The *retrait*.
- SEC. 11. Theories of the origin of private property in land.
- SEC. 12. Same—1. The discovery theory.
- SEC. 13. Same—2. The occupation theory.
- SEC. 14. Same—3. The labor theory.
- SEC. 15. Same—4. The theory of contract.
- SEC. 16. Same—5. The *lex* theory.
- SEC. 17. Same—6. The natural-economic theory.
- SEC. 18. Same—7. The natural rights theory.
- SEC. 19. Same—8. The government grant theory.
- SEC. 20. Real and personal property—Distinction and devolution.
- SEC. 21. Definition of real property.
- SEC. 22. Same—"Land" and "real estate."
- SEC. 23. Same—Maryland doctrine.
- SEC. 24. Same—Tenements.
- SEC. 25. Same—Hereditaments.
- SEC. 26. Same—Same—Division of hereditaments.

SECTION 1. **Property—Generally.**—Property in the abstract is the right or interest which a person may have

in, to, or over anything to the exclusion of all others,¹ and embraces every species of valuable thing² that may be made the subject of exclusive ownership.³ The word property is a term of the largest import, is *nomen generalissimum*, and extends to every species of valuable right and interest, and embraces real⁴ and personal property,

¹ Rigney v. City of Chicago, 102 Ill. 77 ;

Jackson ex d. Pearson v. Housel, 17 John. (N. Y.) 281, 283 ;

Morrison v. Semple, 6 Binn. (Pa.) 94, 98 ;

Soulard v. United States, 29 U. S. (4 Pet.) 511 ; bk. 7 L. ed. 938 ;

Doe v. Langlands, 14 East 370 ; Doe v. Lainckbury, 11 East 290, 518.

² Walker's Am. L. (9th ed.) 306, § 122.

³ Stanton v. Lewis, 26 Conn. 444, 449 ;

Caro v. Metropolitan Railway Co., 46 N. Y. Super. Ct. 138 ; s.c. 19 Am. L. Reg. N. S. 376.

See: Barker v. State, ex rel. Mills, 109 Ind. 58 ; s.c. 9 N. E. Rep. 711.

⁴ For cases in which the word "property" has been adjudged to include land, see :

Soulard v. United States, 29 U. S. (4 Pet.) 511 ; bk. 7 L. ed. 938 ;

Edwards v. Barnes, 2 Bing. N. C. 252 ; s.c. 9 Eng. C. L. 524 ;

Doe v. Morgan, 6 Barn. & C. 512 ; s.c. 9 D. & R. 633 ; 13 Eng. C. L. 235 ;

Doe v. Langlands, 14 East 370 ;

Doe v. Lainckbury, 11 East 290.

For cases in which held to pass a fee, see :

Crossman v. Field, 119 Mass. 170, 172 ;

Lincoln v. Lincoln, 107 Mass. 590 ;

Leland v. Adams, 75 Mass. (9 Gray) 171.

Compare: Wheeler v. Dunlap, 13 B. Mon. (Ky.) 291 ;

Howland v. Howland, 100 Mass. 222 ;

Hurdle v. Outlaw, 2 Jones (N. C.) Eq. 75 ;

Chapman v. Prickett, 6 Bing. 602 ; s.c. 4 M. & P. 404 ; 19 Eng. C. L. 272 ;

King v. George, L. R. 5 Ch. Div. 627 ; s.c. 36 L. T. N. S. 759 ; 22

Moak's Eng. Rep. 364 ;

Doe, ex d. Bunney v. Rout, 2 Marsh. 397 ; s.c. 7 Taunt. 79 ; 2 Eng. C. L. 269.

"Property" is equivalent to "estate," and operates to pass the interest as well as the land.

Hunt v. Hunt, 70 Mass. (4 Gray) 190 ;

Morris v. Henderson, 37 Miss. 492 ;

Fogg v. Clark, 1 N. H. 163 ;

Pippin v. Ellison, 12 Ired. (N. C.) L. 61 ; s.c. 55 Am. Dec. 403 ;

Hurdle v. Outlaw, 2 Jones (N. C.) Eq. 75 ;

Foster v. Stewart, 18 Pa. St. 23 ; Morrison v. Semple, 6 Binn. (Pa.)

94 ;

Rosseter v. Simmons, 6 Serg. & R. (Pa.) 452 ;

Den v. Payne, 5 Hayw. (Tenn.) 104 ;

Mayo v. Carrington, 4 Call (Va.) 472 ;

Doe d. Booley v. Roberts, 11 Ad. & E. 1000 ; s.c. 3 Per. & D. 578 ; 39 Eng. C. L. 524 ;

Bentley v. Oldfield, 19 Beav. 225 ;

Footner v. Cooper, 2 Drew. 7 ;

Roe v. Pattison, 16 East 221 ;

Patton v. Randall, 1 Jac. & W. 189 ;

Nicholls v. Butcher, 18 Ves. 193.

"Property" as applied to land.—The Supreme Court of the United States say in the case of Soulard v. United States, 29 U. S. (4 Pet.) 511 ; bk. 7 L. ed. 938, that the term "property," as applied to lands, comprehends every species of title, inchoate or complete ; that it is supposed to embrace also all rights which lie in contract. Those which are executory as well as those which are executed.

easements, franchises, and all incorporeal hereditaments¹; and includes things in possession and things in expectation.² When applied to land, it comprehends every species of title, complete and inchoate, as well as all those rights which lie in contract, those which are executory as well as those which are executed.³

SEC. 2. **Same—Classes of property.**—Property is divided into two great classes, known as things real and things personal. The class of things real includes every valuable thing of a fixed and immovable nature, as well as every thing pertaining thereto, and passes under the general description of “lands, tenements, and hereditaments,” or simply as “realty” or “real estate.” Things personal include all those things of an unfixed or movable nature, and pass under the general description of “goods and chattels,” or simply “personalty.”⁴ There is a class of property which has been said to occupy a sort of intermediate position between realty and personalty, some of which are called “chattels real,” others “heirlooms,” and others still “fixtures”;⁵ but these are thought all to be properly classed and treated under the head of realty.

SEC. 3. **Same—Blackstone's definition—Exclusive ownership.**—Property has been defined by Blackstone⁶ as “that sole and despotic dominion which one claims and exercises over the external things of the world, in total exclusion of every other individual.” This is the definition of exclusive ownership, or the absolute right of property; but no such ownership does, or in the very nature of things can, exist in a civilized community and under the

¹ *Caro v. Metropolitan Elevated R. Co.*, 48 N. Y. Super. Ct. 138; s.c. 19 Am. L. Reg. N. S. 376; *Boston & L. R. Co. v. Salem & L. R. Co.*, 68 Mass. (2 Gray) 1, 35.

² *Carlton v. Carlton*, 72 Me. 162; *Ide v. Harwood*, 30 Minn. 195; s.c. 14 N. W. Rep. 884; *Vaughan v. Murfreesboro*, 96 N. C. 317; s.c. 2 S. E. Rep. 676; *Walker's Am. L. (9th ed.)* 306, § 122.

³ *Smith v. United States*, 35 U. S.

(10 Pet.) 326, 329; bk. 9 L. ed. 442;

Delassus v. United States, 34 U. S. (9 Pet.) 117, 133; bk. 9 L. ed. 71, 77;

Soulard v. United States, 29 U. S. (4 Pet.) 512; bk. 7 L. ed. 398.

⁴ 2 Bl. Com., 16, 384;

Walker Am. L. (9th ed.) 306, § 122.

Walker's Am. L. (9th ed.) 306, 307, § 122.

⁵ 2 Bl. Com. c. 1.

polity of a civilized government. Under the Roman system¹ of laws and the English, alike, there are certain duties and obligations enjoined upon every land-owner; and certain rights and privileges which the public at large have in his property. All property is acquired and held under the tacit understanding that it shall not be so used as to injure the equal rights of others, or so as to destroy or greatly impair the public rights and interests of the community.² The maxim of the common law is "sic utere tuo, ut alienum non lædas," use your own so as not to injure another's property.³ Private property must ever be held subject to the exercise of such rights as are for the common benefit.⁴ No principle is better established than that the legislature may make what are called police regulations, declaring from time to time in what manner property may be used and enjoyed,⁵ so as to prevent its

¹ See: Cushing's Domat, pt. I., bk. ii., tit. 6.

² Commonwealth v. Tewkesbury, 52 Mass. (11 Met.) 55, 57.

See: Henry v. City of Newburyport, 149 Mass. 582, 585; s.c. 22 N. E. Rep. 75;

Train v. Boston Disinfecting Co., 144 Mass. 523, 530; s.c. 59 Am. Rep. 113; 11 N. E. Rep. 929;

Bancroft v. Cambridge, 126 Mass. 428, 441;

Commonwealth v. Intoxicating Liquors, 115 Mass. 153; s.c. *sub nom.* Boston Beer Co. v. Massachusetts, 97 U. S. 25; bk. 24 L. ed. 989;

Watertown v. Mayo, 109 Mass. 315, 318; s.c. 12 Am. Rep. 694;

Boston v. Richardson, 105 Mass. 351, 362;

City of Salem v. Eastern R. Co., 98 Mass. 431, 443; s.c. 96 Am. Dec. 650.

³ Commonwealth v. Tewkesbury, 52 Mass. (11 Met.) 55, 57.

See: Kerr's "Adjudicated Words, Phrases, and Applied Maxims."

⁴ Commonwealth v. Carter, 132 Mass. 12.

See: Bancroft v. Cambridge, 126 Mass. 438, 441.

⁵ Sawyer v. Davis, 136 Mass. 239, 240; s.c. 49 Am. Rep. 27;

Bancroft v. Cambridge, 126 Mass. 348, 441.

See: Lakeview v. Rosehill Cemetery, 70 Ill. 192;

State v. Noyes, 47 Me. 189;

Merrifield v. Worcester, 110 Mass. 216;

Hale v. Lawrence, 21 N. J. L. (1 Zab.) 714; s.c. 23 N. J. L. (3 Zab.) 590; 57 Am. Dec. 420;

Thorpe v. Rutland, etc., R. Co., 27 Vt. 140.

Salus populi supremus lex.—"The maxim of the law, 'Salus populi suprema lex,' should not be disregarded. It is the great principle on which the statutes for the security of the people are based. It is the foundation of criminal law in all governments of all civilized countries, and of other laws conducive to the safety and consequent happiness of the people. This power has always been exercised, and its existence cannot be denied."

State v. Noyes, 47 Me. 189;

Taunton v. Taylor, 116 Mass. 254, 260;

Commonwealth v. Blodgett, 53 Mass. (12 Met.) 56, 82;

Taylor v. Inhabitants of Plymouth, 49 Mass. (8 Met.) 462, 465;

Marlatt v. Warwick, 19 N. J. Eq.

use from being injurious to the equal enjoyment by others of their property,¹ and, in the exercise of this police power may even destroy private property altogether, when such a step is necessary for the protection of the public.²

SEC. 4. Same—Austin's definition—Restricted property.—Property, as known to us, is always a limited or restricted interest in some tangible or intangible thing, and may properly be defined to be the right to use and deal with a given thing or subject in a manner and to an extent that is indefinite, though not unlimited. Austin has defined property³ to be "a right imparting to the owner

- (4 C. E. Gr.) 439, 454; s.c. 57 Am. Dec. 424;
American Print Works v. Lawrence, 23 N. J. L. (3 Zab.) 590, 607;
Hale v. Lawrence, 23 N. J. L. (3 Zab.) 590; s.c. 57 Am. Dec. 420;
Doe d. Wooden v. Shotwell, 23 N. J. L. (3 Zab.) 465, 474;
Seifert v. City of Brooklyn, 101 N. Y. 136, 144; s.c. 54 Am. Rep. 664; 4 N. E. Rep. 321; 2 Cent. Rep. 138;
Matter of Cheeseborough, 78 N. Y. 232, 237;
Richards v. Mayor of New York, 43 N. Y. Super. Ct. (J. & S.) 315, 323;
Kelsey v. King, 32 Barb. (N. Y.) 410, 418; s.c. 11 Abb. (N. Y.) Pr. 180, 186;
Donahue v. Mayor of New York, 3 Daly (N. Y.) 68;
Wilson v. Mayor of New York, 1 Den. (N. Y.) 595, 598; s.c. 43 Am. Dec. 719;
Doellner v. Tynan, 38 How. (N. Y.) Pr. 176;
Mayor of New York v. Lord, 17 Wend. (N. Y.) 285, 297;
Mayor of New York v. Slack, 3 Wheel. Cr. Cas. (N. Y.) 237, 254;
State v. Yopp, 97 N. C. 477; s.c. 2 Am. St. Rep. 305; 2 S. E. Rep. 458;
Maynard v. Valentine, 2 Wash. 3; s.c. 3 Pac. Rep. 195, 199;
State v. Goodwill, 33 W. Va. 179; s.c. 10 S. E. Rep. 285; 6 L. R. A. 621; 41 Alb. L. J. 51.
United States v. Harmon, 45 Fed. Rep. 414; s.c. 13 Crim. L. Mag. 538;
 Kerr's "Adjudicated Words and Phrases, and Applied Maxims," The Century, vol. 45, p. 150.
 From this principle are derived those rules which subordinate private rights as to persons and property to public good. See: *Pom. Minn. L.* (2d ed.) § 912.
 "A pond of stagnant water may endanger the health of the neighborhood, and the public may cause it to be drained at once, and for that purpose may dig the necessary drains, and the land may be entered with and for that purpose, under the police power, without compensation." *Matter of Cheeseborough*, 78 N. Y. 232, 238.
¹ *Cushman v. Smith*, 34 Me. 247, 258; *Grace v. Newton Board of Health*, 135 Mass. 490, 493; *Bancroft v. Cambridge*, 126 Mass. 428;
Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 86.
² *Carleton v. Rugg*, 149 Mass. 550; s.c. 22 N. E. Rep. 55, Citing: *Bancroft v. Cambridge*, 126 Mass. 428; *Watertown v. Mayo*, 109 Mass. 315; s.c. 12 Am. Rep. 694; *Attorney-General v. Tudor Ice Co.*, 104 Mass. 239; s.c. 6 Am. Rep. 227; *Winthrop v. Farrar*, 93 Mass. (11 Allen) 398; *District Attorney v. Lynn & Boston R. Co.*, 82 Mass. (16 Gray) 242.
³ *Jurisprudence*, vol. II., § 1103.

a power of indefinite user, capable of being transmitted to universal successors by way of descent, and imparting to the owner the power of disposition, from himself and his successors *per universitatem*, and from all other persons who have a *spes successionis* under any existing concession or disposition, in favor of such person or series of persons as he may choose, with the like capacities and powers as he had himself, and under such conditions as the municipal or particular law allows to be annexed to the dispositions of private persons."

SEC. 5. **Early history of property.**—The early history of property remains yet to be written. Our present knowledge of property is derived from our own laws regulating property, founded upon the Roman law, and the early English law. Both of these systems of law grew up in a period when every recollection of the early condition of property and people had perished. When jurists are asked to account for the origin of property rights, they have recourse to what they are pleased to term "the state of nature," from which they derive directly absolute individual ownership—a sort of *quiritary dominium*. This method of accounting for the origin of individual property in land is lame and unsatisfactory in this, that it ignores the well-established principles of evolution,—which apply as well to the differentiation of social relations and to the individualizing of property, as to the development of all vegetable and animal organism,—disregards the law's gradual development found throughout all history, political and sociological, and contradicts facts now well established and well known. It is only after a series of evolutions, and that of a comparatively recent period, that individual ownership in land has arisen. The historical researches of all who have looked into the subject coincide in establishing the fact that originally the soil belonged in common to tribes, communities, or kinsmen,¹ and that the separate ownership, as it now exists amongst

¹ Sir Henry Maine says: "Property once belonged not to individuals, nor to isolated families,

but to large estates." *Ancient Law*, p. 268.

most civilized people,¹ is of comparatively modern growth.²

SEC. 6. **Same—Evolution of private property.**—While primitive man subsisted on wild food,—living by the chase, by fishing, or by gathering wild fruit,—there was no occasion for, or thought of, appropriating the soil. Under the pastoral system that followed, the notion of property in the soil began to spring up, but was always confined to the lands on which the herds of the nomadic tribes grazed; but even then the idea that any individual could claim a part of the soil as exclusively his own did not occur to any one. The very conditions of pastoral life itself were opposed to such a conception. Even when a portion of the soil was put temporarily under cultivation, the territory remained the undivided property of the tribe or clan occupying it; and when the land was divided into parcels and distributed by lot among the several families, only a temporary occupancy was allowed to the individual, while the soil remained the collective property of the tribe or clan, to whom it returned, from time to time, for a new partition and distribution. This is the system Tacitus describes among the Germanic tribes,³ and which exists to-day in the Russian *mir*.

Another stage in the individualization of private property in the soil leaves the parcels in the hands of groups of large patriarchal families dwelling in the same house and working together for the benefit of all, as in

¹ Where private ownership of land is not.—There are some countries, which are recognized as civilized, in portions of which, at last, the private ownership of land does not prevail; at least not in the sense in which we know it. Such as the Russian *mir* (see: Wallace's "Russia," c. VIII.; Geddie's "Russian Empire," c. IX.; Laveleye's "Primitive Property," c. III.) and the Swiss *allmend*. Laveleye's "Primitive Property," c. V. Switzerland enjoys the distinction of standing alone in the world as a land that has maintained both free political institutions and the internal

system of property that prevailed before feudalism overran Europe.

² See: Spencer's "Principles of Sociology," vol. II., c. XV.; Sir Henry Maine's "Early Hist. Inst.," Lect. I. *et seq.*; Id. "Village Communities," Lect. III.; Id. "Ancient Law," Lect. VIII.; Freeman's "Hist. Norm. Conq.," vol. V. 463; Laveleye's "Primitive Property," c. I., Dr. Mayer's "Das Eigenthum nach den verschredenen Weltanschauungen. Freiburg, I. B. (1871); Professor Nasse's Ueber die mittelaltlerliche Feldgemeinschaft in England."

³ Tac. Germ. c. 21.

France and Italy during the Middle Ages,¹ and in Switzerland at the present time. Then came William the Conqueror, and the feudal dispensation,² and finally individual heredity of property appears. Through these long stages of incipient civilization, the impediments in the way of securing private property in lands were great and the incentives small, because, as Herbert Spencer says, while subsistence on wild food continued, the wandering horde inhabiting a given area must continue to make joint use of the area; both because no claim could be shown by any member to any portion, and because the marking out of small divisions, if sharing were agreed upon, would be impracticable. Where pastoral life has arisen, ability to drive herds hither and thither within the occupied region is necessary. In the absence of cultivation, cattle and their owners could not survive were each owner restricted to one spot. There was nothing feasible but united possession of a wide tract. And when there comes a transition to the agricultural stage, either directly from the hunting stage or indirectly through the pastoral stage, several causes conspire to prevent, or to check, the growth of private land-ownerships. There is first the traditional usage. Joint ownership continues after circumstances no longer render it imperative, because departure from the sacred example of forefathers is resisted. Sometimes the resistance is insuperable; as with the Rechabites and the people of Pétra, who by their vow were not allowed to possess either vineyards or cornfields or houses, but were bound to continue the nomadic life. And obviously, where the transition to a settled state is effected, the survival of habits and sentiments established during the nomadic state, must long prevent possession of land by individuals. Moreover, apart from opposing ideas and customs, there are physical difficulties in the way. Even did any member of a pastoral horde, which had become partially settled, establish a claim to exclusive possession of one part of the occupied area, little advantage could be gained before there existed the means of keeping out the

¹ Laveleye's "Primitive Property," ² Treated fully *post*, Bk. II., cc. cc. XV., XVI. II. & III., §§ 152-218.

animals belonging to others. Common use of the greater part of the surface must long continue from mere inability to set up effectual divisions. Only small portions could at first be fenced off. Yet a further reason why land-owning by individuals, and land-owning by families, was established very slowly, was the fact that at first each particular plot had but a temporary value. The soil is soon exhausted ; and in the absence of advanced arts of culture becomes useless. Such tribes as those of the Indian hills show us that primitive cultivators uniformly follow the practice of clearing a tract of ground, raising from it two or three crops, and then abandoning it ; the implication being that whatever private claim had arisen, lapses, and the surface, again becoming wild, reverts to the community.¹

SEC. 7. **Right of property and hereditary patrimony.**—Primitive nations, in obedience to an instinctive sentiment, recognized in every man a natural right to occupy a portion of the soil from which he might derive the means of subsistence from his labor.² At first they divided the collective property of the tribe equally among the heads of families, instead of parceling it out to the individual members, and giving them a private property in it. Traditions of this distribution are common among the Greeks. We meet with it among the inhabitants of Cyclades,³ of Tenedos, Lesbos and the neighboring islands.⁴ It is also said to have existed in Sardinia,⁵ and was found in the Peloponnese when overrun by the Dorians.⁶ This system still obtains in the Russian *mir*,⁷ the Swiss *allmend*,⁸ the Javanese *sawahs*,⁹ and among the southern slaves.¹⁰

Publicists, economists, and statesmen vie with one another in repeating that without property there can be

¹ See : "Principles of Sociology," (1st ed.) vol. II. c. XV., § 538.

² Laveleye's "Primitive Property," 333.

³ Diodorus, v. 84 ;

⁴ Diodorus, v. 81, 83.

⁵ Diodorus, v. 15.

⁶ Laveleye's "Primitive Property," 149.

⁷ Wallace's "Russia," c. VIII. ; Stepniack's "Russia under the Tsars," c. I.

⁸ Laveleye's "Primitive Property," c. V.

⁹ Id. c. IV.

¹⁰ Id. c. XIII.

no liberty. Property, or the right of regarding as one's own determinate portions of matter, of enjoying it or disposing of it at will, without trenching upon the rights of another, always constitutes an essential foundation of a true form of society. Some of our modern thinkers, like Herbert Spencer,¹ Henry George,² Professor de Laveleye,³ M. Huet,⁴ and the German philosopher Fichte,⁵ maintain that rightly there can be no private property in land.⁶

SEC. 8. **Same—Recognition of the right of private property.**—With the troubles of the philosophers we have nothing to do. It is a condition and not a theory that confronts us, a settled system of laws with which we have to deal ; and, so far as this treatise is concerned, we have no more interest in their speculative theories than we have in Bishop Wycliffe's "inheritance of grace," or his difficulties with the Church at Rome. It may be remarked in passing, however, that in all ages and all degrees of civilization, from the Bedouins of the Arabian desert to the Arawaks of the North American plains ;⁷ from the Bush-

¹ See : "Social Statistics" (1st ed.), c. IX. Herbert Spencer's recent thought and investigation has greatly modified his views on the question of private property in land, and caused the erratic Henry George to bring out his caustic criticism entitled "A Perplexed Philosopher ;" a work as unlearned, unreliable, and misleading as any of that author's productions.

² "Progress and Poverty," 307 ;

"A Perplexed Philosopher," *passim*.

³ "Primitive Property," particularly pp. xxv. to xlv.

⁴ Le Regne social du christianisme, bk. III., c. V.

⁵ Der geschlossene Handelstaat, B. I., K. 1, §§ 399, 402 ; K. 7, § 446.

⁶ In the original edition of his "Social Statistics," Herbert Spencer said : "Passing from the consideration of the possible to that of the actual, we find yet further reason to deny the rectitude of property in land. It can never be pretend-

ed that the existing titles to such property are legitimate. Should any one think so, let him look in the chronicles. Violence, fraud, the prerogative of force, the claims of superior cunning,—these are the sources to which those titles may be traced. The original deeds were written with the sword, rather than with the pen ; not lawyers, but soldiers, were the conveyancers, blows were the current coin given in payment ; and for seals, blood was used in preference to wax. Could valid claims be thus constituted ? Hardly. And if not, what becomes of the pretensions of all subsequent holders of estates so obtained ? Does sale or bequest generate a right where it did not previously exist ? Would the original claimants be nonsuited at the bar of reason, because the thing stolen from them had changed hands ?" Chap. IX., § 3, p. 133.

⁷ Spencer's "Principles of Sociology," vol. II., c. XV.

men¹ of Africa to the animals of the prairie,² the right of private property is recognized and enforced, in accordance with the light and civilization of the people, the intelligence and progress of the animal.³

The evolution of private property in land has been set forth in great detail by a Belgian, Professor de Laveleye, in a work full of learning and research, but permeated with the pernicious influence of modern socialistic ideas.⁴

SEC. 9. **Same — Alienation and devise.**—Although the right of private ownership in land has long been recognized, it is only in comparatively recent times that the right of alienation and devise have been accorded to the possessor. Thus it was not allowed in ancient Germany⁵ or Gothland,⁶ was unknown in ancient India⁷ and Scotland,⁸ was formerly forbidden in Sparta,⁹ and is not recognized in the early laws of the Visigoths, as promulgated by Blume.¹⁰ Alienation was prohibited by the Locrian and Leucadian laws,¹¹ and the ordinances of Phido of Corinth.¹²

¹ Lich. vol. II. 194.

² Kerr's "Black Hills," c. III.

³ It is a well-known fact that intelligent animals display a sense of proprietorship, not only of movable property, but of real estate as well. Thus, the dog understands the exclusive possession of property. The domesticated dog fights in defense of his master's clothes, and the untamed dog for his lair or his burrow: the swans of each reach on the Thames river resist invading swans from other reaches, and the public dogs of Constantinople attack dogs from other quarters, if they encroach. Spencer's "Principles of Sociology," vol. I., § 292; Id. vol. II., § 536; Kerr's "Black Hills," c. III.

⁴ "Primitive Property," *passim*.

⁵ Canciani, Bar. leg. antiq., vol. III., pp. 31-36; Laws of the Thuringians, tit. XIII.; Walter, Corpus jus. Germ., vol. I., p. 380; Laws of the Saxons, tit. XV.; Pretz, Mon. Germ. Leg. tit. III., pp. 532 to 568.

⁶ Guta-Lagh (Schildenei's translation), Greifswald, 1818, p. 59; Mirror of Saxony, lib. I., art. 34.

⁷ See Colebrooke, "A Digest of Hindu Law," II. 161, art. xxxiii., Orianne, Traité original des successions d'après le droithindou: extrait du Mitashara de Vijayaésvara (Paris, 1844), pp. 49, 50; Pross' onno Coomar Tagore, "A succinct Commentary of the Hindoo Law prevalent in Mithila, from the original Sanscrit of Vachaspati Misra (Calcutta, 1863), p. 310; Caract. collect. des premières propriétés immobilières," by Viollet, p. 30.

⁸ Leges Burgorum, c. XXXVIII.; Honard, Traités sur les coutumes Anglo-Normadés, tom. I., pp. 449, 450.

⁹ Plutarch's Lycurgus, agis; 1 Plut. Lives (Clough's ed.) 83-126; Aristotle's Politics, II., p. 10.

¹⁰ Blume, Die westgothische Antike oder das Gesetzbuch Reccard des Ersten (1847), c. 294, pp. 18, 20.

¹¹ Aristotle's Politics, II. 4, 4.

¹² Id. II. 3, 7.

Primitive law was as intolerant of testamentary devises as it was of sales, because the transmission of land was generally regarded as a matter of public interest, the regulation of which was not left to individual conveniences or caprice.¹ This was not the case, however, in Athens² or Corinth.³ Such a disposition of property was unknown in Germany,⁴ ancient Hindoo,⁵ Rome before the Twelve Tables,⁶ Sparta,⁷ or Thebes.⁸

SEC. 10. **Same — The retrait.**—The *retrait*, or the right of claiming land that has been aliened to a stranger, recognized in the inhabitants of the village communities of pastoral and early agricultural times, was found everywhere,⁹ and exists to-day in most Mussulman countries, in Algeria, India, and Java,¹⁰ and was still in force in Illyria and Italy under the emperors, being abolished by a constitution concerning these provinces, A. D. 391,¹¹ and survived in France until within a very recent period.¹²

SEC. 11. **Theories of the origin of private property in land.**—Full ownership in the individual, as applied to the soil, is of quite recent creation. Agriculture commenced and was developed under the system of common ownership and periodical partition. In the Roman Empire, which bequeathed to us the theory of *quiritary* property in land, the soil was originally occupied by title of usufruct.¹³ In the Middle Ages, the free-allod was the exception; the

¹ Laveleye's "Primitive Property," 155.

² Plato's Laws, XI. ; Jewett's Plato, vol. IV., p. 424, *et seq.* ; Plutarch's Life of Solon, 1 Plut. Lives (Clough's ed.), 168-203.

³ Laveleye's "Primitive Property," 156.

⁴ Nullum testamentum ; Tacitus, Germ., XX ; Sir Henry Maine's "Ancient Law," p. 172.

⁵ See : Sir George Campbell's "System of Land Tenure in Various Countries," in Cobden Club vol., p. 172.

⁶ Fustel de Coulonges, "La cité antiq." (3d ed.), p. 89.

⁷ Laveleye's "Primitive Property," 156.

⁸ Ib.

⁹ Laveleye's "Primitive Property," 152.

¹⁰ Sir William Hay Macnaghten, "Principles of Hindu and Mohammedan Law," c. IV., pp. 204, 205.

¹¹ Laveleye's "Primitive Property," 152.

¹² See : Bourdot de Richebourg, vol. I., pp. 306, 347 ; Libri foudo-ruin, lib. V., tits. XIII., XIV.

¹³ It is said by Gaius, II. 7 : "In solo provinciali, dominium populi Romani est vel Cæsaris, nos autem possessionem tantum et usufructum habere videmur."

precarium, and the *beneficium*, the fief,—that is, a sort of hereditary usufruct,—was the rule ; and agricultural labor was executed by “*mainmortables*,” serfs, who, so far from being owners of the soil they cultivated, were not even owners of their own movables ; for the right of succession was denied them.¹ Various systems or theories have been put forward in explanation of the origin and justice of private property in land, the principal ones of which merit a moment’s consideration. They are :

1. The discovery theory ;
2. The occupation theory ;
3. The labor theory ;
4. The contract theory ;
5. The lex theory ;
6. The natural-economic theory ;
7. The natural rights theory ; and
8. The government grant theory.

SEC. 12. **Same — 1. The discovery theory.**—The theory of title by discovery is one that our English ancestors maintained, in common with the other nations of Europe, in regard to the American soil. On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all ; and the character and religion of its inhabitants afforded an apology for considering them as people over whom the superior genius of Europe might claim an ascendancy. The potentates of the Old World found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the New World, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between

¹ Laveleye’s “*Primitive Property*,” 338.

themselves. This principle was that "discovery" gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments; which title might be consummated by possession.¹

But this theory, so far at least as it applies to this country, has no foundation in any known principle of jurisprudence or Christian policy. It was enforced and maintained only by the might of the sword and the scent of carnage. It never had any foundation in principle, and is indefensible, except on the theory that "might makes right," under which, Henry Lichtenstein² tells us, the more powerful among the savages of South America compel the weaker to resign their weapons, wives, and even their children.

SEC. 13. **Same — 2. The occupation theory.**—Some modern jurists, as well as those of ancient Rome, consider the occupancy of things and lands without an owner as the principal title conferring individual property. This theory might be justifiable if any lands could be found that were not, in theory or in fact, already occupied. History shows us that since the dispersion at the building of the Tower of Babel, when the tribes of Israel were scattered throughout the world, the earth has never been regarded by men as *res nullius*. The hunting-grounds of those tribes that lived by the chase, and the pasture-lands of those that lived from the produce of their flocks, have always been recognized as the collective domain of the tribe; and this collective possession has continued in many instances, even after agriculture had begun to fertilize the soil. For this reason what is termed unoccupied land has never been regarded as without an owner. Everywhere, in former times as well as in our own, such land was considered as belonging to the community or the state. Consequently there was no room in former times, any more than at the present day, for ac-

¹ Johnson v. McIntosh, 21 U. S. (8 Wheat.) 543, 572; bk. 5 L. ed. 681, 688. ² "Travels in South America," vol. II., p 194.

quisition by occupancy.¹ Occupancy, being a fact resulting from force or chance, can give no basis for a title in the court of good conscience, and is inveighed against by philosophers of the Herbert Spencer type.² Yet this is the only theory of the origin of the title of private property in land that Sir Henry Maine thinks it worth while to give consideration in his philosophic treatise on Ancient Law.³

SEC. 14. **Same—3. The labor theory.**—Another class of philosophers and thinkers would make labor the basis of the right to the private ownership of land. This is the theory generally adopted by economists, because, since Adam Smith,⁴ they have attributed to labor the production of all wealth. As expounded by John Locke⁵ the theory is briefly this: God gave the soil to mankind at large, but as no one enjoys either the soil or that which it produces, unless he be owner, individuals must be allowed the use, to the exclusion of all others. Every one has an exclusive right over his own person. The labor of his body and the work of his hands therefore are likewise his property. No one can have a greater right than he to that which he has acquired, especially if there remain a sufficiency of similar objects for others.

According to this theory, labor establishes between man and the objects which he has transformed by his labor relations stronger than mere occupation, whether symbolic or actual, can give.⁶ But this theory has been and is violently opposed by continental jurists,⁷ and the civil code has nothing to say in approval of it.

SEC. 15. **Same—4. The theory of contract.**—It has been maintained by the philosopher Hobbes and others, that

¹ M. Thiers' "De la Propriété," *passim*;

M. Renourd "Du Droit industriel," *passim*;

² Spencer's "Social Statistics," c. IX.

See: *ante*, § 7.

³ Maine's "Ancient Law," p. 238.

⁴ "Wealth of Nations" (Ward & Locke's 1 vol. ed.), p. 2, *passim*.

See: M. Thiers' "De la Propriété," p. 38.

⁵ Locke's "Civil Government," c. IV.

⁶ Röeder, "Die Gruentzüge des Naturrechts," § 79.

⁷ See: M. Warukoenig's "Doctrina juris philosophica," p. 121; Ahern's "Naturrecht," *passim*.

men abandoned the primitive community of property in consequence of a convention, or contract, and that thereby all private property in land began.¹ The great trouble with this theory is that it requires us to establish the reality of a convention, which cannot be done, because this consent or contract is not an historic fact, but simply a juristic necessity engendered by the theory. To our way of thinking, this fact is fatal to the theory.

SEC. 16. Same—5. The *lex* theory.—Many writers, of various shades of opinion, without having recourse to abstract theories of natural justice, or to the obscurities of historical origins, have maintained the theory that property is the creature of law.² Bentham says³ that property and law are born and must die together ; that before the law there was no property ; take away the law, all property ceases. He is of the opinion that “ law alone has accomplished what all the natural feelings were not able to do. Law alone has been able to create a fixed and durable possession which deserves the name of property. The law alone could accustom men to submit to the yoke of foresight, at first painful to be borne, but afterwards agreeable and mild ; it alone could encourage in them labor superfluous at present, and which they are not to enjoy till the future.” Montesquieu says⁴ “ that as men have renounced their natural independence to live under political laws, they have also renounced the natural community of goods to live under civil laws. The former laws give them liberty, the latter laws give them property.” Faucher declares⁵ that the primitive community of goods has never been found in a state of nature ; and this is true as to personal property, but not as to landed property ; for this was collective everywhere in primitive times.

SEC. 17. Same—6. The natural-economic theory.—Ac-

¹ See Hobbes' Works, vol. III., c. XV. ³ Bentham's Works, vol. I., pp. 307-309.

² See : Bossuet, “Polit. tirée del l'Ecriture, lib. I., art. 3, 4 props.; Hobbes' Works, vol. II., p. 84; Id. vol. IV, 164. ⁴ Montesquieu, “Esprit des Lois,” lib. XXVI., c. 15. ⁵ See : Dictionnaire de l'Economie politique, tit. “Propriété.”

ording to certain economists, such as John Stuart Mill, Wilhelm Roscher, Adolph Wagoner, and others, human nature is such as to require property, because without it there would be no stimulus to labor. Roscher says: "Just as human labor can only arrive at complete productivity when it is free, so capital does not attain to full productive power except under the system of free private property. Who would care to save and renounce immediate enjoyment, if he could not reckon on future enjoyment?"¹

This theory, by basing the right to private property on general utility, has the advantage of allowing successive improvements in existing institutions by the elimination of what is contrary to equity and against the general interest, and the introduction of modifications required by the conditions and wants of the community.²

SEC. 18. Same — 7. The natural rights theory.—Another theory of the origin of individual property in land regards it as a natural right. According to this theory the personal right of man as determined by nature is, to possess a sphere of action sufficient to supply him with the means of support. This physical sphere should therefore be guaranteed to every one, conditionally, however, on his cultivating it by his own labor. Thus all should labor, and all should also have wherewith to labor. The second in order of the four great German philosophers,³ maintains in his "Foundation of Natural Rights"⁴ that every man has an inalienable right to live by labor, and consequently to find the means of employing his hands.⁵ Hegel says⁶ that every one ought to be pos-

¹ Roscher, Syst. I., §§ 77, 82.

² The student curious to pursue further this theory will find it well presented in a work entitled "Lehrbuch der politischen Öconomie, I. Grundlegung," by Adolph Wagoner and Erwin Nasse.

See also two works of M. A. Samter, one entitled "Die Social-Lehre," and the other "Gesellschaftliches - und - private - Eigenthum," Leipzig, 1877.

³ Kant, Fichte, Schilling and Hegel.

⁴ Johann Gottlieb Fichte, "Grundlage des Naturrechts."

⁵ The same author says in his work on the French Revolution: "The transformation (*bildung*) of materials by our own efforts is the true juridical basis of property, and the only natural one. He who does not labor cannot eat, unless I give him food; but he has no right to be fed. He cannot justly make

⁶ "Rechtsphilosophie," § 49.

sessed of property. The poet Schiller has the idea in two lines, which have been said to contain the whole philosophy of history on the subject :

“ Etwas muss er sein eigen nennen,
Oder des Mensch wird, modern und brennen.”¹

Which may be liberally rendered :

“ Something a man must have his own to call,
Or on slaughter and burnings at once he'll fall.”

SEC. 19. Same — 8. The government grant theory.—According to Blackstone it is a fundamental principle of the English law, derived from the maxim of the feudal tenure, that the king was the original proprietor, or lord paramount, of all the land in the kingdom, and the source of all titles.² This principle has been adopted in this country and applied to our republican form of government, and has become a settled fundamental doctrine with us. The title to the lands in this country is derived by direct grant from our local governments, or from the federal government since the Revolution. Titles prior to that date were derived from the crown or the royal chartered governments originally established here.³ All titles to land in this country are at present held through government grant, either from the crown, through the colonial corporations and the colonial or proprietary authorities, or through the governments of the various states or of the United States.⁴

others work for him. Every man has over the material world a primordial right of ‘appropriation,’ and a right of property over such things only as have been modified by him.”

¹ Wallenstein, pt. I., Scene 11.

² See : 2 Bl. Com. 51, 53, 59, 86, 105.

³ *Dearmas v. Mayor, etc.*, of New Orleans, 5 La. 132 ;

Jackson v. Waters, 12 John. (N. Y.) 365 ;

Jackson v. Ingraham, 4 John. (N. Y.) 163.

Purchase at Indian treaties.—It has been said that purchases at Indian treaties, under the competent sanction of the govern-

ment of the United States, vest a valid title in the purchaser, without a patent.

Mitchell v. The United States, 34 U. S. (9 Pet.) 711, 748, 756, 757 ; bk. 9 L. ed. 283, 296, 299, 300.

While this doctrine has been questioned, the law is considered as well settled that purchases at India treaties with the approbation of the government agent, carry a valid title without the necessity of a patent from the United States. *Coleman v. Doe*, 12 Miss. (4 Smed. & M.) 40.

⁴ **Nature of Indian titles.**—It is said by the supreme court of the United States in the case of

SEC. 20. **Real and personal property—Distinction and devolution.**—There is now more personal property in this country than there is real, but to the real property there still cling many of the ancient rules and laws, which invest it with an interest and importance not possessed by personal property. Of these ancient laws none are more conspicuous than the feudal rule of descent, under which, in England, as modified by amending acts,¹ when the owner dies intestate, his real property goes to his heir, and his personal property to the next of kin.² In the United States, where there has been a greater breaking away from the feudal usages and customs, and a more thorough uprooting of the antiquated feudal laws, if the owner dies intestate his real property goes to his heirs and his personal property goes to his executor or administrator for distribution. In the United States the devolution of property by operation of law is regulated almost entirely by local statutes in the various States. The majority, if not all, of these statutes are modeled after the English Statute of Distribution,³ which was borrowed from the civil law,⁴ and are to be interpreted and applied according to the rules of the civil law rather than those of the common law.⁵ The provision of the English statute are pronounced by James Schouler,⁶ one of those excellent enactments⁷ following the Restoration,—one in striking contrast with the course of descent of the common law. Its great advantage seems to have been absolute equality at the expense of the fundamental rules of the common law, and it upsets

Fletcher v. Peck, 10 U. S. (6 Cr.) 87; bk. 3 L. ed. 162, that the nature of the Indian titles to lands lying within the territorial limits of a state are entitled to be respected by the courts until legitimately extinguished, and that the title is not such as to be absolutely repugnant to seisin in fee on the part of the state within whose jurisdiction the lands are situated.

¹ 3 & 4 Will. IV. c. 106;
Amended by 22 & 23 Vict. c. 351, §§ 19 & 20.

² Williams on Real Property, 10.

³ 22 & 23 Car. II. c. 2, § 10.

⁴ Just. Nov. 118;

3 Kent Com. (13th ed.) 422.

⁵ *Palmer v. Allicock*, 3 Mod. 58;

Carter v. Crawley, 1 T. Raym. 496;

Edwards v. Freeman, 2 Pr. Wm. 436;

3 Redf. on Wills, 422, pl. 3;

1 Woerner's American Laws of Admsrs. p. 131, § 64.

⁶ Schouler's Ex. & Admr. § 495.

⁷ Lord Hardwick says that it was "very incorrectly penned" in *Stanley v. Stanley*, 1 Atk. 457.

the old doctrine of primogeniture, the preference of males over females, the blood of the first purchaser, the rule that property never ascends, and the exclusion of the half-blood.¹

SEC. 21. **Definition of real property.**—Real property, or real estate, is an estate in fee or for life in land ;² that is, something that may be held by tenure and passes to the heir of the possessor at his death instead of to his administrator,³ and embraces lands, tenements and hereditaments,⁴ but does not comprehend terms for years, or anything short of a freehold estate.⁵ By the term land is ordinarily understood whatever is parcel of the terrestrial globe, or is permanently affixed to such parcel, whether by ordinary course of nature,—as grass, herbage, trees and water, or by the hand of man,—as buildings and fences ;⁶ and it not only includes the surface of the earth, but everything under it and over it, *cujus est solum, ejus est usque ad cælum*.⁷ Land is the most

¹ Davis v. Rowe, 6 Rand. (Va.) 356, 361.

² 3 Kent Com. (13th ed.) 401.

³ See : Mason's Estate, 4 Watts. (Pa.) 346 ;

Buckridge v. Ingram, 2 Ves. Jr. 652 ;

Wind v. Jekyl, 1 Pr. Wm. 575.

⁴ 2 Bl. Com. 16 ;

1 Co. Litt. (19th ed.) 4a.

See : Van Rensselaer v. Poucher, 6 Den. (N. Y.) 35.

"Lands" in England.—In England, since the passage of Lord Brougham's Act, 13 & 14 Vict. c. 21, § 4, the word "land" includes "messuages, tenements, hereditaments, houses and buildings, of any tenure, unless where there are words to exclude houses and buildings, or to restrict the meaning of tenements to some particular tenure."

Challis' Real Prop. 36, 37.

⁵ 1 Co. Litt. (19th ed.) 19, 20 ;

2 Kent Com. (13th ed.) 342 ; 3 Id. 401.

See : Merry v. Hallet, 2 Cow. (N. Y.) 497.

⁶ Mott v. Palmer, 1 N. Y. 564, 572 ;

Thayer v. Wright, 4 Den. (N. Y.) 180 ;

Green v. Armstrong, 1 Den. (N. Y.) 554 ;

Goodrich v. Jones, 2 Hill (N. Y.) 142 ;

1 Co. Litt. (19th ed.) 4a, 6a.

⁷ Gonnon v. Hargadon, 92 Mass. (10 Allen) 106, 109 ;

Sargent v. Adams, 69 Mass. (3 Gray) 72, 79 ;

Stockwell v. Hunter, 52 Mass. (11 Met.) 448, 455 ;

Atkins v. Bordman, 43 Mass. (2 Met.) 457, 467 ; s.c. 37 Am. Dec. 100 ;

Stevens v. Paterson & N. R. Co., 20 N. J. Eq. (5 C. E. Gr.) 126,

136 ; s.c. 34 N. J. L. (5 Vr.) 532, 570 ; 3 Am. Rep. 260 ;

Barnett v. Johnson, 15 N. J. Eq. (2 McCart.) 481, 489 ;

Hoffman v. Armstrong, 48 N. Y., 201 ; s.c. 8 Am. Rep. 537 affirm-

ing 46 Barb. (N. Y.) 337, 338 ;

People v. Central R. Co., 42 N. Y. 283, 296, reversing 48 Barb.

(N. Y.) 478 ; s.c. 33 How. (N. Y.) Pr. 407 ;

Lampman v. Milks, 21 N. Y. 505, 511 ;

Auburn & C. P. R. Co. v. Douglass, 9 N. Y. 444 ;

Mott v. Palmer, 1 N. Y. 569 ;

Relyea v. Beaver, 34 Barb. (N. Y.) 547, 551 ;

firm inheritance, and is therefore said to be *solum quia est solidium*.¹ In its more limited sense, the term land denotes the quality and character of the interest or estate which the tenant may own in lands; and when used to describe an estate, it is understood to denote a freehold estate at least.²

SEC. 22. Same—"Land" and "real estate."—The terms "land" and "real estate," as used in the statutes of the various states of the Union, include every freehold estate and interest in land; that is, all estates in fee or for life,³ as well as a remainder in fee,⁴ and should be construed as co-extensive in meaning with "lands, tenements, and hereditaments,"⁵ and in some states is declared to include every estate, interest, and right, legal and equitable, in lands, tenements, and hereditaments, except such as are determined or extinguished by the death, intestate, of any one seized or possessed thereof, or in any manner entitled thereto, and except leases for years and estates for the life of another person.⁶ Some statutes, like those of Missouri, extend the term real estate so as to include chattels real.⁷

Kelsey v. King, 33 How. (N. Y.)

Pr. 39, 48; s.c. 1 Transc. App. (N. Y.) 133, 141;

Green v. Armstrong, 1 Den. (N. Y.) 554;

Ruckler v. Hiller, 4 Campb. 219;

Baten's Case, 9 Co. 54;

In re Thornton, 4 Excli. 822;

2 Bl. Com. 17, 18;

Broom's Max. 395;

Kerr's "Adjudicated Words and Phrases and Applied Maxims";

Pom. Mun. L. (2d ed.) § 315;

Shep. Touch. 90.

¹ 1 Co. Litt. (19th ed.) 4a.

² Johnson v. Richardson, 33 Miss. 462, 464.

³ Jenkins v. Fahey, 73 N. Y. 355, 362.

The term "real estate," as used in the New York Statutes, comprehends equitable as well as legal estates; L. 1843, c. 87, § 5; 4 N. Y. Rev. Stats. (8th ed.) 2425; 3 Rev. Stats. Codes & L. of N. Y. 2952, § 2.

⁴ Jenkins v. Fahey, 73 N. Y. 355, 362.

⁵ 4 N. Y. Rev. Stat. (8th ed.) 2461, § 10; 1 Rev. Stats. Codes & L. 829, § 38; N. Y. Code Civ. Proc. § 3.

See: Gen. Stats. Ky. c. 21, § 13;

Mass. Gen. Stats. c. 3, § 7;

Ray v. Sweeney, 14 Bush. (Ky.)

1; s.c. 29 Am. Rep. 388, 391;

Floyd v. Carow, 88 N. Y. 561, 569;

Despard v. Churchill, 53 N. Y. 192, 199;

Bliss v. Greeley, 45 N. Y. 671,

674; s.c. 6 Am. Rep. 157;

Wright v. Douglass, 2 N. Y. 373, 376;

Carter v. Burr, 39 Barb. (N. Y.) 65.

Jenkins v. Fahey, 73 N. Y. 355, 362. This is but an elaboration of the common law definition of the term.

Merry v. Hallet, 2 Cow. (N. Y.) 497;

3 Kent Com. (13th ed.) 401.

⁷ Mo. Rev. Stats. c. 32, § 49.

SEC. 23. **Same—Maryland doctrine.**—In an early Maryland case it is said that “as between vendor and vendee, mortgagor and mortgagee, and as regards the mere question of the title of the defendant, land, in the legal signification, comprehends all ground, soil, or earth whatever; all minerals are, in this sense, component parts of land; and it comprehends tide-water rivers, lakes, and running streams, as so much land covered with water; it includes all houses, fences, and structures upon the ground; and it also embraces all vegetable productions, as trees, herbage, grass, etc., standing upon and growing out of the soil.¹ If either the owner of the fee-simple, a particular tenant, or even a wrong-doer builds a house, or annexes to a house then standing upon the land any glass windows, wainscot, benches, doors, vats, furnaces, or the like, they are thereby immediately blended with the land itself, become parcel of it, and vest in the owner of the inheritance.² All these things are embraced by the phrase land, in the legal and comprehensive sense of that term.”³

SEC. 24. **Same—Tenement.**—The word “tenement” is frequently used in a restricted sense, as signifying a house or building,⁴ but it is also used in a much more enlarged sense, as signifying land, or any incorporeal inheritance, or anything of a permanent nature that may be holden by a tenure,⁵ whether it be of a substantial kind, like

¹ 1 Co. Litt. (19th ed.) 4a.

² *Herlakenden's Case*, 4 Co. 62;

1 Co. Litt. (19th ed.) 53a.

³ *Coombs v. Jordan*, 3 Bland. Ch. (Md.) 284; s.c. 22 Am. Dec. 236, 259.

⁴ See: *Sacket v. Wheaton*, 34 Mass. (17 Pick.) 103.

⁵ *Commonwealth v. Wise*, 110 Mass. 181, 182;

Sacket v. Wheaton, 34 Mass. (17 Pick.) 103, 105;

3 Kent. Com. (13th ed.) 401.

Includes shops of one room.—Under the Massachusetts liquor laws it has been held that a shop consisting of one room, and not forming a part of a dwelling-house, constitutes a tenement.

Commonwealth v. Cogan, 107 Mass. 212;

Citing: *Commonwealth v. Godley*, 77 Mass. (11 Gray,) 454; *Commonwealth v. McCaughey*, 75 Mass. (9 Gray) 296.

Includes suite of rooms when.—Under a statute regulating the supply of water to the “occupant of a tenement,” it has been held that the word “tenement” applies to a suite of rooms in a model-tenement house, having separate water fixtures, and occupied by a separate tenant and his family, and containing the conveniences of a common dwelling-house.

Young v. Boston, 104 Mass. 95.

lands and houses,¹ or of an unsubstantial and ideal kind, like commons, lands, offices, and the like.² Kents says³ that a tenement comprises everything which may be holden, so as to create a tenancy in the feudal sense of the word, and includes things incorporate, though they did not lie in tenure.⁴

SEC. 25. **Same—Hereditaments.**—Hereditaments is a term of still broader extent than either lands or tenements, and includes not only lands and tenements, but comprehends whatever passes, without testamentary disposition, on the death of the owner, to the heirs by hereditary succession,⁵ and embraces heirlooms as well as lands and tenements.⁶ Land regarded as a hereditament stands in a peculiar position, because its existence is wholly independent of the manner in which estates in land are limited, while other hereditaments can only by a metaphor be said to have any existence apart from their limitation for estates of inheritance. The word hereditament, when used in relation to land, sometimes denotes the land itself as a physical object, and sometimes the estate in the land. The use of a single name to denote two such disparate ideas is not without inconvenience; but the practice is now inveterate. Thus, with some degree of confusion, it is commonly said that land is both a tenement and an hereditament. Here it is evident that the word tenement is not used in exactly the same sense as when a legal estate for life is styled a tenement; and the word hereditament is not used in exactly the same sense as when a rent-charge in fee-simple is styled a hereditament. In the case of land, the estate contemplated is the legal fee-simple; and since this exhausts the whole possible interest, by way of

¹ *Sacket v. Wheaton*, 34 Mass. (17 Pick.) 103.

The word "tenement" in a will has never been construed, independent of other circumstances, to passing a fee.

Wright v. Page, 23 U. S. (10 Wheat.) 204; bk. 6 L. ed. 303.

² 2 Bl. Com. 17;

1 Co. Litt. (19th ed.) 6a.

³ 3 Kent Com. (13th ed.) 401.

⁴ See: *Doe v. Dyball*, 1 Moore & P. 330.

1 Co. Litt. (19th ed.) 19b, 20a;

1 Prest. Est. 8.

⁵ *Canfield v. Ford*, 28 Barb. (N. Y.) 336;

2 Bl. Com. 17;

1 Co. Litt. (19th ed.) 6a;

1 Inst. 6;

1 Prest. Est. 12, 13.

⁶ See: *post*, § 63.

estate, in the land, and since, for most purposes, it matters little whether we speak of the land itself, or of the utmost possible interest in the land, some degree of obscurity is often permitted to exist as to which precisely of these two things is meant to be the subject of reference. The word has, to some extent, a double meaning. In other cases, in which the thing has no real existence apart from the estate in the thing, the words used have only a single meaning.¹

SEC. 26. *Same — Same — Division of hereditaments.*—Hereditaments are commonly divided first into real, mixed, and personal hereditaments; and second, into corporeal and incorporeal hereditaments. The phrase hereditaments real, or real hereditaments, is commonly used to denote lands regarded as a physical object, and legal estates of inheritance in lands, whether in possession, remainder, or reversion. The phrase hereditaments mixed, or mixed hereditaments, includes all estates of inheritance which savor of the realty. The phrase hereditaments personal, or personal hereditaments, includes certain inheritable rights, either having no connection with lands, such as a personal annuity granted for an estate of inheritance,² or having a connection which implies no participation either in lands or its profits; also annuities grant in fee,³ and certain annuities charged upon public revenues.⁴ Corporeal hereditaments are fixed as to their definition by the legal maxim, that at common law they lie in livery, and not in grant. The phrase therefore includes only lands regarded as a physical object, and legal estates of inheritance in possession. The only conveyance *in pais*—that is, made between party and party, and not matter of record, as a fine or recovery,—by which these could at common law be conveyed to a stranger, was a feoffment, and the essence of a feoffment is the livery of the seisin. All other hereditaments, to which applies the description, *tangi non possunt nec videri*, are included under the term incor-

¹ Challis on Real Prop. 39.

² Turner v. Turner, Ambl. 776.

³ Stafford v. Buchley, 2 Ves. Sr. 171.

⁴ Holderness v. Carmarthen, 1 Bro. C. C. 377.

poreal hereditaments. These are said at common law to lie in grant ; because they would pass by the mere delivery of a deed purporting to convey them, and the word grant was the most appropriate, though not the only, word of conveyance for the purpose.

CHAPTER II.

WHAT IS REAL PROPERTY.

- SEC. 27. Generally.
- SEC. 28. Things real become personal by agreement.
- SEC. 29. Church-pews—Definition.
- SEC. 30. Same—Assignment of pews.
- SEC. 31. Same—Rights of pew-holders—English doctrine.
- SEC. 32. Same—Same—American doctrine.
- SEC. 33. Same—Same—Limitation and qualification of property in pew.
- SEC. 34. Same—Same—As to right of occupancy.
- SEC. 35. Same—Law regulating.
- SEC. 36. Same—Same—Episcopal church.
- SEC. 37. Same—Same—Same—Vestry's control.
- SEC. 38. Same—Same—Free church—Power of trustees.
- SEC. 39. Same—Grant in perpetuity.
- SEC. 40. Same—Interest of pew-holder in church edifice and lands.
- SEC. 41. Same—Restrictions on use and treatment of pew.
- SEC. 42. Same—Abandonment or sale of church edifice.
- SEC. 43. Same—Changes and repairs.
- SEC. 44. Burial lots.
- SEC. 45. Corporate stocks and lands.
- SEC. 46. Same—Realty held by corporation in trust when.
- SEC. 47. Same—Land is real estate when.
- SEC. 48. Same—Nature and object of investment.
- SEC. 49. Electric poles and wires realty.
- SEC. 50. Emblements—Growing crops.
- SEC. 51. Same—When crop severed.
- SEC. 52. Fee-farm lease.
- SEC. 53. Fructus industriales.
- SEC. 54. Same—Products of a mixed nature—Hops.
- SEC. 55. Fructus naturales.
- SEC. 56. Same—Growing trees.
- SEC. 57. Same—Same—Overhanging trees.
- SEC. 58. Same—Same—"Line trees."
- SEC. 59. Same—Cut trees.
- SEC. 60. Ground-rent—Definition.
- SEC. 61. Same—Nature and methods of creation.
- SEC. 62. Same—Disposition of in case of intestacy.
- SEC. 63. Heirlooms—Definition.
- SEC. 64. Same—Not recognized in America.

SEC. 65. Houses and buildings.

SEC. 66. Same—Built by tenant.

SEC. 67. Same—Consent to erection.

SEC. 68. Same—Chamber or floor in building.

SEC. 69. Same—Same—Effect of destruction of building.

SECTION 27. **Generally.**—Land, as we shall presently see,¹ is generally regarded as real property ; and so also is anything that is permanently affixed to it, either by the act of man or the process of nature, as well as many of the intangible rights which adhere to it and grow out of its possession. Thus all trees, herbage, buildings, fences, and other improvements or betterments² upon the surface, and all mines, quarries, metals, minerals, oils, or gases within the soil belong to and pass with the land.³ Yet the soil may be owned by one man, and the fences and buildings by another ; and as between such owners, such structures will be regarded as personal property. But in their nature, fences and buildings, like everything else attached to the earth, are real estate, and pass with the soil to the heir or grantee. It is truly said that rails are not in their nature real property. But a fence, though constructed of rails, is in its nature real property. It is just as plainly so as is a house. Both are made of materials which were once personal property ; but they become realty when formed into a structure and attached to the soil. The word land includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings and fences. This is but common learning ; and there is no more room for question that a grant of land, *eo nomine*, will carry buildings and fences, than there is that it will carry growing trees and herbage upon, or mines and quarries in, the ground beneath the surface.⁴

SEC. 28. **Things real become personalty by agreement.**—There are many things which belong to and pass with the soil, and are accounted as real property, which by special agreement may be made the subject of a distinct

¹ See : *Post*, § 79.

² See : *Post*, “ Betterments.”

³ *Mott v. Palmer*, 1 N. Y. 564, 572.

⁴ *Mott v. Palmer*, 1 N. Y. 564, 572–3.

ownership, and thereby become personal property; and many other things which are commonly regarded as personal property become a part of the realty on becoming attached or affixed to it, and pass with it to the heir, devisee, or grantee as fixtures and the like. And there are certain interests in and connected with land, known as chattels real, which do not attach to or pass with it on its devolution.¹ Thus a lease for years, being less than a freehold estate in the land, is regarded as a chattel interest. The duration of the term, whether for a few years or for a great number of years, is immaterial,² provided only it be fixed and determined, and there be a reversion or remainder in fee in some other person;³ except in those states where long tenures are made inheritable by statute.⁴ Thus under the present Massachusetts statute so long as fifty years of a lease for a hundred years or more remain unexpired, it is regarded for many purposes as an estate in fee-simple.⁵ Under the New York Code of Civil Procedure,⁶ five years of an unexpired lease is regarded as real property for many purposes.⁷

SEC. 29. **Church-pews—Definition.**—A pew is a seat in a church, separated from all the others, with a convenient place to stand or kneel therein.⁸ Strictly speaking, a church-pew is a closed seat in a church,⁹ and the word is so used in England; but in this country, a pew is gener-

¹ 2 Kent Com. (13th ed.) 342.

² *Chapman v. Gray*, 15 Mass. 439, 445;

Montague v. Smith, 13 ss. 396.

³ See: *Hollenbeck v. McDonald*, 112 Mass. 347, 349;

Chapman v. Gray, 15 Mass. 439, 445;

Gray's Case, 5 Mass. 419;

2 Bl. Com. 386;

1 Co. Litt. (19th ed.) 46a, 118a;

2 Kent Com. (13th ed.) 342.

Leases for long term of years.—It is said by the Supreme Judicial Court of Massachusetts in the case of *Chapman v. Gray*, 15 Mass. 439, 445, that if long terms for years were more frequent among us, the legislature

might, perhaps, provide expressly for them; but as they are extremely rare, they seem to have been left on the footing of all other chattels.

⁴ 1 Wood Conv. XX.

See: *Post*, chapter XX. "Estate for Years."

⁵ *Hollenbeck v. McDonald*, 112 Mass. 247, 249.

⁶ N. Y. Code Civ. Proc. § 1430;

1 Revised Stats. Codes and Laws, 1077.

⁷ See: *Ex parte Wilson*, 7 Hill (N. Y.) 150.

⁸ 2 Bouv. L. Dict. (15th ed.) 412.

⁹ *Brumfitt v. Roberts*, L. R. 5 C. P. 224, 232.

ally understood to be a long low bench or slip, capable of seating several persons

SEC. 30. **Same — Assignment of pews.**—In England, before the Reformation, the body of the church was common to all parishioners ; but after the Reformation the practice arose of assigning particular seats or pews to individuals. This assignment of pews was made by the ordinary, by a faculty which was a mere license, and was personal to the licensee, and all disputes concerning it were determined in the spiritual courts.¹ And while every parishioner has a right to a seat in the parish church, he cannot claim the right to have a particular pew assigned to his use.² A right to a pew can exist only by a grant of an ordinary or a bishop, called a “faculty,” or by prescription.³ At first the power of ordering the seats or pews in the church was discretionary and was vested by common law in the ordinary, but by custom it came to be exercised by the church wardens, who were the representatives of the ordinary in that respect, and whose assignment of seats was presumed to have been made with the approbation and consent of the ordinary.⁴ As a consequence it has become the settled law of the English courts that church wardens have a discretionary power to appropriate the pews in the church, subject only to the control of the ordinary.⁵ While it was formally held in England⁶ that a right to a pew may be acquired by prescription, it is thought that in this

¹ *State v. Trinity Church*, 45 N. J. L. (16 Vr.) 230 ; s.c. 28 Alb. L. J. 111.

See : *Presbyterian Church v. Andrus*, 21 N. J. L. (1 Zab.) 325, 329 ;

Burnes' Eccl. L. tit. “Churches,” c. 27 ;

Hook's Church Dict. tit. “Pews.”

² *State v. Trinity Church*, 45 N. J. L. (16 Vr.) 230 ; s.c. 28 Alb. L. J. 111 ;

Matter of Cathedral Church, 8 L. T. 861.

³ See : *Crisp v. Martin*, L. R. 2 Pro. Div. 15 ; s.c. 19 Moak's Eng. Rep. 553 ;

Bryan v. Whistler, 8 Barn. & C. 288 ; s.c. 15 Eng. C. L. 147 ;

Griffin v. Dighton, 5 Best & S. 93 ; s.c. 117 Eng. C. L. 93 ;

Morgan v. Curtis, 3 Man. & R. 389 ;

Jarratt v. Steele, 3 Phill. 167 ;

Pettman v. Bridger, 1 Phill. 316 ;

2 Bl.Com. 428.

⁴ 2 Bac. Abr. 242 ;

1 Burns Eccl. L. 359 ;

Church Warden, 2 ;

Woods Inst. 88-90.

⁵ See : *State v. Trinity Church*, 45 N. J. L. (16 Vr.) 230 ; s.c. 28 Alb. L. J. 111 ;

Reynolds v. Monkton, 2 M. & Rob. 384 ;

Matter of Cathedral Church, 8 L. T. 861.

⁶ See : *Morgan v. Curtis*, 3 Mees. & R. 389.

country an individual right to the occupation of a particular pew will not arise from an occupation of it for ever so long a time,¹ unless it is annexed to a house, and it also be shown that the pew was repaired by the claimant, and those under whom he claims for the prescriptive period.²

SEC. 31. Same — Rights of pew-holders in pews—English doctrine.—In England, the freehold to the church being in the parson for the time being, the right which the pew-holder has in his pew is merely an incorporeal interest, and is in the nature of an easement in the lands of another,³ entitling the party to a right to occupy the pew during divine services;⁴ but does not confer the right to be in the pew at all times, or at any other time than when the church is open for church purposes.⁵

SEC. 32. Same — Same — American doctrine.—In this country the title to pews in a church generally depend on the statutes enacted to regulate this kind of property. In some of the states church-pews are declared by statute to be an interest in real property,⁶ while in others they are declared to be an interest in personal property. In the absence of statutes regulating such property, the interest of a party in a pew in a church, although a limited and qualified interest, is usually considered to be an interest in

¹ See: *Boothby v. Baily*, Hob. 69;
Stocks v. Booth, 1 T. R. 428; s.c.

1 Rev. Rep. 244;

Wood's Inst. 90.

² *State v. Trinity Church*, 45 N. J. L. (16 Vr.) 280; s.c. 28 Alb. L. J. 111.

See: *Hook's Dict.* tit. "Pews";

Wood's Inst. 90.

³ *Brumfitt v. Roberts*, L. R. 5 C. P. 232;

Woolcombe v. Ouldrige, 3 Add. 1;

Mainwaring v. Giles, 5 Barn. & Ald. 356; s.c. 7 Eng. C. L. 198;

Gully v. Bishop of Exeter, 4 Bing. 290, 294; s.c. 13 Eng. C. L. 508, 510;

Reynolds v. Monkton, 2 M. & Rob. 384;

Pettman v. Bridger 1 Phill. 316.

See: *Daniel v. Wood*, 18 Mass. (1 Pick.) 102; s.c. 11 Am. Dec. 151;

Shaw v. Beveridge, 3 Hill (N. Y.) 26, s.c. 38 Am. Dec. 616.

⁴ 2 Add. Eccl. 419.

⁵ *Brumfitt v. Roberts*, L. R. 5 C. P. 232;

Mainwaring v. Giles, 5 Barn. & Ald. 356; s.c. 7 Eng. C. L. 198;

Gully v. Bishop of Exeter, 4 Bing. 294; s.c. 13 Eng. C. L. 508;

Ridout v. Harris, 17 Up. Can. C. P. 88.

⁶ As in Massachusetts, outside of the city of Boston, *Jackson v. Rounesville*, 46 Mass. (5 Met.) 127; and in Vermont, *O'Hear v. De Goesbriand*, 33 Vt. 593; s.c. 80 Am. Dec. 653, 655.

real property,¹ notwithstanding the ownership is simply that of an exclusive easement for special purposes,² being merely a right to occupy under certain restrictions.³ They are regarded and treated as real property in all cases arising under the statute of frauds,⁴ the statute of conveyances,⁵ or of descent and distributions,⁶ and a

¹ See: Succession of Gamble, 23 La. An. 9;

Sohier v. Trinity Church, 109 Mass. 1;

Jackson v. Rounseville, 46 Mass. (5 Met.) 127;

Daniel v. Wood, 18 Mass. (1 Pick.) 102; s.c. 11 Am. Dec. 151;

Gay v. Baker, 17 Mass. 435, 438; s.c. 9 Am. Dec. 159;

Bates v. Sparrell, 10 Mass. 323; Presbyterian Church v. Andruss, 21 N. J. L. (1 Zab.) 325;

St. Paul's Church v. Ford, 34 Barb. (N. Y.) 16;

Viele v. Osgood, 8 Barb. (N. Y.) 130; Shaw v. Beveridge, 3 Hill (N. Y.), 26; s.c. 38 Am. Dec. 616;

Trustees First Baptist Church of Ithaca v. Bigelow, 16 Wend. (N. Y.) 28;

Church v. Wells, 24 Pa. St. 249; Howe v. Stevens, 47 Vt. 262;

O'Hear v. De Goesbriand, 33 Vt. 593; s.c. 80 Am. Dec. 653, 655;

Barnard v. Whipple, 29 Vt. 401; s.c. 70 Am. Dec. 422;

True v. Morrill, 28 Vt. 672; Hodges v. Green, 28 Vt. 358;

Kellog v. Dickinson, 18 Vt. 266. Right to use church for purposes of worship—Interest in land.—In the case of Brumfield v. Carson, 33 Ind. 94; s.c. 5 Am. Rep. 184, it is said that the right to use a church edifice to worship in when unoccupied by the church to which it belongs, is an interest in real estate, and a contract therefor, to be valid under the statute of frauds, must be in writing, signed by the party to be charged.

² Daniel v. Wood, 18 Mass. (1 Pick.) 102;

Gay v. Baker, 17 Mass. 438; s.c. 9 Am. Dec. 159;

Church v. Wells, 24 Pa. St. 249.

³ Sohier v. Trinity Church, 109 Mass. 1, 21;

Citing: *Re New South Meeting-house*, 95 Mass. (13 Allen) 497 502;

Attorney-General v. Proprietors Meeting-house in Federal Street, 69 Mass. (3 Gray) 1;

Howard v. First Parish of North Bridgewater, 24 Mass. (7 Pick.) 138;

Wentworth v. First Parish of Canton, 20 Mass. (3 Pick.) 344;

Daniel v. Wood, 18 Mass. (1 Pick.) 102; s.c. 11 Am. Dec. 151;

Gay v. Baker, 17 Mass. 434; s.c. 9 Am. Dec. 159.

⁴ State v. Trinity Church, 45 N. J. L. (16 Vr.) 230; s.c. 28 Alb. L. J. 111;

Voorhees v. Presbyterian Church, 17 Barb. (N. Y.) 103; aff'g 8 Id. 135;

Viele v. Osgood, 8 Barb. (N. Y.) 130;

Trustees of the First Baptist Church of Ithaca v. Bigelow, 16 Wend. (N. Y.) 28;

Barnard v. Whipple, 29 Vt. 401; s.c. 70 Am. Dec. 422.

⁵ Rights in a pew can be transferred only in the manner provided for the transfer of real property. Barnard v. Whipple, 29 Vt. 401; s.c. 70 Am. Dec. 422.

See: Viele v. Osgood, 8 Barb. (N. Y.) 130.

⁶ Bates v. Sparrell, 10 Mass. 323; First Baptist Church v. Bigelow, 16 Wend. (N. Y.) 28;

O'Hear v. De Goesbriand, 33 Vt. 593; s.c. 80 Am. Dec. 653, 655;

Barnard v. Whipple, 29 Vt. 401; s.c. 70 Am. Dec. 422.

In the case of Freligh v. Platt, 5 Cow. (N. Y.) 494, the court say: "A sale of real estate *ex vi termini* means an absolute transfer of the property. But the sale of pews in a church is not a sale of real estate within the New York act regulating religious societies. By the grant of a pew the grantee acquires a limited usufructuary right only. He must use it as a pew in a house of worship, but has not an unlimited, absolute right.

devise of a testator's real estate carries with it his pew-rights.¹

SEC. 33. Same—Same—Limitation and qualification of property in pew.—While the pew-holder has an absolute and exclusive right to the possession and enjoyment of his pew for the purposes of public worship as long as the house remains, and may maintain an action against a trespasser, or any person who disturbs him in the possession or enjoyment thereof, or in any way infringes upon his rights thereto,² yet this interest in the pew is separate from the fee,³ and is limited and qualified both as to the nature of the estate and the time and manner of enjoyment.⁴

SEC. 34. Same—Same—As to right of occupancy.—The assigning or leasing of a pew does not confer upon the holder thereof the right to be in it at any other time than during public worship, or to occupy it for any other pur-

He cannot use it lawfully for purposes incompatible with its nature. The right, too, is limited as to time."

Bates v. Sparrell, 10 Mass. 323;
See: Succession of Gamble, 23 La. An. 9;

Presbyterian Church v. Andruss, 21 N. J. L. (1 Zab.) 325;

See: Gorton v. Hadsell, 63 Mass. (9 Cush.) 508;

Jackson v. Rounseville, 46 Mass. (5 Met.) 127;

Sargent v. Pierce, 43 Mass. (2 Met.) 80;

Kimball v. Second Parish of Rowley, 41 Mass. (24 Pick.) 347;

Howard v. First Parish of North Bridgewater, 24 Mass. (7 Pick.) 138;

Gay v. Baker, 17 Mass. 435; s.c. 9 Am. Dec. 159;

Fisher v. Glover, 4 N. H. 180;

Woodworth v. Payne, 74 N. Y. 196; s.c. 30 Am. Rep. 298;

Wheaton v. Gates, 18 N. Y. 395;

St. Paul's Church v. Ford, 34 Barb. (N. Y.) 16;

Cooper v. Presbyterian Church, 32 Barb. (N. Y.) 222;

Abernethy v. Society of Puritans, 3 Daly (N. Y.) 1;

Heeney v. St. Peter's Church, 2 Edw. Ch. (N. Y.) 608;

Shaw v. Beveridge, 3 Hill (N. Y.) 26; s.c. 38 Am. Dec. 616;

Baptist Church v. Witherell, 3 Paige Ch. (N. Y.) 296, 302; s.c. 24 Am. Dec. 223,

Price v. Methodist Episcopal Church, 4 Ohio 515, 541;

Howe v. Stevens, 47 Vt. 262;

O'Hear v. De Goesbriand, 33 Vt. 593; s.c. 80 Am. Dec. 653;

Perrin v. Granger, 33 Vt. 101;

Kellog v. Dickinson, 18 Vt. 263;

Pettman v. Bridger, 1 Phill. Eccl. 316.

² See Woodworth v. Payne, 74 N. Y. 196, 200; s.c. 30 Am. Rep. 298, 301;

Shaw v. Beveridge, 3 Hill (N. Y.) 26; s.c. 38 Am. Dec. 616;

Trustees of the First Baptist Church of Ithaca v. Bigelow, 16 Wend. (N. Y.) 28;

Justice MILLER says in Woodworth v. Payne, *supra*, that

pews may be leased and held distinct from the fee.

⁴ See: Kimball v. First Parish of Rowley, 41 Mass. (24 Pick.) 347;

Daniel v. Wood, 18 Mass. (1 Pick.) 102; s.c. 11 Am. Dec. 151;

Gay v. Baker, 17 Mass. 435; s.c. 9 Am. Dec. 159.

poses than those of public worship,¹ and matters connected therewith.² Thus where the parish or society lends or hires the use of the meeting-house in which the pew is situated for purposes not connected with the public religious worship of the society or congregation which owns the house, it is thought that the use of the house extends to the use of the pews also, to the exclusion of the holders thereof.³ In the case of *Shaw v. Beveridge*,⁴ the court say that the owners of pews have an exclusive right to their possession and occupation for the purposes of public worship; not as an easement, but by virtue of their individual right of property therein, derived, perhaps, in theory at least, from the corporation represented by the trustees who are seized and possessed of the temporalities of the church. The owners hold and possess their particular seats in severalty, in subordination to the more general right of the trustees in the soil and freehold. These rights are distinct and separate; and neither do they, nor the respective possessions growing out of the enjoyment of them, necessarily conflict with each other.⁵

SEC. 35. **Same—Law-regulating.**—At common law unless the right to a pew was an easement proper, that is, was appurtenant to some dominant tenement or estate, it was of purely ecclesiastical jurisdiction, and the remedies pertaining to it were of ecclesiastical cognizance.⁶ It is a well settled rule that courts of law will not interfere

¹ *First Baptist Society v. Grant*, 59 Me. 245;

Presbyterian Church v. Andruss, 21 N. J. L. (1 Zab.) 325;

Erwin v. Hurd, 13 Abb. (N. Y.) N. C. 91;

Craig v. First Presbyterian Church, 88 Pa. St. 42, 51; s.c. 32 Am. Rep. 417;

Jones v. Towne, 47 Vt. 262;

Brumfitt v. Roberts, L. R. 5 C. P. 232;

See: *Post*, § 39.

² **Meetings for temporal purposes**—such as meetings of the society or congregation, held for temporal purposes, at which times it is thought the pew-holder has a right to occupy

his pew in preference to any one else.

See: *Wall v. Lee*, 34 N. Y. 141, 149; *First Baptist Church of Hartford v. Witherell*, 3 Paige Ch. (N. Y.) 296.

³ See: *Jackson v. Rounseville*, 46 Mass. (5 Met.) 127, 132.

⁴ 3 Hill (N. Y.), 26; s.c. 38 Am. Dec. 616.

⁵ *Second Congregational Society of North Bridgewater v. Waring*, 41 Mass. (24 Pick.) 304.

⁶ *Mainwaring v. Giles*, 5 Barn & Ald. 356; s.c. 7 Eng. C. L. 198; *Spooner v. Brewster*, 3 Bing. 136; s.c. 11 Eng. C. L. 75;

Rogers v. Brooks, 1 T. R. 431;

Stocks v. Booth, 1 T. R. 428; s.c. 1 Rev. Rep. 244.

with the rules of a voluntary religious society, adopted for the regulation of its own affairs, unless to protect some civil right which is infringed by their operation.¹ It is said in the case of the Baptist Church *v.* Witherell,² that over the church, as such, the legal tribunals do not profess to have any jurisdiction whatever, except to protect the civil rights of others, and to preserve the peace. All questions relating to the faith and practice of the church, and its members, belong to the church judicatories to which they have voluntarily subjected themselves. It follows that, where property and other substantial rights are not involved, the decisions of ecclesiastical courts are final, as they are the best judges of what constitutes an offense against the word of God and the discipline of the church.³

SEC. 36. **Same—Same—Episcopal church.**—The English ecclesiastical law forms the basis of the law regulating the affairs of the Episcopal church in this country, and is in force, except as modified by statute and the usages and canons of the church.⁴

SEC. 37. **Same—Same—Vestry's control.**—The vestry of an Episcopal church may control the occupancy of a pew, and where the right to occupy has been given by them, it is not alienable or transmissible, and where the pew is rented annually, the one renting it has at most only a

¹ Chase *v.* Cheney, 58 Ill. 509; s.c. 11 Am. Rep. 95; 10 Am. Leg. Reg. 295;

State *v.* Trinity Church, 45 N. J. L. (16 Vr.) 230; s.c. 28 Alb. L. J. 111;

See: People *ex rel.* Dilcher *v.* The German United Evangelical Church, 53 N. Y. 103;

Petty *v.* Tooker, 21 N. Y. 267; Robertson *v.* Bullion, 9 Barb. (N. Y.) 64;

Gable *v.* Miller, 10 Paige Ch. (N. Y.) 627; s.c. 2 Den. (N. Y.) 492;

Baptist Church of Hartford *v.* Witherell, 3 Paige Ch. (N. Y.) 296; s.c. 24 Am. Dec. 223;

Sutter *v.* First Dutch Reformed Church, 42 Pa. St. 503;

German Reformed Church *v.* Seibert, 3 Pa. St. 282;

Forbes *v.* Eden, L. R. 1 Sc. J. App. 568.

² 3 Paige Ch. (N. Y.) 296; s.c. 24 Am. Dec. 223.

See: Robertson *v.* Bullion, 9 Barb. (N. Y.) 64;

Diffendorf *v.* Reformed Cal. Church, 20 John. (N. Y.) 12;

Lawyer *v.* Cipperly, 7 Paige Ch. (N. Y.) 281;

³ German Reformed Church *v.* Seibert, 3 Pa. St. 291.

See: Shannon *v.* Frost, 3 B. Mon. (Ky.) 250, 258.

⁴ State *v.* Trinity Church, 45 N. J. L. (16 Vr.) 230; s.c. 28 Alb. L. J. 111;

Lynd *v.* Menzies, 33 N. J. L. (4 Vr.) 162;

Hoffman's Law of the Church, 14, 30, 34, 64.

leasehold interest for the term. The civil court will not review the action of vestrymen in excluding a member of a church from a particular pew : and this is true although they give no reason for their action, and do not give the complaining party a hearing.¹

SEC. 38. **Same—Same—Free church.**—It has been said that in a free church where no charge is made for the sittings, the trustees have power to determine where attendants at worship shall sit, and may by force remove one who persists in sitting in a place other than that assigned to him.² But such trustees have not authority to distribute the property of the society among the individual members or any class of them ; nor can such right be conferred by the vote of a majority of the members of the society and the order of a court.³

SEC. 39. **Same—Granting in perpetuity.**—The grant of a pew in a church edifice in perpetuity does not give to the pew-holder an absolute right of property, as in a grant of land in fee-simple, but a limited usufructuary interest merely,⁴ being simply a right to occupy,⁵ under certain

¹ *State v. Trinity Church*, 45 N. J. L. (16 Vr.) 230 ; s.c. 28 Alb. L. J. 111.

² *Sheldon v. Vail*, 28 Hun (N. Y.) 354.

³ *Wheaton v. Gates*, 18 N. Y. 395.
See : *Madison Avenue Baptist Church v. Baptist Church on Oliver St.*, 4 N. Y. 131, 140.

⁴ See : *Re New South Meeting-house*, 95 Mass. (13 Allen) 497, 502 ;

Attorney-General v. Proprietors Meeting-house in Federal Street, 69 Mass. (3 Gray) 1 ;

Howard v. First Parish in North Bridgewater, 24 Mass. (7 Pick.) 138 ;

Wentworth v. First Parish in Canton, 20 Mass. (3 Pick.) 344 ;

Daniel v. Wood, 18 Mass. (1 Pick.) 102 ; s.c. 11 Am. Dec. 151 ;

Gay v. Baker, 17 Mass. 435, 438 ; s.c. 9 Am. Dec. 159 ;

Wall v. Lee, 34 N. Y. 149 ;

Wheaton v. Gates, 18 N. Y. 395 ;

Viele v. Osgood, 8 Barb. (N. Y.) 130 ;

Freligh v. Platt, 5 Cow. (N. Y.) 494 ;

Heeney v. St. Peter's Church, 2 Edw. Ch. (N. Y.) 608 ;

White v. Trustees Methodist Episcopal Church, 3 Lans. (N. Y.) 477, 481 ;

First Baptist Church v. Witherell, 3 Paige Ch. (N. Y.) 296 ; s.c. 24 Am. Dec. 223 ;

Craig v. First Presbyterian Church, 88 Pa. St. 42, 51 ; s.c. 32 Am. Rep. 417 ;

Kincaid's Appeal, 66 Pa. St. 411 ; s.c. 5 Am. Rep. 377.

⁵ **Interrogating pastor from pew—Interfering with collection.**—BROWN, J., says in the case of *Wall v. Lee*, 34 N. Y. 141, 149, that the pew-holder cannot use his pew as a place from which to interrogate the clergyman and fix a quarrel upon him, or in any way interrupt the services ; nor to impede or interfere with charitable or other collections taken up from the

restrictions,¹ the pew during public worship of the congregation,² and possibly of sitting therein at meetings of the society held for temporal purposes.³

SEC. 40. **Same—Interest of pew-holder in church edifice and lands.**—Pews are held by very peculiar titles, which are a qualified and usufructuary right merely.⁴ The interest in a pew, while in the nature of and treated as real estate, is incorporeal,⁵ and carries with it no interest in the church edifice, or the land upon which the church stands.⁶ The parish or society is the sole owner of the fee both of the soil on which the church building stands and of the building itself.⁷ Though limited both as to extent and manner of enjoyment and as to duration, the estate a pew-holder has in his pew may be for years, for

congregation assembled for religious worship.
¹ *Cohier v. Trinity Church*, 109 Mass. 1.

See: *Re New South Meeting-house*, 95 Mass. (13 Allen) 497;

Attorney-General v. Proprietors Meeting-house in Federal Street, 69 Mass. (3 Gray) 1;

Howard v. First Parish in North Bridgeport, 24 Mass. (7 Pick.) 138;

Wentworth v. First Parish in Canton, 20 Mass. (3 Pick.) 344;

Daniel v. Wood, 18 Mass. (1 Pick.) 102; s.c. 11 Am. Dec. 151.

² *First Baptist Society v. Grant*, 59 Me. 245;

Presbyterian Church v. Andruss, 21 N. J. L. (1 Zab.) 325;

Jones v. Towne, 58 N. Y. 462; s.c. 42 Am. Rep. 602;

Erwin v. Hurd, 13 Abb. (N. Y.) N. C. 91;

Craig v. First Presbyterian Church, 88 Pa. St. 42, 51; s.c. 32 Am. Rep. 417;

Howe v. Stevens, 47 Vt. 262;

Brumfitt v. Roberts, L. R. 5 C. P. 232.

³ *Wall v. Lee*, 34 N. Y. 141, 149;

First Baptist Church of Hartford v. Witherell, 3 Paige Ch. (N. Y.) 296; s.c. 24 Am. Dec. 223.

⁴ *Sohier v. Trinity Church*, 109 Mass. 1, 20;

Citing: *Re New South Meeting-house*, 95 Mass. (13 Allen) 497, 502;

Attorney-General v. Proprietors Meeting-house in Federal Street, 69 Mass. (3 Gray) 1;

Howard v. First Parish in North Bridgewater, 24 Mass. (7 Pick.) 138;

Wentworth v. First Parish in Canton, 20 Mass. (3 Pick.) 344;

Daniel v. Wood, 18 Mass. (1 Pick.) 102; s.c. 11 Am. Dec. 151;

Gay v. Baker, 17 Mass. 434; s.c. 9 Am. Dec. 159.

⁵ 3 Kent Com. (13th ed.) 402.

⁶ See: *Fassett v. First Parish in Boylston*, 36 Mass. (19 Pick.) 361;

Daniel v. Wood, 18 Mass. (1 Pick.) 102; s.c. 11 Am. Dec. 151;

Matter of Reformed Church, 16 Barb. (N. Y.) 237;

Freligh v. Platt, 5 Cow. (N. Y.) 494;

Abernethy v. Society of Church of Puritans, 3 Daly (N. Y.) 1, 4;

Heeney v. St. Peter's Church, 2 Edw. Ch. (N. Y.) 608.

⁷ *Proprietors of Union Meeting-house v. Rowell*, 66 Me. 400;

Gay v. Baker, 17 Mass. 435; s.c. 9 Am. Dec. 159.

See: *Jackson v. Rounseville*, 46 Mass. (5 Metc.) 127;

Daniel v. Wood, 18 Mass. (1 Pick.) 102; s.c. 11 Am. Dec. 151;

Trustees of First Baptist Church of Ithaca v. Bigelow, 16 Wend. (N. Y.) 28;

Kincaid's Appeal, 66 Pa. St. 411; s.c. 5 Am. Rep. 377.

life, or even in fee ; and may be held in consideration of a fixed sum, or periodical payment of a stipulated amount, or assessments either fixed and certain or uncertain.¹ The deed or contract under which a pew is held is the only criterion of the nature and extent of the estate,² as well as of the extent of the power of the society to tax the holder thereof.³

SEC. 41. Same—Restriction, use, and treatment of pew.—Having no title in or to either the soil beneath his pew,⁴ nor the space above it,⁵ the pew-owner has no right to dig a vault under it nor erect anything over it, without the consent of the owners or trustees of the church ;⁶ neither has he the right to decorate such pew according to his fancy ;⁷ and should he do so the trustees may efface the objectionable decoration, fill up the excavation beneath,

¹ Lease of pew at stipulated rental—Construction of Lease.—In the case of *Gifford v. First Presbyterian Society of Syracuse*, 56 Barb. (N. Y.) 114, a lease of a pew in a church contained a condition that the lessee and his assigns should pay to the trustees of the religious society, for the time being, all the taxes or assessments which might be levied or assessed thereon by said trustees, for certain specified purposes. It also contained the following restrictions: "No taxes or assessments to be levied or assessed for the next ten years for the purchase of a bell or organ ; . . . nor are they in any one year to exceed ten per cent. on the original appraised value of said slips." This language was held to be general enough to cover the whole duration of the lease, and that it was the intention of the parties to limit the taxation to ten per cent. in each year while the estate should continue, and that the trustees were not authorized, at any time, to tax or assess upon the pew in question any more than at the rate of ten per cent. of the original appraised value thereof.

² *First Methodist Episcopal Society v. Brayton*, 91 Mass. (19 Allen) 249 ;

Abernethy v. Society of Church of Puritans, 3 Daly (N. Y.), 1. 4.

³ Limitation in deed of pew on power to assess tax—If the power of a religious society to assess a tax upon a pew is derived from and limited by the deeds of the society to the pew-owners, a tax assessed in part for purposes not specifically named in the deed is void.

First Methodist Society v. Brayton, 91 Mass. (9 Allen) 248.

See : *Mussey v. Bulfinch Methodist Society*, 55 Mass. (1 Cush.) 163 ;

Stetson v. Kempton, 13 Mass. 272 ; s.c. 7 Am. Dec. 145.

⁴ *Gay v. Baker*, 17 Mass. 435 ; s.c. 9 Am. Dec. 159.

⁵ *Kimball v. Second Parish of Rowley*, 41 Mass. (24 Pick.) 347 ;

Wentworth v. First Parish in Canton, 20 Mass. (3 Pick.) 344 ;

Gay v. Baker, 17 Mass. 435 ; s.c. 9 Am. Dec. 159 ;

Kellogg v. Dickinson, 18 Vt. 266, 273.

⁶ *Wentworth v. First Parish of Canton*, 20 Mass. (3 Pick.) 345 ;

Daniels v. Wood, 18 Mass. (Pick.) 102 ; s.c. 11 Am. Dec. 151.

⁷ *Church v. Wells*, 24 Pa. St. 249.

or remove the obstruction above, which interferes with the equal enjoyment by others of the pews.¹

SEC. 42. Same — Abandonment, sale, or destruction of church edifice.—The fee to the land and the building being in the society, if the building should become useless or dilapidated, and is abandoned by the congregation as a place of worship, or is destroyed by fire or otherwise, the rights of the pew-holder are gone.² If the church edifice is sold and removed and a new structure erected, or the church and ground sold and the site abandoned as a place of worship, the pew-holder is not entitled to a share of the proceeds.³ He can neither compel the holding of divine services in the church, nor prevent the abandonment of it as a place of worship.⁴ A court of equity will not, on the application of a pew-owner, enjoin the pulling down and rebuilding or removal of the church edifice, by the trustees, whenever it shall be deemed expedient and proper.⁵ If a congregation abandon its meeting-house as a place of public worship, although it continue to be fit for that purpose, and erect a new one on a different site, it does not thereby subject itself to any liability to the proprietor or lease-holder of a pew in the old meeting-house, in the absence of any showing that the society acted wantonly or with any intention to injure him.⁶

¹ *Kimball v. Second Parish of Rowley*, 41 Mass. (24 Pick.) 347;

Wentworth v. First Parish in Canton, 20 Mass. (3 Pick.) 344;

Kellogg v. Dickinson, 18 Vt. 266, 273.

² *Abernethy v. Society of Church of Puritans*, 3 Daly (N. Y.) 1.

Kincaid's Appeal, 66 Pa. St. 411; s.c. 5 Am. Rep. 377.

³ *Howe v. Stevens*, 47 Vt. 262.

See: *Wentworth v. First Parish of Canton*, 20 Mass. (3 Pick.) 245, 246;

Church v. Wells, 24 Pa. St. 249.

⁴ *Matter of Reformed Dutch Church*, 16 Barb. (N. Y.) 237;

Viele v. Osgood, 8 Barb. (N. Y.) 135;

McNabb v. Bond, 4 Brad. (N. Y.) 7;

Heeney v. St. Peter's Church, 2 Edw. Ch. (N. Y.) 608, 612;

Van Houten v. First Reformed

Dutch Church, 17 N. J. Eq. (2 C. E. Gr.) 126, 130;

Re Brick Presbyterian Church, 3 Edw. Ch. (N. Y.) 155.

⁵ See: *Howard v. First Parish in North Bridgewater*, 24 Mass. (7 Pick.) 138;

Wentworth v. First Parish in Canton, 20 Mass. (3 Pick.) 344;

Freligh v. Platt, 5 Cow. (N. Y.) 494, 496;

Heeney v. St. Peter's Church, 2 Edw. Ch. (N. Y.) 612;

Shaw v. Beveridge, 3 Hill (N. Y.) 26; s.c. 38 Am. Dec. 616.

⁶ See: *Fassett v. First Parish in Boylston*, 36 Mass. (19 Pick.) 361;

Voorhees v. Presbyterian Church, 8 Barb. (N. Y.) 152;

Re Brick Presbyterian Church, 3 Edw. Ch. (N. Y.) 155;

Kincaid's Appeal, 66 Pa. St. 411, 422; s.c. 5 Am. Rep. 377;

SEC. 43. **Same—Changes and repairs.**—All interest in and right to a pew is held subordinate to the right of the society or corporation to make necessary changes or desired repairs,¹ alter the internal structure of the house, enlarge the building, remodel the pews, or remodel or rebuild the meeting-house itself, or tear it down and build a new structure elsewhere.² The convenience of the individual must, in such cases, be subject to the general convenience of the whole congregation, and whoever purchases or leases a pew, does so subject to this right of the society.³ If the edifice becomes useless by reason of age and dilapidation, or through injury, and the house has to be repaired or the building torn down and a new one erected in the same place, or if from some necessary cause the location is changed, the old edifice sold and a new one erected on the new spot selected, the pew-holder's rights are gone, and he has no claim either in law or equity.⁴

First Baptist Church of Hartford v. Witherell, 3 Paige Ch. (N. Y.) 296; s.c. 24 Am. Dec. 223;

Bronson v. St. Peter's Church, 7 N. Y. Leg. Obs. 361.

¹ Sohler v. Trinity Church, 109 Mass. 1, 21;

Van Houten v. First Dutch Reformed Church, 17 N. J. Eq. (2 C. E. Gr.) 126;

Erwin v. Hurd, 13 Abb. (N. Y.) N. C. 91;

Abernethy v. Society of Church of Puritans, 7 Daly (N. Y.) 1, 7;

Solomon v. Congregation B'nai Jeshurun, 49 How. (N. Y.) 263;

How v. Stevens, 47 Vt. 263;

Greenway v. Hockin, L. R. 5 C. P. 235;

Hinde v. Chorlton, L. R. 2 C. P. 104.

Jones v. Towne, 58 N. H. 462; s.c. 42 Am. Rep. 602;

Citing: Sohler v. Trinity Church, 109 Mass. 1;

Fassett v. First Parish of Boylston, 63 Mass. (19 Pick.) 361;

Kimball v. Second Parish of Rowley, 41 Mass. (24 Pick.) 347;

Daniel v. Wood, 18 Mass. (1 Pick.) 102; s.c. 11 Am. Dec. 151;

Gay v. Baker, 17 Mass. 438; s.c. 9 Am. Dec. 159.

See: Wentworth v. First Parish of Canton, 20 Mass. (3 Pick.) 344;

Van Houten v. First Reformed Dutch Church, 17 N. J. Eq. (2 C. E. Gr.) 130;

Voorhees v. Presbyterian Church, 8 Barb. (N. Y.) 135;

Kincaid's Appeal, 66 Pa. St. 411; s.c. 5 Am. Rep. 373;

Craig v. First Presbyterian Church, 88 Pa. St. 42; s.c. 32 Am. Rep. 417;

Kellogg v. Dickinson, 18 Vt. 266.

Pew held in subordination to society's title and rights to repair.

—In Voorhees v. Presbyterian Church, 8 Barb. (N. Y.) 151; s.c. 17 Id. 103; 5 How. (N. Y.) Pr. 74, it is said that the right that a pew-holder acquires, under a lease thereof, is in subordination to the more general right of the trustees in the soil and freehold, and to repair and alter the church; and that he cannot, therefore, by an action to recover the possession of the pew from them, practically enjoin such repairs; that his remedy, if the repairs deprive him of his pew, as by placing the pulpit on its site, is by an action for damages.

³ Jones v. Towne, 58 N. H. 462; s.c. 42 Am. Rep. 602;

Fisher v. Glover, 4 N. H. 180.

⁴ Kincaid's Appeal, 66 Pa. St. 411, 423; s.c. 5 Am. Rep. 377, 382.

The society, congregation, or parish may take down their meeting-house at any time in order to rebuild, either as a matter of necessity or of expediency. In the former case we have seen, they are not liable to indemnify the pew-holder for the loss of his pew ; but should the congregation or parish, from mere motives of convenience or desire for ornament, determine to pull down the old building and erect a new church edifice, they can do so only on an indemnity being paid to the pew-holder ; that is, the society or parish making the sale or lease of the pew must not wantonly deprive the grantee of the benefit of the license or privilege without making due compensation.¹

SEC. 44. **Burial lots.**—Rights of sepulture in public cemeteries and under churches are peculiar, and are not very dissimilar from rights in church-pews, above set forth.² Cemeteries and places of general sepulture are so far public that private interests in them are subject to the control of the public authorities having charge of the police regulations.³ The purchaser of a lot in a cemetery

Citing : *Fassett v. Boylston*, 36 Mass. (19 Pick.) 361 ;

Howard v. First Parish in North Bridgewater, 24 Mass. (7 Pick.) 138 ;

Wentworth v. First Parish in Canton, 20 Mass. (3 Pick.) 344 ;

Daniel v. Wood, 18 Mass. (1 Pick.) 102 ; s.c. 11 Am. Dec. 151 ;

Gay v. Baker, 17 Mass. 435 ; s.c. 9 Am. Dec. 159 ;

Cooper v. First Presbyterian Church, 32 Barb. (N. Y.) 222 ;

Re Reformed Dutch Church of Sand Hill, 16 Barb. (N. Y.) 237 ;

Voorhees v. Presbyterian Church, 8 Barb. (N. Y.) 135 ; s.c. 17 Id. 103 ; 5 How. (N. Y.) Pr. 74 ;

Freligh v. Platt, 5 Cow. (N. Y.) 494 ;

Re Brick Presbyterian Church, 3 Edw. Ch. (N. Y.) 133 ;

Baptist Church of Hartford v. Witherell, 3 Paige Ch. (N. Y.) 296 ; s.c. 24 Am. Dec. 223 ;

Church v. Wells, 24 Pa. St. 249 ;

Perrin v. Grange, 33 Vt. 101 ;

Kellogg v. Dickinson, 18 Vt. 266.

See : *White v. Trustees of M. E. Church*, 3 Lans. (N. Y.) 477 ;

s.c. 3 Alb. L. J. 214.

¹ *Sohier v. Trinity Church*, 109 Mass. 1, 21 ;

Gay v. Baker, 17 Mass. 435 ; s.c. 9 Am. Dec. 159 ;

Jones v. Towne, 58 N. H. 462 ; s.c. 42 Am. Rep. 602 ;

First Baptist Church of Hartford v. Witherell, 3 Paige Ch. (N. Y.) 296 ; s.c. 24 Am. Dec. 223 ;

Provisions for indemnity to the pew-holder are made in some states by statute, as Mass. Gen. Stats. c. 30, §§ 35, 36.

See : *Sohier v. Trinity Church*, 109 Mass. 1, 21.

² *Sohier v. Trinity Church*, 109 Mass. 1, 21 ;

Buffalo City Cemetery v. Buffalo, 46 N. Y. 503 ;

People v. St. Patrick's Cathedral, 21 Hun (N. Y.) 191.

³ *Sohier v. Trinity Church*, 109 Mass. 1, 21 ;

Coats v. New York City, 7 Cow. (N. Y.) 585, 604 ;

Brick Presbyterian Church v. New York City, 5 Cow. (N. Y.) 538 ;

Kincaid's Appeal, 66 Pa. St. 411 ; s.c. 5 Am. Rep. 377 ;

belonging to a society for "burial purposes," does not carry with it any title to the land;¹ and a lot-owner's certificate does not confer upon him any title or estate in the soil,² but simply carries a right, exclusive of any and every other person, to bury³ upon the subdivided plot assigned him as long as the ground is used for burial purposes.⁴ Such right of burial is not an absolute right of property, but is a mere privilege or license to be enjoyed so long as the place continues to be used as a burial ground,⁵ subject alike to the right to abandon the use of the premises for burial purposes,⁶ and municipal control over it; and the right granted is revocable whenever public necessity requires.⁷

See : *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191 ; *Woodlawn Cemetery v. Everett*, 118 Mass. 354 ;

Upjohn v. Richland Board of Health, 46 Mich. 542 ; s.c. 9 N. W. Rep. 845 ;

Removal of dead from cemetery by municipality.—The legislature may at any time authorize a municipal corporation to remove the dead from a cemetery within its limits.

Craig v. First Presbyterian Church, 88 Pa. St. 42 ; s.c. 32 Am. Rep. 417.

¹ *Sohier v. Trinity Church*, 109 Mass. 1, 21 ;

Kincaid's Appeal, 66 Pa. St. 411 ; s.c. 5 Am. Rep. 377.

Sale of cemetery and removal of buried.—In *Windt v. German Reformed Church*, 4 Sandf. Ch. (N. Y.) 471, it was held that the sepulture of friends and relatives in a cemetery belonging to a religious society confers no right or title upon the survivors, and they cannot prevent the sale of such cemetery by the corporation and the removal of the interred remains, when such removal is in all respects conducted according to law.

² *Partridge v. First Independent Church*, 39 Md. 638 ;

Richards v. N. W. Protestant Dutch Church, 32 Barb. (N. Y.) 42 ; s.c. 20 How. (N. Y.) Pr. 317 ; *sub nom. Richards v. N. W. Dutch Church*, 11 Abb. (N. Y.) Pr. 30 ;

Windt v. German Reformed Church, 4 Sandf. Ch. (N. Y.) 471 ; *Pierce v. Methodist Episcopal Church*, 4 Ohio 515, 539.

³ *Kincaid's Appeal*, 66 Pa. St. 411 ; s.c. 5 Am. Rep. 377, 380.

⁴ *People v. St. Patrick's Cathedral*, 21 Hun (N. Y.) 191.

Common property and control—Vote to divide.—Property of this kind, acquired by the common contribution of the members of an association, is subject to their common control. No separate interest is acquired; and such property is managed by the majority. Even a vote to divide gives to individuals no right to enforce any separate interest.

Denton v. Jackson, 2 John. Ch. (N. Y.) 320, 329 ;

Price v. Methodist Episcopal Church, 4 Ohio 515, 540-1.

⁵ See : *Windt v. German Reformed Church*, 4 Sandf. Ch. (N. Y.) 471 ;

Craig v. First Presbyterian Church, 88 Pa. St. 42 ; s.c. 32 Am. Rep. 417 ;

Kincaid's Appeal, 66 Pa. St. 411 ; s.c. 5 Am. Rep. 377, 381.

⁶ *Craig v. First Presbyterian Church*, 88 Pa. St. 42 ; s.c. 32 Am. Rep. 417.

⁷ *Dwenger v. Geary*, 113 Ind. 113 ; s.c. 14 N. E. Rep. 903 ; 12 West. Rep. 695 ;

Richards v. N. W. Protestant Dutch Church, 32 Barb. (N. Y.) 42 ;

Craig v. First Presbyterian

SEC. 45. **Corporate stocks and lands.**—In England, shares of stock in corporations whose property consists in a large measure of lands, have been declared to be real estate;¹ and some of the earlier American cases manifest a tendency to regard them as in the nature of a right or interest in lands, and therefore themselves realty.² But the doctrine established by the later decisions is that shares of stock in railways,³ and other corporations, are incorporeal personal property,⁴ and are treated as such in all respects.⁵ Strictly speaking, however, shares of stock in a joint stock company are not real property, or personal property, or *choses in action* even, but simply resemble in their nature *choses in action*,⁶ being simply evidences of property, and of a right to demand dividends as they accrue.⁷ But

- Church, 88 Pa. St. 42; s.c. 32 Am. Rep. 417.
- ¹ *Weekley v. Weekley*, 2 Young & C. 281n; *Davall v. New River Co.*, 3 De G. & S. 394; *Buckeridge v. Ingram*, 2 Ves. 652; *Drybutter v. Bartholomew*, 2 Pr. Wms. 127.
- Compare*: *Walker v. Milne*, 11 Beav. 507; *Starling v. Parker*, 9 Beav. 450; *Ashton v. Langdale*, 4 De G. & S. 402; s.c. 20 L. J. R. (N. S.) Ch. 234; 4 Eng. L. & Eq. 80.
- ² *Welles v. Cowles*, 2 Conn. 567; s.c. 4 Conn. 182; 10 Am. Dec. 115; *Copeland v. Copeland*, 7 Bush. (Ky.) 349; *Price v. Price*, 6 Dana (Ky.) 107; *Howe v. Starkweather*, 17 Mass. 240; *Meason's Estate*, 4 Watts (Pa.) 341.
- ³ *Johns v. Johns*, 1 Ohio St. 350; *Huntzinger v. Philadelphia Coal Co.*, 11 Phila. (Pa.) 609. See: *Walker v. Milne*, 11 Beav. 507; *Starling v. Parker*, 9 Beav. 450; *Ashton v. Langdale*, 4 De G. & S. 402; s.c. 20 L. J. R. (N. S.) Ch. 234; 4 Eng. L. & Eq. 80.
- ⁴ *Southwestern R. Co. v. Thomason*, 40 Ga. 408; *Allen v. Pegram*, 16 Iowa 163, 173; *Griffith v. Watson*, 19 Kan. 23; *Tippets v. Waller*, 4 Mass. 595, 596; *Johns v. Johns*, 1 Ohio St. 350; *Dyer v. Osborne*, 11 R. I. 321, 325; s.c. 23 Am. Rep. 460; *Arnold v. Ruggles*, 1 R. I. 165; *Gilpin v. Howell*, 5 Pa. St. 41; s.c. 45 Am. Dec. 720; *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *Isham v. Iron Co.*, 10 Vt. 230; *Barksdale v. Finney*, 14 Gratt. (Va.) 356; *Edwards v. Hall*, 6 De G. M. & G. 74; s.c. 35 Eng. L. & Eq. 433.
- ⁵ See: *Tippets v. Walker*, 4 Mass. 595; *Blake v. Jones*, 1 Bail. (S. C.) Eq. 141; s.c. 21 Am. Dec. 530; *Bradley v. Holdsworth*, 3 Mees. & W. 422; *Bligh v. Brent*, 2 Young & C. 294.
- ⁶ A certificate of stock in a land company, which is different from other kind of companies holding land incidentally to their general purpose, has been said not to be land, but a mere chose in action. See: *Blake v. Jones*, 1 Bail. (S. C.) Eq. 141; s.c. 21 Am. Dec. 530.
- ⁷ *Hutchins v. State Bank*, 53 Mass. (12 Met.) 421, 426. See: *Allen v. Pegram*, 16 Iowa 163, 173; *Field v. Pierce*, 102 Mass. 253, 261; *Bank of Waltham v. Waltham*, 51 Mass. (10 Met.) 334, 339; *Brundage v. Brundage*, 60 N. Y. 544;

after the surplus has been earned and the dividend declared, whether such dividend be in money or stock, it becomes personal property.¹

SEC. 46. **Same—Realty held by corporation in trust when.—**

A corporation may be seized of a great deal of real as well as personal property, in which case each individual share-holder will be entitled to a share, in proportion to the amount of the stock held by him, out of the net product of both, when brought into one common fund.² The reason for this is that the lands, buildings, and the like, of joint stock companies, used in the prosecution of the business of the corporation, are the mere instruments by means of which the joint stock of the company is made to produce the profit out of which dividends are declared, and belong exclusively to the corporate body³ in trust for the individuals who hold the stock of and compose the company;⁴ and the interest of each individual member in the real estate thus held is ordinarily regarded as personalty.⁵

Denton v. Livingston, 9 John. (N. Y.) 96; s.c. 6 Am. Dec. 264, 266;

Slaymaker v. Gettysburgh Bank, 10 Pa. St. 373;

Gilpin v. Howell, 5 Pa. St. 57; s.c. 45 Am. Dec. 720;

Dyer v. Osborne, 11 R. I. 321; s.c. 22 Am. Rep. 460, 464;

Arnolds v. Ruggles, 1 R. I. 165; *Chesapeake & O. R. Co. v. Paine*, 29 Gratt. (Va.) 502, 506;

De Gendre v. Kent, L. R. 4 Eq. Cas. 283;

Wildman v. Wildman, 9 Ves. 177; *Kirby v. Potter*, 4 Ves. 751; s.c. 4 Rev. Rep. 342;

Francis v. Nash, 7 Geo. II.; *Comyn. Dig. tit. "Execution,"* c. 4.

Shares of stock ideal merely—Rhode Island doctrine.—It is said by DUFFEE, C. J., in the case of *Arnold v. Ruggles*, 11 R. I. 165, that "a share is a mere ideal thing. It is no portion of matter, it is no portion of space, it is not susceptible of tangible and visible possession, actual or constructive. It is not, therefore, a chattel per-

sonal, susceptible of possession actual or constructive * * * *

If a right be an ideal thing merely, or something existing but in law or contract, the possession must be ideal, subsisting from law or contract."

¹ See: *Hutchins v. State Bank*, 53 Mass. (12 Met.) 421;

Tippets v. Walker, 4 Mass. 595; *King v. Paterson & H. R. R. Co.*,

29 N. J. L. (5 Dutch.) 82, 504; *Brundage v. Brundage*, 60 N. Y. 544.

Compare: Welles v. Cowles, 2 Conn. 567.

² *Bradley v. Holdsworth*, 3 M. & W. 334.

³ See: *Waltham Bank v. Waltham*, 51 Mass. (10 Met.) 334, 339;

Bradley v. Holdsworth, 3 Mees. & W. 422.

⁴ *Angel & Ames on Corp.* § 569; *Wordsworth on Joint Stock Cos.* 288.

⁵ See: *Toll Bridge v. Osborn*, 35 Conn. 7;

Mohawk & H. R. R. Co. v. Clute, 4 Paige Ch. (N. Y.) 384, 393;

Bligh v. Brent, 2 Young & C. 268.

SEC. 47. **Same—Land is real estate when.**—Where the lands held by a corporation are vested in the individual share-holders, and the management only is vested in the body corporate, the shares are held to be real estate.¹ And where a corporation is created solely for the purpose of holding, making use of, or improving real estate, the shares therein will be regarded as real estate.²

SEC. 48. **Same—Nature and object of investment.**—It may be laid down as a general principle that shares in the property of a corporation are real or personal property, according to the nature, object and manner of investment. Where the corporate powers are to be exercised solely in land,³ and the property in the land, though it be an incorporeal hereditament, is vested inalienably in the corporators themselves, the shares are deemed real estate⁴. Such has been considered by the common law to be the nature of shares in toll-bridges, canal and turn-pike corporations;⁵ but this doctrine has been greatly modified by the more recent cases in this country.⁶ Where the property originally entrusted was money, and was to be made profitable to the contributors by applying it to certain purposes, in the course of which it had to be invested in lands or personal property, and changed at pleasure, the capital fund is vested in the body corpo-

¹ See: *Buckeridge v. Ingram*, 2 Ves. Jr. 652;

Stafford v. Buckley, 2 Ves. Jr. 182;

Drybutter v. Bartholomew, 2 Pr. Wms. 127;

Weekley v. Weekley, 2 Young & C. Exch. 281;

Bligh v. Brent, 2 Young & C. 268.

² See: *Welles v. Cowles*, 2 Conn. 567;

Price v. Price, 6 Dana (Ky.) 107;

Durkee v. Stringham, 8 Wis. 1.

³ As where original authority is given by the charter to remove obstructions in a river and render it navigable, to open new channels, etc., to make a canal, erect waterworks. and the like.

⁴ See: *Townsend v. Ash*, 3 Atk. 336;

Drybutter v. Bartholomew, 2 Pr. Wms. 127;

Buckeridge v. Ingram, 2 Ves. 652.

⁵ See: *Welles v. Cowles*, 2 Conn. 567;

Price v. Price, 6 Dana (Ky.) 107;

Binney's Case, 2 Bland Ch. (Md.) 99, 145-146;

Meason's Estate, 4 Watts (Pa.) 341, 346.

In Massachusetts, however, from an early period, shares in all these corporations have been held to be personal property, the holder having only a personal action for his dividends.

See: *Russell v. Temple*, 3 Dane's Abr. 108, 2-6.

⁶ See: *Ante*, § 45.

rate, and the shares of stock are deemed personal property.¹

SEC. 49. **Electric poles and wires realty.**—The poles, wires, lamps, and other attachments erected in the streets for lighting purposes by an electrical company, have been held to be real and not personal property.² By parity of reasoning the poles of an electrical street railway are real property. This is in harmony with the reasoning which makes the foundation and columns of the New York City Elevated Railroad land and liable to taxation as real property.³ But it has been held that the machinery and fixtures of an electric light plant, placed in a building for a mere temporary purpose, are not a part of the realty.⁴ Whether wires placed within the plastering of a building for the purpose of lighting it by electricity are a permanent addition to the building, and for that reason become fixtures, is to be determined from the intention of the parties and not the fact of physical annexation.⁵

SEC. 50. **Emblements — Growing crops.**—Growing crops planted by the owner of the soil are a part of the realty, and, as a general rule, will pass with it on conveyance,⁶ even though reserved by parol by the grantor at the time

¹ *Johns v. Johns*, 1 Ohio St. 350, 355 ;

Bradley v. Holdsworth, 3 Mees. & W. 422 ;

Bligh v. Brent, 2 Young & C. Exch. 268, 294-5.

² *Keating Implement & Machine Co. v. Marshall Elec. L. & P. Co.*, 74 Tex. 605 ; s.c. 12 S. W. Rep. 489.

³ *People ex rel. The New York Elevated Railroad v. Commissioners of Taxes*, 82 N. Y. 459.

See : *Post*, § 106.

⁴ *Havens v. West Side Electric Light Co.*, 44 N. Y. S. R. 589 ; s.c. 17 N. Y. Supp. 580.

⁵ *Harrisburg Electric Light Co. v. Goodman*, 129 Pa. St. 206 ; s.c. 19 Atl. Rep. 844.

⁶ *Floyd v. Ricks*, 14 Ark. 286 ; s.c. 58 Am. Dec. 374 ;

Gibbons v. Dillingham, 10 Ark. 9 ; s.c. 50 Am. Dec. 233 ;

Bull v. Griswold, 19 Ill. 631 ;

Turner v. Cool, 23 Ind. 56 ; s.c. 85 Am. Dec. 449 ;

Chapman v. Long, 10 Ind. 465 ;

Trullinger v. Webb, 3 Ind. 196, 200 ;

Porche v. Bodin, 28 La. An. 761 ;

Dennett v. Hopkinson, 63 Me. 350 ;

Connor v. Coffin, 22 N. H. 538 ;

Howell v. Schenck, 24 N. J. L. (4 Zab.) 89 ;

Sherman v. Willett, 42 N. Y. 146 ;

Bradner v. Faulkner, 34 N. Y. 347 ;

Morris v. Whitcher, 20 N. Y. 41 ;

Webster v. Zielly, 52 Barb. (N. Y.) 482 ;

Wintemute v. Light, 46 Barb. (N. Y.) 278, 283 ;

Foote v. Colvin, 3 John. (N. Y.) 216, 222, 506 ; s.c. 3 Am. Dec. 478 ;

Thayer v. Rock, 13 Wend. (N. Y.) 53 ;

Lane v. King, 8 Wend. (N. Y.) 584 ;

Brittain v. McKay, 1 Ired. (N. C.) 265 ;

Bittinger v. Baker, 29 Pa. St. 66 ;

s.c. 70 Am. Dec. 154 ;

of sale.¹ And this seems to be the case even though the crops are at the time standing in the field unharvested, although ripe, and the season for gathering them is long past.² A different rule seems to prevail in Ohio³ and Pennsylvania,⁴ where growing crops are said to be personal property, but pass with the land unless severed by reservation or exception, which may be by parol.⁵ Such was the rule of the common law, and is held uniformly in England not to have been altered by the statute of frauds and perjuries.⁶ It is the general rule that a crop growing on land at the time of a sale under execution passes to the purchaser;⁷ and the same is true on a sale under a mortgage foreclosure.⁸

Wilson v. McNeal, 10 Watts (Pa.) 422, 427;

Burnside v. Weightman, 9 Watts (Pa.) 47, overruling *Smith v. Johnson*, 1 Pen. & W. (Pa.) 471; s.c. 21 Am. Dec. 404;

Bank of Pennsylvania v. Wise, 3 Watts (Pa.) 394, 406;

Creigh v. Beelin, 1 Watts & S. (Pa.) 83;

Crews v. Pendleton, 1 Leigh (Va.) 297; s.c. 19 Am. Dec. 750;

Brantom v. Griffiths, 1 C. P. Div. 349; s.c. 17 Moak's Eng. Rep. 301;

Mechelen v. Wallace, 7 Ad. & El. 49; s.c. 34 Eng. C. L. 51;

Vaughn v. Hancock, 3 C. B. 766; s.c. 54 Eng. C. L. 766;

Earl of Falmouth v. Thomas, 1 Cr. & M. 89.

Growing wheat is an interest in land, it is said in Missouri cases, and that a contract concerning it is within the statute of frauds, and must be in writing.

McIlvaine v. Harris, 20 Mo. 457; s.c. 64 Am. Dec. 196.

See: *Steele v. Faber*, 37 Mo. 80;

Pratte v. Coffman, 27 Mo. 424, 426.

¹ *Wintermute v. Light*, 46 Barb. (N. Y.) 278;

Austin v. Sawyer, 9 Cow. (N. Y.) 39.

² *Tripp v. Hasceig*, 20 Mich. 254, 261; s.c. 4 Am. Rep. 388;

Kittredge v. Woods, 3 N. H. 503, s.c. 14 Am. Dec. 393.

³ *Baker v. Jordan*, 3 Ohio St. 438, followed in

Youmans v. Caldwell, 4 Ohio St. 72, 78;

Jones v. Timmons, 21 Ohio St. 596, 604.

⁴ *Backenstoss v. Stahler's Admr.*, 33 Pa. St. 251; s.c. 75 Am. Dec. 592;

Lauchner v. Rex, 20 Pa. St. 464;

Bear v. Bitzer, 16 Pa. St. 175; s.c. 55 Am. Dec. 490;

Smith v. Johnston, 1 Penn. & W. (Pa.) 471;

Wilkins v. Varshbinder, 7 Watts (Pa.) 378.

⁵ See: Cases cited in last two footnotes.

⁶ *Backenstoss v. Stahler's Admr.*, 33 Pa. St. 231; s.c. 75 Am. Dec. 592.

Citing: *Evans v. Roberts*, 5 Barn. & C. 829; s.c. 11 Eng. C. L. 700;

Dunne v. Ferguson, Hayes (Ir. Exch.) 540;

Sainsbury v. Matthews, 4 Mees. & W. 343.

⁷ *Pitts v. Hendrix*, 6 Ga. 452;

Porche v. Bodin, 28 La. An. 761;

Hershey v. Metzgar, 90 Pa. St. 217; s.c. 9 Reporter, 384;

Bittenger v. Baker, 29 Pa. St. 66; s.c. 70 Am. Dec. 154;

Bear v. Bitzes, 16 Pa. St. 175.

Sale on execution or in partition.—In Ohio the crops do not pass to the purchaser under a sale on execution or in partition.

See: *Albin v. Riegel*, 40 Ohio St. 329;

Houts v. Showalter, 10 Ohio St. 125;

Cassily v. Rhodes, 12 Ohio, 88.

⁸ *Jones v. Thomas*, 8 Blackf. (Ind.) 428;

SEC. 51. Same — When crop severed.—A different rule prevails where the crop has been severed.¹ Thus in the case of *Dixon v. Nicolls*,² where land had been rented on the shares, and the grain had been severed from the realty, but remained stacked thereon, and undivided, it was held not to pass to the purchaser, by a deed to the land, without reservation or exception; and it is said, in a recent case in Pennsylvania,³ that where there has been a severance of the growing grain, it does not pass to him who purchases the land subsequent to its severance.⁴ And growing crops are a part of the realty as between the successful plaintiff in an action of ejectment and the evicted defendant,⁵ where the crops were planted after the commencement of the action in ejectment.⁶ But the rule is otherwise where the grain was sown and harvested by one on lands to which he claimed title, and of which he was in actual possession.⁷ Crops planted by a tenant who holds under the owner of the soil are, as between the landlord and his tenant, personal property, and the tenant has the right to remove them;⁸ they be-

Ledyard v. Phillips, 47 Mich. 305; s.c. 11 N. W. Rep. 170;

Ruggles v. First Nat. Bk. of Centerville, 43 Mich. 192; s.c. 5 N. W. Rep. 257;

Howell v. Schenck, 24 N. J. L. (4 Zab.) 89;

Aldrich v. Reynolds, 1 Barb. Ch. (N. Y.) 613;

Gardener v. Finley, 19 Barb. (N. Y.) 317, 320;

Jewett v. Keenholts, 16 Barb. (N. Y.) 193;

Gillett v. Balcom, 6 Barb. (N. Y.) 370;

Simers v. Saltus, 3 Den. (N. Y.) 214;

Shepard v. Philbrick, 2 Den. (N. Y.) 174;

Lane v. King, 8 Wend. (N. Y.) 584; s.c. 24 Am. Dec. 105;

Crews v. Pendleton, 1 Leigh (Va.) 297; s.c. 19 Am. Dec. 750.

See: *Wiltzie on Mort. Forec.* 706-708.

¹ *Coombs v. Jordan*, 3 Bland. Ch. (Md.) 284; s.c. 22 Am. Dec. 236.

² 39 Ill. 372; s.c. 89 Am. Dec. 312.

³ *Hershey v. Metzgar*, 90 Pa. St. 217; s.c. 9 Reporter, 384.

⁴ See: *Stambaugh v. Yeats*, 2 Rawle (Pa.) 161;

Myers v. White, 1 Rawle (Pa.) 253.

⁵ See: *Altes v. Hinckler*, 36 Ill. 275; s.c. 85 Am. Dec. 407;

Crotty v. Collins, 13 Ill. 567;

Strode v. Swim, 1 A. K. Marsh. (Ky.) 366;

Brothers v. Hurdle, 10 Ired. (N. C.) L. 490; s.c. 51 Am. Dec. 400;

Doe ex d. Upton v. Witherwick, 3 Bing. 11; s.c. 11 Eng. C. L. 16.

⁶ *McLean v. Bovee*, 24 Wis. 295; s.c. 1 Am. Rep. 185.

⁷ *Martin v. Thompson*, 62 Cal. 618; s.c. 45 Am. Rep. 663;

Page v. Fowler, 39 Cal. 412; s.c. 2 Am. Rep. 462;

Stockwell v. Phelps, 34 N. Y. 363; s.c. 90 Am. Dec. 710.

⁸ *Wintermute v. Light*, 46 Barb. (N. Y.) 278;

Pfanner v. Sturmer, 40 How. (N. Y.) Pr. 401;

Stewart v. Doughty, 9 John. (N. Y.) 108, 112;

Hunt v. Watkins, 1 Humph. (Tenn.) 498.

come part of the realty, however, should the tenant voluntarily abandon or forfeit possession of the premises.¹

SEC. 52. Fee-farm lease.—A fee-farm lease is the granting of lands in fee, reserving rent, and is only letting lands to farm in fee-simple instead of the usual modes for life or for years.² A farm-fee rent is a rent-charge issuing out of such an estate in fee, and is a perpetual rent, reserved on a conveyance in fee-simple. Fee-farms are lands held in fee, to render for them annually the true value, or more or less, and is called a fee-farm, because a farm-rent is reserved, upon a grant in fee.³ It is expressly said in the statute *Quia Emptores*, that it extends only to lands held in fee-simple,⁴ but Sir Edward Coke declares that it extends to lands that are held in fee-farm.⁵ A fee-farm lease creates an estate of inheritance in the grantee, his heirs and assigns. It is in fact a fee-simple estate, subject only to the payment of the rents reserved, and the performance of the lawful conditions contained in the instrument creating the estate.⁵

SEC. 53. Fructus industriales.—A distinction is to be observed between *fructus naturales*, or the natural growths of the soil, such as trees, grasses, herbs, fruit on trees, and the like, which at common law are part of the soil, and *fructus industriales*, or fruits or products the result of the annual labor of man in sowing and reaping, planting and gathering,⁶ which, though strictly a part of the

- Compare* : Ladd v. Abel, 18 Conn. 513 ;
 Graves v. Weld, 5 Barn. & Adol. 105 ; s.c. 27 Eng. C. L. 53.
 1 Chandler v. Thurston, 27 Mass. (10 Pick.) 205, 210 ;
 Debow v. Colfax, 10 N. J. L. (5 Halst.) 128 ;
 Pfanner v. Sturmer, 40 How. (N. Y.) Pr. 401 ;
 Stewart v. Doughty, 9 John. (N. Y.) 108 ;
 Whipple v. Foote, 2 John. (N. Y.) 418, 421n ; s.c. 3 Am. Dec. 442 ;
 Gee v. Young, 1 Hayw. (N. C.) 17 ;
 Hawkins v. Skegg, 10 Humph. (Tenn.) 31 ;
 Bulwer v. Bulwer, 2 Barn. & Ald. 470 ;
 Orlando's Case, 5 Co. 116a.
 2 De Peyster v. Michael, 6 N. Y. 467 ; s.c. 57 Am. Dec. 470 ;
 2 Bl. Com. 43.
 3 2 Inst. 44.
 4 1 Evan's Stats. 195.
 5 See : De Peyster v. Michael, 6 N. Y. 467, 497 ; s.c. 57 Am. Dec. 470.
 6 Brittain v. McKay, 1 Ired. (N. C.) L. 265 ; s.c. 35 Am. Dec. 738 ;
 Flynt v. Conrad, 1 Phil. (N. C.) L. 110, 192 ; s.c. 93 Am. Dec. 588.

realty as much as those products which the soil brings forth without man's intervention, are treated as personal property for many purposes.¹ Crops, when planted by the owner of the soil, constitute, in general, part of the realty, and will pass to the vendee by a conveyance of the land ;² but the owner of the soil may sell a crop to be cut without conveying any interest in the land, and the purchaser will acquire title to it as a chattel, even though not fit for harvesting at the time of the sale.³ Such crops as are planted by the owner of the soil, if mature and to be gathered immediately, may not only be sold by him,⁴ but they may be taken on execution,⁵ as personal property, where they can be readily

¹ See : *Preston v. Ryan*, 45 Mich. 147 ; s.c. 7 N. W. Rep. 819 ;

Brittain v. McKay, 1 Ired. (N. C.) L. 265 ; s.c. 35 Am. Dec. 738.

² See : *Ante*, § 50.

³ *Harris v. Frink*, 49 N. Y. 24, 27 ; s.c. 10 Am. Rep. 318, 320 ;

See : *Craddock v. Riddlesbarger*, 2 Dana (Ky.), 206 ;

Austin v. Sawyer, 9 Cow. (N. Y.) 39, 42, 43 ;

Newcomb v. Ramer, 2 John. (N. Y.) 421, note a ;

Jones v. Flint, 10 Ad. & E. 753 ; s.c. 37 Eng. C. L. 396 ;

Evans v. Roberts, 5 Barn. & C. 829 ; s.c. 11 Eng. C. L. 700 ;

Sainsbury v. Matthews, 4 Mees. & W. 343.

⁴ *McKenzie v. Lampley*, 31 Ala. 526 ;

Crine v. Tifts, 65 Ga. 644 ;

Northern v. State, 1 Ind. 113 ;

Craddock v. Riddlesbarger, 2 Dana (Ky.) 205 ;

Parham v. Thompson, 2 J. J. Marsh. (Ky.) 159 ;

Thompson v. Craigmyle, 4 B. Mon. (Ky.) 391 ; s.c. 41 Am. Dec. 240.

Pickens v. Webster, 31 La. An. 870 ;

Porche v. Bodin, 28 La. An. 761 ;

Coombs v. Jordan, 3 Bland Ch. (Md.) 312 ; s.c. 22 Am. Dec. 236 ;

Cheshire Nat. Bk. v. Jewett, 119 Mass. 241, 244 ;

Mulligan v. Newton, 82 Mass. (16 Gray) 211 ;

Heard v. Fairbanks, 46 Mass. (5 Met.) 111 ; s.c. 38 Am. Dec. 394 ;

Penhollow v. Dwight, 7 Mass. 74 ; s.c. 5 Am. Dec. 21 ;

Preston v. Ryan, 45 Mich. 174 ; s.c. 7 N. W. Rep. 819 ;

Gillitt v. Truax, 27 Minn. 528 ; s.c. 8 N. W. Rep. 767 ;

Bloom v. Welsh, 27 N. J. L. (3 Dutch.) 177 ;

Westbrook v. Eager, 16 N. J. L. (1 Harr.) 81 ;

Shepard v. Philbrick, 2 Den. (N. Y.) 174 ;

Hartwell v. Bissell, 17 John. (N. Y.) 128 ;

Stewart v. Doughty, 9 John. (N. Y.) 108.

Whipple v. Foot, 2 John. (N. Y.) 418 ; s.c. 3 Am. Dec. 442 ;

Smith v. Tritt, 1 Dev. & B. (N. C.) L. 241 ; s.c. 28 Am. Dec. 565 ;

Cassily v. Rhodes, 12 Ohio 88 ;

Peacock v. Purvis, 2 Brod. & B. 362 ;

Storer v. Hunter, 3 Barn. & C. 368 ; s.c. 10 Eng. C. L. 172 ;

Poole's Case, 1 Salk. 368 ;

Scorell v. Boxall, 1 You. & J. 398.

Compare : *Norris v. Watson*, 22 N. H. 364 ; s.c. 55 Am. Dec. 160.

⁵ *Green v. Armstrong*, 1 Den. (N. Y.) 550, 556.

See : *Austin v. Sawyer*, 9 Cow. (N. Y.) 39 ;

Newcomb v. Reimer, 2 John. (N. Y.) 421n. ;

Mumford v. Whitney, 15 Wend. (N. Y.) 387 ; s.c. 30 Am. Dec. 60 ;

Jones v. Flint, 10 Ad. & E. 753 ; s.c. 37 Eng. C. L. 397 ;

Graves v. Weld, 5 Barn. & Ad. 105 ; s.c. 27 Eng. C. L. 53 ;

severed, like wheat or corn, or dug like potatoes or turnips, or pulled like beets or onions;¹ because, at common law, a growing crop, produced by the expense and labor of the occupier of the land, was, as the representative of that labor and expense, considered as an independent chattel,²

- Evans v. Roberts, 5 Barn. & C. 829; s.c. 11 Eng. C. L. 700;
 Parker v. Staniland, 11 East 362; s.c. 10 Rev. Rep. 521;
 Warwick v. Bruce, 2 Maule & S. 205;
 Stainsbury v. Matthews, 4 Mees. & W. 343;
 Carrington v. Roots, 2 Mees. & W. 248.
¹ Dunne v. Ferguson, Hayes (Ir. Exch.) 542;
 Warwick v. Bruce, 2 Maule & S. 205.
 Sainsbury v. Matthews, 4 Mees. & W. 343;
As to what constitutes a valid levy, there is a variety of opinion amongst the decided cases.
 In Whipple v. Foot, 2 John. (N. Y.) 418; s.c. 3 Am. Dec. 442, it is said that to make a valid levy of an execution on growing crops, it is not necessary that a manual possession should be taken; that it is sufficient merely to declare that the subject is levied on under execution.
 In State v. Poor, 4 Dev. & B. (N. C.) L. 384; s.c. 34 Am. Dec. 387, it is said that a levy upon a growing crop is insufficient, unless the officer take open and notorious possession by entering the premises, and publicly announcing the seizure to answer the writ. To the same effect is
 Trivillo v. Tilford, 6 Watts (Pa.) 468; s.c. 31 Am. Dec. 484.
 See: Dorrance's Admr. v. Commonwealth, 13 Pa. St. 164;
 Loury v. Coulter, 9 Pa. St. 349, 352.
 In Beekman v. Lansing, 3 Wend. (N. Y.) 416; s.c. 20 Am. Dec. 707, it is said that to constitute a valid levy, the officer must enter upon the premises where the crops or goods are and take actual possession of them, if it can be done; they must be brought within his view and made subject to his control; and this doctrine is approved in
 Roth v. Wells, 29 N. Y. 485;
 Rodgers v. Bonner, 55 Barb. (N. Y.) 9, 24;
 Camp v. Chamberlain, 5 Den. (N. Y.) 203;
 Green v. Burke, 23 Wend. (N. Y.) 490, 492;
 Westervelt v. Pinckney, 14 Wend. (N. Y.) 123; s.c. 28 Am. Dec. 516.
 See: Commonwealth v. Stremback, 3 Rawle (Pa.) 341; s.c. 24 Am. Dec. 351.
 It seems that the officer should assert his title, by virtue of the writ, by acts which, were it not for the execution, would make him a trespasser.
 Westervelt v. Pinckney, 14 Wend. (N. Y.) 123; s.c. 28 Am. Dec. 516.
 See: Roth v. Wells, 29 N. Y. 485;
 Camp v. Chamberlain, 5 Den. (N. Y.) 198, 203;
 Green v. Burke, 19 Wend. (N. Y.) 497;
 Beekman v. Lansing, 3 Wend. (N. Y.) 446; s.c. 20 Am. Dec. 707.
² Graff v. Fitch, 56 Ill. 373; s.c. 11 Am. Rep. 85;
 Matlock v. Fry, 15 Ind. 483;
 Craddock v. Riddlesbarger, 2 Dana (Ky.) 205;
 Purner v. Piercy, 40 Md. 212; s.c. 17 Am. Rep. 591;
 Westbrook v. Eager, 16 N. J. L. (1 Harr.) 81;
 Harris v. Frink, 49 N. Y. 24; s.c. 10 Am. Rep. 313;
 Whipple v. Foot, 2 John. (N. Y.) 418; s.c. 3 Am. Dec. 442;
 Austin v. Sawyer, 9 Cow. (N. Y.) 39;
 Mumford v. Whitney, 15 Wend. (N. Y.) 387; s.c. 30 Am. Dec. 60;
 Pourrier v. Raymond, 1 Hann. (N. B.) 520;
 Jones v. Flint, 10 Ad. & E. 753; s.c. 37 Eng. C. L. 396;
 Evans v. Roberts, 5 Barn. & C. 829; s.c. 11 Eng. C. L. 700;
 Poulter v. Killingbeck, 1 Bos. & P. 397;

and the purchaser has a lawful right of entry, egress and regress, for the purpose of removal.¹

It has been said that the fact that the crop is immature and growing will not invalidate the sale,² because all crops of grain or vegetables, the annual product of human labor and the cultivation of the soil, are personal property and subject to be sold as such before maturity, no matter how long they are to remain in the soil in order to complete their growth.³ The reason for

Parker v. Staniland, 11 East 362;
s.c. 10 Rev. Rep. 521;

Dunne v. Ferguson, Hayes (Ir. Exch.) 542;

Warwick v. Bruce, 2 Maule & S.; 205;

Sainsbury v. Matthews, 4 Mees. & W. 843;

Another line of English cases deny that crops are personal property, and maintain that they can be transferred as real estate only.

See: *Earl of Falmouth v. Thomas*, 1 Crompt. & M. 89;

Emmerson v. Heelis, 2 Taunt. 38.

¹ *Thompson v. Craigmyle*, 4 B. Mon. (Ky.) 391; s.c. 41 Am. Dec. 240;

Brittain v. McKay, 1 Ired. (N. C.) L. 265; s.c. 35 Am. Dec. 738.

See: *Coombs v. Jordan*, 3 Bland. Ch. (Md.) 284; s.c. 22 Am. Dec. 236;

Austin v. Sawyer, 9 Cow. (N. Y.) 39;

Stewart v. Doughty, 9 John. (N. Y.) 108;

Whipple v. Foot, 2 John. (N. Y.) 418; s.c. 3 Am. Dec. 442;

Cheshire Bank v. Jewett, 119 Mass. 224;

Penhallow v. Dwight, 7 Mass. 34; s.c. 5 Am. Dec. 21;

Bond v. Coke, 71 N. C. 100;

Walton v. Jordan, 65 N. C. 172;

Lewis v. McNatt, 65 N. C. 65;

Smith v. Tritt, 1 Dev. & B. (N. C.) L. 241; s.c. 28 Am. Dec. 565;

Robinson v. Gee, 4 Ired. (N. C.) L. 186, 191;

² *Craddock v. Riddlesbarger*, 2 Dana (Ky.) 206;

Austin v. Sawyer, 9 Cow. (N. Y.) 42;

Jones v. Flint, 10 Ad. & E. 753; s.c. 37 Eng. C. L. 396;

Carrington v. Roots, 2 Mees. & W. 248.

Compare: *Emmerson v. Heelis*, 2 Taunt. 38.

³ *Davis v. McFarlane*, 37 Cal. 634; *Marshall v. Ferguson*, 23 Cal. 65; *Bostwick v. Leach*, 3 Day (Conn.) 476;

Ticknor v. McClelland, 84 Ill. 471;

Thompson v. Wilhte, 81 Ill. 356;

Graff v. Fitch, 58 Ill. 373, 377; s.c. 11 Am. Rep. 85;

Bull v. Griswold, 19 Ill. 631;

Miller v. State, 39 Ind. 267;

Sherry v. Picken, 10 Ind. 375;

Bowman v. Conn, 8 Ind. 58;

Bricker v. Hughes, 4 Ind. 146;

Northern v. State, 1 Ind. 113;

Moreland v. Myall, 14 Bush (Ky.) 474;

Craddock v. Riddlesbarger, 2 Dana (Ky.) 205;

Robbins v. Oldham, 1 Duv. (Ky.) 28;

Bryant v. Crosby, 40 Me. 9, 23;

Cutler v. Pope, 13 Me. 377;

Safford v. Annis, 7 Me. 168;

Purner v. Piercy, 40 Md. 212; s.c. 17 Am. Rep. 591;

Smith v. Bryan, 5 Md. 141; s.c. 59 Am. Dec. 104;

Delaney v. Root, 99 Mass. 546; s.c. 97 Am. Dec. 52;

Ross v. Welch, 77 Mass. (11 Gray) 235;

Brown v. Sanborn, 21 Minn. 402;

Howe v. Batchelder, 49 N. H. 204;

Pitkin v. Noyes, 48 N. H. 294; s.c. 2 Am. Rep. 218;

Kingsley v. Holbrook, 45 N. H. 313; s.c. 86 Am. Dec. 173;

Westbrook v. Eager, 16 N. J. L. (1 Harr.) 81;

Bloom v. Welsh, 27 N. J. L. (3 Dutch.) 177;

Lacustrine Fertilizer Co. v. Lake Guano Fertilizer Co., 82 N. Y. 476, 484;

this is that growing crops being personal property so far as to be capable of severance and sale by oral contract, an agreement for their sale is not an agreement for the sale of an interest in land.¹

SEC. 54. Same — Products of a mixed nature — Hops.— There are some products of the earth which partake both of the nature of *fructus industriales* and *fructus naturales*. In such a case the true test has been said to be whether the crop is produced chiefly by the manur-
ance and industry of man. Thus the fact that a crop is produced from perennial roots is not conclusive evidence that it is to be ranked as a *fructus naturales*, and as such to pass with the soil. Hop-roots are perennial,² and doubtless as much a part of the soil as the forest

- Reeder v. Sayre, 70 N. Y. 180 ; s.c. 26 Am. Rep. 567, affirming 6 Hun (N. Y.) 562 ;
Harris v. Frink, 49 N. Y. 24 ; s.c. 10 Am. Rep. 318 ;
Austin v. Sawyer, 9 Cow. (N. Y.) 39 ;
Green v. Armstrong, 1 Den. (N. Y.) 550, 554 ;
Hartwell v. Bissell, 17 John. (N. Y.) 128 ;
Stewart v. Doughty, 9 John. (N. Y.) 108 ;
Frear v. Hardenberg, 5 John. (N. Y.) 272 ; s.c. 4 Am. Dec. 356 ;
Newcomb v. Ramer, 2 John. (N. Y.) 421, note a ;
Whipple v. Foot, 2 John. (N. Y.) 418 ; s.c. 3 Am. Dec. 442 ;
Brittain v. McKay, 1 Ired. (N. C.) L. 265 ;
Hershey v. Metzgar, 90 Pa. St. 217 ;
Backenstoss v. Stahler's Admr., 33 Pa. St. 261, 254 ; s.c. 75 Am. Dec. 592 ;
Wilkins v. Vashbinder, 7 Watts (Pa.) 379 ;
Bellows v. Wells, 36 Vt. 509 ;
Jones v. Flint, 10 Ad. & El. 753 ; s.c. 37 Eng. C. L. 396 ;
Evans v. Roberts, 5 Barn. & C. 829 ; s.c. 11 Eng. C. L. 700 ;
Sainsbury v. Matthews, 4 Mees. & W. 343 ;
Dunne v. Ferguson, 1 Hayes (I Exch.) 540.
- ¹ See : Marshall v. Ferguson, 23 Cal. 65, 69 ;
Bostwick v. Leach, 3 Day (Conn.) 476 ;
Reed v. Johnson, 14 Ill. 257 ;
Sherry v. Picken, 10 Ind. 375 ;
Craddock v. Riddlesbarger, 2 Dana (Ky.) 204 ;
Parham v. Thompson, 2 J. J. Marsh. (Ky.) 159 ;
Safford v. Annis, 7 Me. (7 Greenl.) 168 ;
Purner v. Piercy, 40 Md. 212 ; s.c. 17 Am. Rep. 591 ;
Smith v. Bryan, 5 Md. 141 ; s.c. 59 Am. Dec. 104 ;
Westbrook v. Eager, 16 N. J. L. (1 Harr.) 81 ;
Green v. Armstrong, 1 Den. (N. Y.) 550 ;
Smith v. Tritt, 1 Dev. & B. (N. C.) L. 241 ; s.c. 28 Am. Dec. 564 ;
Brittain v. McKay, 1 Ired. (N. C.) L. 265 ; s.c. 35 Am. Dec. 738 ;
Backenstoss v. Stahler's Admr., 33 Pa. St. 251 ; s.c. 75 Am. Dec. 592 ;
Bear v. Bitzer, 16 Pa. St. 178 ; s.c. 55 Am. Dec. 490 ;
Wilkins v. Vashbinder, 7 Watts (Pa.) 378 ;
Evans v. Roberts, 5 Barn. & C. 829 ; s.c. 11 Eng. C. L. 700 ;
Sainsbury v. Matthews, 4 Mees. & W. 343 ;
Eaton v. Southby, Willes, 131 ;
Scorell v. Boxall, 1 You. & J. 396.
See: Bishop v. Bishop, 11 N. Y. 123.

trees, but the crop of hops grown from these roots depends entirely upon the manurance and industry of man for its value, and for that reason is classed as *fructus industriales*, and is personal property.¹

SEC. 55. *Fructus naturales*.—The natural product of the soil without man's intervention, such as trees before being felled and converted into timber,² and fruit before it is gathered,³ were at common law regarded as much a part of the soil as the earth from which they sprung.⁴ Yet they may in a measure be dealt with and treated by the owner as chattels, the same as *fructus industriales*, and may be sold as such where the intention of the parties contemplates that they shall be severed and removed immediately, or within a reasonable time; but should the sale contemplate their being left to grow or obtain additional strength and increase from the earth, it will be regarded as a sale of an interest in the realty,⁵ and for that reason is within the statute of

¹ *Stewart v. Doughty*, 9 John. (N. Y.) 108;

Graves v. Weld, 5 Barn. & Ad. 105; s.c. 2 Nev. & M. 725; 27 Eng. C. L. 58;

Evans v. Roberts, 5 Barn. & Cres. 829; s.c. 11 Eng. C. L. 700;

Latham v. Atwood, Cro. Car. 515;

Anonymous Case, Freem. Ch. 210;

Fisher v. Forbes, 9 Vin. Abr. 373, pl. 82;

2 Bl. Com. 122;
1 Co. Litt. (19th ed.) 55a, 55b.

² See: *United States v. Schuler*, 6 McL. C. C. 37.

³ *Blackberries fructus naturales*.—In *Sparrow v. Pond*, 49 Minn. 412; s.c. 52 N. W. Rep. 36, in an opinion going over the ancient learning on the subject, it is held that blackberries, while growing on the bushes, are not subject to a levy under an execution as personal property. They are not *fructus industriales*, like grain, but are *fructus naturales*, like natural bushes and grasses, and are regarded as a part of the realty.

⁴ See: *Adams v. Smith*, Breese (Ill.) 221;

Olmstead v. Niles, 7 N. H. 522;
Putney v. Day, 6 N. H. 430; s.c. 25 Am. Dec. 470;

Slocum v. Seymour, 36 N. J. L. (7 Vr.) 138;

Bank of Lansingburgh v. Crary, 1 Barb. (N. Y.) 542;

Green v. Armstrong, 1 Den. (N. Y.) 550, 556;

Teal v. Auty, 2 Brod. & B. 99;
Crosby v. Wadsworth, 6 East

602; s.c. 2 Smith, 599; 8 Rev. Rep. 566;

Rodwell v. Phillips, 9 Mees. & W. 501.

⁵ See: *White v. Foster*, 102 Mass. 375;

Harrell v. Miller, 35 Miss. 700;
Howe v. Batchelder, 49 N. H.

204;
Kingsley v. Holbrook, 45 N. H.

313; s.c. 86 Am. Dec. 173;
Olmstead v. Niles, 7 N. H. 522;

Slocum v. Seymour, 36 N. J. L. (7 Vr.) 138;

Vorebeck v. Rowe, 50 Barb. (N. Y.) 302;

Warren v. Leland, 2 Barb. (N. Y.) 613;

Green v. Armstrong, 1 Den. (N. Y.) 550;

Pattison's Appeal, 61 Pa. St. 294; s.c. 100 Am. Dec. 637;

frauds, and should be in writing.¹ This rule has been applied in the sale of shrubs and nursery trees,² in the sale of growing trees,³ in the sale of grass in the meadow ready to be cut,⁴ and in the sale of an apple and peach crop.⁵

SEC. 56. **Same — Growing trees.**—Growing trees are regarded as a part of the land from which they spring,⁶ and as such are real property.⁷ Being an interest in land,⁸ as long as they are not actually, or in contemplation of law, severed from the soil, they are within the statute of frauds, and the property in them cannot be transferred by parol;⁹ but when once they are severed,

- Huff v. McCauley, 53 Pa. St. 206 ; ⁵ Cain v. McGuire, 13 B. Mon. (Ky.) 340 ;
 Buck v. Pickwell, 27 Vt. 157 ; Brown v. Stanclift, 80 N. Y. 627 ;
 Lillie v. Dunbar, 62 Wis. 198 ; s.c. 20 Alb. L. J. 55.
 s.c. 22 N. W. Rep. 467 ; See : Purner v. Pierce, 40 Md. 212 ;
 Daniels v. Bailey, 43 Wis. 566 ; s.c. 17 Am. Rep. 591.
 Summers v. Cook, 28 Grant (Ont.) 179 ; ⁶ Baker v. Lewis, 33 Pa. St. 301 ;
 s.c. 75 Am. Dec. 598.
 Macdonnell v. McKay, 15 Grant (Ont.) 391. ⁷ Vorebeck v. Roe, 50 Barb. (N. Y.) 302 ;
¹ Putney v. Day, 6 N. H. 430 ; s.c. 25 Am. Dec. 470 ; Bank of Lansingburgh v. Crary, 1 Barb. (N. Y.) 543 ;
 Green v. Arrastrong, 1 Den. (N. Y.) 550, 556 ; Green v. Armstrong, 1 Den. (N. Y.) 550 ;
 Olmstead v. Niles, 7 N. H. 523 ; Hutchins v. King, 68 U. S. (1 Wall.) 53 ; bk. 17 L. ed. 544 ;
 Jones v. Flint, 10 Ad. & E. 753 ; s.c. 37 Eng. C. L. 397 ; Jones v. Flint, 10 Ad. & E. 753 ;
 Teal v. Auty, 2 Brod. & B. 99 ; s.c. 37 Eng. C. L. 397.
 Crosby v. Wadsworth, 6 East 602 ; s.c. 2 Smith, 599 ; 8 Rev. Rep. 566 ; ⁸ Brackett v. Goddard, 54 Me. 309 ;
 Rodwell v. Phillips, 9 Mees. & W. 501. Wright v. Barrett, 30 Mass. (13 Pick.) 44 ;
 Warren v. Leland, 2 Barb. (N. Y.) 613.
² See : Whitmarsh v. Walker, 42 Mass. (1 Met.) 813. ⁹ McGregor v. Brown, 10 N. Y. 114 ;
³ Byassee v. Reese, 4 Met. (Ky.) 372 ; s.c. 83 Am. Dec. 481 ; Warren v. Leland, 2 Barb. (N. Y.) 613.
 Cutler v. Pope, 13 Me. 377 ; Compare : Clafin v. Carpenter, 45 Mass. (4 Met.) 580 ;
 Erskine v. Plummer, 7 Me. (7 Greenl.) 447 ; Olmstead v. Niles, 7 N. H. 522 ;
 Purner v. Piercy, 40 Md. 212 ; s.c. 17 Am. Rep. 591 ; Smith v. Surman, 9 Barn. & C. 561 ; s.c. 17 Eng. C. L. 253.
 Nettleton v. Sikes, 49 Mass. (8 Met.) 34 ; **A** parol contract conveys no interest in growing timber.—The New Brunswick Land Company v. Kirk, 1 Allen (N. B.) 443.
 Clafin v. Carpenter, 45 Mass. (4 Met.) 580 ; s.c. 38 Am. Dec. 381 ; Kennedy v. Robinson, 2 Cr. & Dix. 113 ;
 Putney v. Day, 6 N. H. 430 ; s.c. 25 Am. Dec. 470 ; Kerr v. Connell, Bert. (N. B.) 133 ;
 Killmore v. Howlett, 48 N. Y. 569 ; Murray v. Gilbert, 1 Hannay (N. B.) 553 ;
 Boyce v. Washburn, 4 Hun (N. Y.) 792 ; Segree v. Perley, 1 Kerr (N. B.) 439.
 Sterling v. Baldwin, 42 Vt. 306.
⁴ See : Banton v. Shorey, 77 Me. 48.

either in fact or in contemplation of law, they become personal property.¹ The sale of growing trees, with the right at a future time—whether that time is fixed or indefinite—to enter upon the land and cut and remove them, conveys an interest in the land;² but when the intention is to transfer the title of the trees after they shall have been felled, or separated from the realty, this is held to be an executory contract for the sale of personal property,³ and vests the title to the trees in the vendee

- ¹ *Claffin v. Carpenter*, 45 Mass. (4 Met.) 580;
Smith v. Surman, 9 Barn. & C. 561; s.c. 17 Eng. C. L. 253;
Stukely v. Butler, Hob. 173.
 See: *Olmstead v. Niles*, 7 N. H. 522;
Marshall v. Green, L. R. 1 C. P. Div. 35; s.c. 15 Moak's Eng. Rep. 218;
Lilford's Case, 11 Co. 50.
² *Harrell v. Miller*, 35 Miss. 700; s.c. 72 Am. Dec. 154;
Howe v. Batchelder, 49 N. H. 204;
Kingsley v. Holbrook, 45 N. H. 313;
Ockington v. Richey, 41 N. H. 275;
Olmstead v. Niles, 7 N. H. 522;
Putney v. Day, 6 N. H. 430; s.c. 25 Am. Dec. 470;
Hendrickson v. Ivins, 1 N. J. Eq. (1 Saxt.) 562;
Slocum v. Seymour, 36 N. J. L. (7 Vr.) 138; s.c. 13 Am. Rep. 432;
McGregor v. Brown, 10 N. Y. 114;
Vorebeck v. Roe, 50 Barb. (N. Y.) 302;
Silvernail v. Cole, 12 Barb. (N. Y.) 685;
Dubois v. Kelly, 10 Barb. (N. Y.) 496;
Pierrepoint v. Barnard, 5 Barb. (N. Y.) 364;
Warren v. Leland, 2 Barb. (N. Y.) 614;
Bank of Lansingburgh v. Cray, 1 Barb. (N. Y.) 542;
Green v. Armstrong, 1 Den. (N. Y.) 550;
Lawrence v. Smith, 27 How. (N. Y.) Pr. 327;
Boyce v. Washburn, 4 Hun (N. Y.) 792;
Mumford v. Whitney, 15 Wend. (N. Y.) 380; s.c. 30 Am. Dec. 60;
Harrell v. Miller, 35 Miss. 700;
Bowers v. Bowers, 95 Pa. St. 477;
Pattison's Appeal, 61 Pa. St. 294;
Huff v. McCauley, 53 Pa. St. 206; s.c. 91 Am. Dec. 203;
Yeakle v. Jacob, 33 Pa. St. 376;
Buck v. Pickwell, 27 Vt. 157;
Hutchins v. King, 68 U. S. (1 Wall.) 53; bk. 17 L. ed. 544.
³ *Bostwick v. Leach*, 3 Day (Conn.) 476, 484;
Armstrong v. Lawson, 73 Ind. 498;
Owens v. Lewis, 46 Ind. 488; s.c. 15 Am. Rep. 295;
Byassee v. Reese, 4 Met. (Ky.) 372; s.c. 83 Am. Dec. 481;
Cain v. McGuire, 13 B. Mon. (Ky.) 340;
Edwards v. Grand Trunk R. Co., 54 Me. 105;
Cutler v. Pope, 13 Me. 377;
Erskine v. Plummer, 7 Me. (7 Greenl.) 447; s.c. 22 Am. Dec. 216;
Purner v. Piercy, 40 Md. 212; s.c. 17 Am. Rep. 591;
Smith v. Bryan, 5 Md. 141; s.c. 59 Am. Dec. 104;
White v. Foster, 102 Mass. 375;
Delaney v. Root, 99 Mass. 546; s.c. 97 Am. Dec. 52;
Drake v. Wells, 93 Mass. (11 Allen) 141;
Parsons v. Smith, 87 Mass. (5 Allen) 578;
Giles v. Simonds, 81 Mass. (15 Gray) 441; s.c. 77 Am. Dec. 373;
Douglas v. Shumway, 79 Mass. (13 Gray) 498;
Nettleton v. Sikes, 49 Mass. (8 Met.) 34;
Claffin v. Carpenter, 45 Mass. (4 Met.) 580; s.c. 38 Am. Dec. 381;

absolutely.¹ It has been said that the grant by the owner of land of all the timber standing and growing thereon to another and his heirs and assigns forever, with permission freely to enter, cut and carry them away at pleasure, conveys an estate of inheritance in the trees, with the right in the soil necessary for their support and growth, while the fee in the soil itself remains in the grantor.²

SEC. 57. **Same — Same — Overhanging trees.** — Where the trunk of a tree is wholly upon the land of one person, it is a part of his land³ and he is entitled to all its fruit,⁴ notwithstanding the fact that some of the branches overhang and some of the roots penetrate the land of an adjacent owner.⁵ And this is thought to be true even after

- Whitmarsh v. Walker, 42 Mass. (1 Metc.) 313 ;
 Harrell v. Miller, 35 Miss. 700 ;
 s.c. 72 Am. Dec. 154 ;
 Killmore v. Howlett, 48 N. Y. 569 ;
 Mumford v. Whitney, 15 Wend. (N. Y.) 380 ; s.c. 30 Am. Dec. 60 ;
 McClintock's Appeal, 71 Pa. St. 365 ;
 Sterling v. Baldwin, 42 Vt. 306 ;
 Ellison v. Brigham, 38 Vt. 64 ;
 Marshall v. Green, L. R. 1 C. P. Div. 35 ; s.c. 15 Moak's Eng. Rep. 218.
¹ Owens v. Lewis, 46 Ind. 488 ; s.c. 15 Am. Rep. 295 ;
 Russell v. Richards, 11 Me. (2 Fairf.) 371 ; s.c. 26 Am. Dec. 532 ; 10 Me. (1 Fairf.) 429 ; 25 Am. Dec. 254 ;
 Drake v. Wells, 93 Mass. (11 Allen) 141, 143 ;
 Giles v. Simonds, 81 Mass. (15 Gray) 441 ; s.c. 77 Am. Dec. 373 ;
 McNeal v. Emerson, 81 Mass. (15 Gray) 384 ;
 Heath v. Randall, 58 Mass. (4 Cush.) 195 ;
 Nettleton v. Sikes, 49 Mass. (8 Met.) 34 ;
 Pierrepont v. Barnard, 6 N. Y. 279 ; s.c. 5 Barb. (N. Y.) 364 ;
 2 Am. Lead. Cas. (4th ed.) 739, 740, 746, 752 ;
 Smith v. Benson, 1 Hill (N. Y.) 176 ;
 Mumford v. Whitney, 15 Wend. (N. Y.) 380 ; s.c. 30 Am. Dec. 60 ;
 Barnes v. Barnes, 6 Vt. 388.
² See : White v. Foster, 102 Mass. 375 ;
 Delaney v. Root, 99 Mass. 546 ; s.c. 97 Am. Dec. 52 ;
 Clap v. Draper, 4 Mass. 266 ; s.c. 8 Am. Dec. 215 ;
 Knotts v. Hydrick, 12 Rich. (S. C.) L. 314.
³ Lyman v. Hale, 11 Conn. 177 ; s.c. 27 Am. Dec. 728 ;
 Hoffman v. Armstrong, 48 N. Y. 201, 203 ; s.c. 8 Am. Rep. 537 ;
 Dubois v. Beaver, 25 N. Y. 123 ; s.c. 82 Am. Dec. 326 ;
 Holder v. Coates, 1 Moo. & M. 112 ; s.c. 22 Eng. C. L. 485 ;
 Masters v. Pollie, 2 Rolle, 141.
Compare : Waterman v. Soper, 1 Ld. Raym. 737.
⁴ Hoffman v. Armstrong, 48 N. Y. 201 ; s.c. 8 Am. Rep. 537 ;
 Skinner v. Wilder, 38 Vt. 115 ; s.c. 88 Am. Dec. 645 ;
 Master v. Pollie, 2 Rolle, 141.
See : Norrice v. Baker, 3 Bulst. 196 ;
 Mitten v. Faudrye, Poph. 161, 163.
⁵ Lyman v. Hale, 11 Conn. 177 ; s.c. 27 Am. Dec. 728 ;
 Hoffman v. Armstrong, 48 N. Y. 201 ; s.c. 8 Am. Rep. 537 ;
 affirming 46 Barb. (N. Y.) 337 ;
 Dubois v. Beaver, 25 N. Y. 122 ; s.c. 82 Am. Dec. 326 ;

the fruit ripens and falls from the branches of the tree on to the land of such adjoining owner ; and that the owner of the tree may enter peaceably and take the fallen fruit away.¹ The adjoining owner, however, cannot be required to submit to this trespass of the tree on his land, but may cut the penetrating roots and lop off the overhanging branches.²

SEC. 58. **Same — Same — “Line trees.”** — When a tree stands upon the boundary line between two adjacent properties, so that a part of the trunk of the tree is on one side and a part on the other side of the line, the tree and its fruit is then the common property of the owners of the adjoining estates, and neither can remove or injure either without the consent of the other.³

Skinner v. Wilder, 38 Vt. 115 ; s.c. 88 Am. Dec. 645.

Rights of adjoining owners in tree wholly on one's land.—In *Dubois v. Beaver*, *supra*, ALLEN, J., says that different opinions have been held as to the rights of the owners of adjoining estates in trees planted, and the bodies of which are wholly upon one, while the roots extend and grow into the other ; some holding that, in such cases, the tree, by reason of the nourishment derived from both estates, becomes the joint property of the owners of such estates.

Griffin v. Bixby, 12 N. H. 454 ; s.c. 37 Am. Dec. 225 ;

Waterman v. Soper, 1 Ld. Raym. 737 ;

2 Bouv. Inst. 158.

While others, with better reason, it seems to me, hold that the tree is wholly the property of him on whose land the trunk stands.

Lyman v. Hale, 11 Conn. 117 ; s.c. 27 Am. Dec. 728 ;

Holder v. Coates, 1 Moo. & M. 112 ;

Masters v. Pollie, 2 Rolle, 141 ;

Cabbe on Real Prop. § 96.

¹ See : *Parsons' Laws of Business* (2d ed.) 817.

² *Grandona v. Lovdal*, 70 Cal. 161 ; s.c. 11 Pac. Rep. 623 ;

Lyman v. Hale, 11 Conn. 173 ; s.c. 27 Am. Dec. 728, 731.

Cope v. Marshall, 1 Burr. 268 ;

Welch v. Nash, 8 East 394 ; s.c. 9 Rev. Rep. 478 ;

Waterman v. Soper, 1 Ld. Raym. 737 ;

Masters v. Pollie, 2 Rolle, 141, 144 ;

Rex v. Pappineau, 2 Str. 688 ;

Crowhurst v. Am. Burial Board, 39 L. T. N. S. 355.

Nuisance of overhanging branches abated.—In *Lyman v. Hale*, 11 Conn. 173 ; s.c. 27 Am. Dec. 728, 731, BISSELL, J., says : Now, if these branches were a nuisance to the defendant's land, he had clearly a right to treat them as such, and as such to remove them. But he as clearly had no right to convert either the branches or the fruit to his own use.

Beardslee v. French, 7 Conn. 125 ; s.c. 18 Am. Dec. 86 ;

Dyson v. Collick, 5 Barn. & Ald. 600 ; 7 Serg. & Lowb. 205 ; s.c. 7 Eng. C. L. 328 ;

Welch v. Nash, 8 East 294.

³ *Griffin v. Bixby*, 12 N. H. 454 ; s.c. 37 Am. Dec. 225 ;

Dubois v. Beaver, 25 N. Y. 123 ; s.c. 82 Am. Dec. 326 ;

Skinner v. Wilder, 38 Vt. 115 ; s.c. 88 Am. Dec. 645 ;

Waterman v. Soper, 1 Ld. Raym. 737 ;

Anonymous Case, 2 Rolle, 255.

See : *Odiorna v. Lyford*, 9 N. H. 502, 511 ; s.c. 32 Am. Dec. 387.

SEC. 59. **Same—Cut trees.**—Although growing trees are a part of the soil, and pass with it on conveyance, whether upright or prostrate,¹ as soon as trees are severed from the root by being cut or blown down they become “timber” or “lumber,” according to the use to which the fallen trunk can be applied.² Where such tree-trunks are allowed to lie upon the ground where they fell, they will remain fixtures and pass by a deed of the land;³ but where the fallen trunks have been worked up into hewed timbers, posts and round logs, or other materials, and are lying loosely upon the land, though originally intended to be put into a building upon the land, they cease to be fixtures and do not pass by a deed of the realty, nor under the description of appurtenances.⁴

SEC. 60. **Ground-rent—Definition.**—Ground-rent is a rent reserved by a grantor to himself and his heirs, as a consideration, or part consideration, of a conveyance of land in fee-simple.⁵ We are not aware that ground-rents, *eo nomine*, and as a species of real estate, exist in any state in the Union, aside from Pennsylvania.⁶ Being in the nature of a common-law rent, this species of property is deserving of a brief exposition here. Although ground-rents are frequently called, by conveyancers and others, rent charges, and although in drawing the ground-rent deed they are invariably treated as such, the land being expressly charged with the right of distress, yet it has been settled since the case of *Ingersoll v. Sergeant*,⁷ that they are rents service.

Trespass for cutting “line” tree.

—It is said in the case of *Relvea v. Beaver*, 34 Barb. (N. Y.) 547, that whether “line trees” are common property or not, trespass will lie by one owner against an adjoining owner for cutting such a tree.

¹ *Cockrill v. Downey*, 4 Kan. 426.

See: *Ante*, § 56.

² See: *United States v. Schuler*, 6 McL. C. C. 37.

³ *Brackett v. Goddard*, 54 Me. 309.

⁴ *Cook v. Whiting*, 16 Ill. 480.

⁵ *Bosler v. Kuhn*, 8 Watts & S. (Pa.) 183, 185;

Kenege v. Elliott, 9 Watts (Pa.) 258, 262;

Anderson's L. Dic. 496;

1 Bouv. L. Dict. (15th ed.) 723.

⁶ See an interesting and instructive paper on “Ground-rents in Philadelphia,” in the *Quarterly Journal of Economics*, vol. II., pp. 297–314.

⁷ 1 Whart. (Pa.) 337.

See: *Franciscus v. Reigart*, 4 Watts (Pa.) 98;

Kenege v. Elliott, 9 Whart. (Pa.) 258, 262.

SEC. 61. **Same — Nature and method of creation.**—Ground-rent, like rent granted for owelty of partition, or in lieu of dower, partakes of the realty, and has no touch of personal responsibility in its complexion ; and even where the reservation is attended with a clause of distress, the land is exclusively the debtor ;¹ that is, the obligation to pay a ground-rent arises from no mere personal covenant to pay, but by force of the reservation and acceptance of the land. The former is by words exclusively of the grantor himself, but by which the grantee becomes bound upon acceptance of the estate.² It must not be understood by this that the grantee is not personally liable upon any express covenants he may have made to pay rent, or in an action of debt or assumpsit at common law ;³ but simply that the ground-rent is created by the reservation and not by the covenant to pay. The consideration for the payment of the rent is the enjoyment of the land ;⁴ there is, therefore, no personal responsibility independent of such enjoyment, and hence it is that the land is termed the debtor.⁵ The covenant is but an accessory, the rent being the principal.⁶

SEC. 62. **Same — Disposition of in case of intestacy.**—The interest of the owner of the ground-rent is an estate altogether distinct, and of a very different nature from that which the owner of the land has in the land itself. Each is considered the owner of a fee-simple estate. The one has an estate of inheritance in the rent, and the other has an estate of inheritance in the land out of which the rent issues. The one is an incorporeal inheritance in fee, and the other is a corporeal inheritance in fee.⁷ Ground-

¹ *Bosler v. Kuhn*, 8 Watts & S. (Pa.) 183, 185.

² 1 Co. Litt. (19th ed.) 144a.

³ See : *Maule v. Weaver*, 7 Pa. St. 329, 331.

⁴ *Warner v. Caulk*, 3 Whart. (Pa.) 193, 197 ;
Ingersoll v. Sergeant, 1 Whart. (Pa.) 337.

⁵ The enjoyment of the land is so completely the consideration for the payment of the rent, that the grantee of the land is bound to pay the rent only as

long as the title he receives from the grantor proves sufficient to secure and protect him in that enjoyment.

See : *Nagle v. Ingersoll*, 7 Pa. St. 185 ;

St. Mary's Church v. Miles, 1 Whart. (Pa.) 229, 235 ;

Garrison v. Moore (Pa.), 9 Leg. Int. 2.

⁶ Chief Justice GIBSON, in *Bosler v. Kuhn*, 8 Watts & S. (Pa.) 185.

⁷ *Irwin v. Bank of United States*, 1 Pa. St. 349.

rents, being real estate, in case of intestacy, go to the heirs and not to the administrator or executor.¹

SEC. 63. Heirlooms — Definition.—Heirlooms are a class of goods and chattels which, contrary to the nature of chattel property, goes, by special custom in England, to the heir along with the inheritance, and not to the executor of the last proprietor,² and is neither lands nor tenements, but a mere movable; yet being inheritable is comprised under the general term hereditaments.³ Heirlooms are generally implements and articles of furniture⁴ which cannot be taken away without damaging or dismembering the freehold;⁵ such as a horn long on the estate,⁶ Journals of the House of Lords, delivered to a peer,⁷ family pictures,⁸ doves in a dove-cot,⁹ rabbits in a warren,¹⁰ fish in a pond,¹¹ deer in a park,¹² jewels in a crown,¹³ family jewels,¹⁴ and charts and evidences attendant on the inheritance.¹⁵

SEC. 64. Same — Not recognized in America.—It is thought that the laws of this country do not recognize heirlooms,¹⁶ notwithstanding the fact that Ohio courts are said to have held that they are exempt from execution,¹⁷

¹ Cobb v. Biddle, 14 Pa. St. 444.

² 2 Bl. Com. 427;

1 Co. Litt. (19th ed.) 18b;

11 Vin. Abr. 167.

See : Spooner v. Brewster, 3 Bing.

136; s.c. 11 Eng. C. L. 75;

Byng v. Byng, 10 H. L. Cas. 183;

Petre v. Heneage, 12 Mod. 520;

s.c. 1 Ld. Raym. 728;

Pusey v. Pusey, 1 Vern. 273.

³ 2 Bl. Com. 17;

1 Co. Litt. (19th ed.) 388;

Shep. Touch. 432.

⁴ Id.

⁵ 4 Bl. Com. 427.

⁶ Pusey v. Pusey, 1 Vern. 273.

⁷ Upton v. Ferrers, 5 Ves. 806.

⁸ Liford's Case, 11 Co. 50;

Savile v. Scarborough, 1 Swan. 537; s.c. 1 Wils. Ch. 239.

⁹ Ford v. Tynte, 2 Johns. & H. 150.

¹⁰ Ford v. Tynte, 2 Johns. & H. 150.

¹¹ Liford's Case, 11 Co. 50; Shep. Touch. 470.

¹² Liford's Case, 11 Co. 50;

Shep. Touch. 470.

It seems that it will be otherwise where the deer are tamed.

See : Morgan v. Abergavenny, 8 C. B. 768, 788; s.c. 65 Eng. C. L. 767, 787.

¹³ 2 Bl. Com. 428; 1 Co. Litt. 18.

¹⁴ These may be heirlooms independently of the real estate.

Shelley v. Shelley, 37 L. J. Ch. 357; s.c. L. R. 6 Eq. 540; 16 W. R. 1036.

Books are not heirlooms, and if limited to go with the entailed goods or estate, they become the absolute property of the first tenant in tail.

Bridgewater v. Egerton, 2 Ves. Sr. 122.

¹⁵ Lord v. Wardle, 3 Bing. N. C. 680; s.c. 32 Eng. C. L. 314.

¹⁶ See: Messeley's Estate, 5 W. N.C. 102;

1 Woener's Am. L. Admsr. 590.

¹⁷ McMicken v. Board of Directors of University, 2 Am. L. Reg. N. S. 489.

awarded exemplary damages for their conversion,¹ and to have declared that the bond given does not take their place in replevin.² But the first case simply relates to family pictures, which are exempt by statute, the second is merely a reference, by way of illustration, to family pictures and other relics as objects having ideal values, and the third is barely a statement made *arguendo* by the court that where the thing replevied is of a peculiar or fictitious value, “such as family portraits, heirlooms, personal mementos, and the like,” the defendant will not necessarily be compelled to accept the appraisement in lieu of the article.

SEC. 65. Houses and buildings.—A well-known maxim of the common law, *quicquid plantatur solo, solo cedit*, whatever is affixed to or planted in the ground, is a part of the soil,³ is recognized alike in England⁴ and America.⁵ Under this rule all houses and buildings are included in the terms “lands” and “real estate.”⁶ All houses being *prima facie* a part of the realty,⁷ if one person erects a house upon the lands of another without any interest in the land, and without any agreement thereto, such house becomes a part of the realty and passes

¹ Woolsey v. Seeley, Wright (Ohio) 360.

² Smith v. McGregor, 10 Ohio St. 461, 473.

³ Kerr's “Adjudicated Words, Phrases and Applied Maxims.”

⁴ Wake v. Hall, L. R. 8 App. Cas. 195; s.c. 52 L. J. Q. B. 494; 48 L. T. 834; 31 W. R. 585; 47 J. P. 548, aff'g L. R. 7 Q. B. D. 595; 50 L. J. Q. B. 545; 44 L. T. 42; 45 J. P. 340;

Minshall v. Lloyd, 2 Mees. & W. 450;

Dearden v. Evans, 5 Mees. & W. 11;

Brown Max. 401;

1 Co. Litt. (19th ed.) 53a.

⁵ Inhabitants of Sudbury v. Jones, 62 Mass. (8 Cush.) 184, 189;

Price v. Weehawken Perry Co., 31 N. J. Eq. (4 Stew.) 34;

Williamson v. New Jersey S. R. Co., 29 N. J. Eq. (2 Stew.) 317;

North Hudson R. Co. v. Booraem, 28 N. J. Eq. (1 Stew.) 450, 454;

Bellow v. New York Floating Dry Dock Co., 112 N. Y. 263,

282; s.c. 20 N. Y. S. R. 707;

Beardsly v. Ontario Bank, 31 Barb. (N. Y.) 619, 630;

Buckley v. Buckley, 11 Barb. (N. Y.) 43, 54;

King v. Wilcomb, 7 Barb. (N. Y.) 263, 266;

St. Johnsbury & L. C. R. Co. v. Willard, 61 Vt. 134; s.c. 17

Atl. Rep. 38; 2 L. R. A. 528.

⁶ Coombs v. Jordan, 3 Bland. Ch. (Md.) 284; s.c. 22 Am. Dec. 283;

Inhabitants of Sudbury v. Jones, 62 Mass. (8 Cush.) 184, 189;

2 Bl. Com. 17;

1 Co. Litt. (19th ed.) 4a.

⁷ Ford v. Cobb, 20 N. Y. 344;

Mott v. Palmer, 1 N. Y. 564;

Reid v. Kirk, 12 Rich. (S. C.) L. 54;

Lipsky v. Borgmann, 52 Wis. 256; s.c. 38 Am. Rep. 735;

Huebschmann v. McHenry, 29 Wis. 655.

with a conveyance of the land.¹ And if a man builds a house on his own land with the materials of another, the property in the land vests in the building by the right of accession, and the owner of the land is only obliged to answer to the owner of the materials for their value.² This is on the principle that the nature has been changed and that the articles have become a part of the freehold.³ By the law of England, as well as by the civil law, trespassers who willfully take the property of another can acquire no right in it on the principle of accession, but the owner may reclaim it so long as he can establish its identity,⁴ whatever alteration of form it may have undergone,⁵ unless it be changed into a different species and be incapable of restitution to its former state; and by the civil law even then the trespasser could acquire no right by accession, unless the materials had been taken away in ignorance of their being the property of another.⁶

SEC. 66. Same — Built by tenant.—We will see in a sub-

¹ *Bonney v. Foss*, 62 Me. 248;

Inhabitants of Sudbury v. Jones, 62 Mass. (8 Cush.) 184, 189-190;

Cooper v. Adams, 39 Mass. (6 Cush.) 87;

Peirce v. Goddard, 39 Mass. (22 Pick.) 559; s.c. 33 Am. Dec. 764;

Washburn v. Sproat, 16 Mass. 449;

Rimteyer v. Morss, 4 Abb. Ct. App. (N. Y.) 55; s.c. 5 Abb. (N. Y.) Pr. N. S. 44; 3 Keyes (N. Y.) 349;

West v. Stewart, 7 Pa. St. 122;

Leland v. Gasset, 17 Vt. 403.

² *Mitchell v. Stetson*, 61 Mass. (7 Cush.) 435, 439;

Peirce v. Goddard, 39 Mass. (22 Pick.) 559; s.c. 33 Am. Dec. 764;

2 Kent Com. (13th ed.) 360, 361.

It is laid down by Molloy as a settled principle of law that if a man cuts down the trees of another, or takes timber or plank prepared for the erection or repairing of a dwelling-house, nay, though some of them are for shipping and building a ship, the property follows

not the owners but the builders. Mol. de Jure Mar. lib. 2, c.1, § 7.

See *Peirce v. Goddard*, 39 Mass. (22 Pick.) 559; s.c. 33 Am. Dec. 764.

³ See Bros. tit. "Property," pl. 23.

⁴ *Riddle v. Driver*, 12 Ala. 590;

Davis v. Easley, 13 Ill. 192;

Herad v. James, 49 Miss. 236;

Silbury v. McCoon, 3 N. Y. 379; s.c. 53 Am. Dec. 307;

Hyde v. Cookson, 21 Barb. (N. Y.) 92;

Curtis v. Groat, 6 John. (N. Y.) 168;

Snyder v. Vaux, 2 Rawle (Pa.) 423; s.c. 21 Am. Dec. 466.

⁵ *Mitchell v. Stetson*, 61 Mass. (7 Cush.) 435, 439;

Peirce v. Goddard, 39 Mass. (22 Pick.) 559, 561; s.c. 33 Am. Dec. 764;

Betts v. Lee, 5 John. (N. Y.) 348; s.c. 4 Am. Dec. 368.

⁶ *Peirce v. Goddard*, 39 Mass. (22 Pick.) 559; s.c. 33 Am. Dec. 764.

See: *Betts v. Lee*, 5 John. (N. Y.) 348; s.c. 4 Am. Dec. 368;

2 Kent Comm. (13th ed.) 362.

sequent chapter¹ that where a tenant erects upon the lands occupied by him buildings for his own convenience or comfort in the occupancy or use of the premises, he has the right, within certain restrictions, to remove such buildings during the term of his lease, or the period of his future possessions as such tenant. But if such tenant intended building for the permanent improvement of the freehold, or if he have a permanent interest in the land as remainderman or revisioner,² is the husband of the tenant in fee,³ or be in possession under a contract of purchase,⁴ the structure becomes a part of the realty.⁵

SEC. 67. **Same—Consent to erection.**—Where a house or other building is erected upon the lands of another with his consent, either express or implied, it will remain the property of the builder,⁶ as between the parties, and he may maintain trover for it as against the owner of the land.⁷ But as between innocent third parties and *bona fide* purchasers this rule does not prevail. The right to erect a building upon the lands of another being an incorporeal hereditament and not a tangible right⁸ should be created only by written instrument.⁹

SEC. 68. **Same—Chamber or floor in building.**—As one may have the title in fee to a house without further interest in the land on which it stands than a right to have

¹ See : *Post*, chapter IV. "Fixtures."

² *Cooper v. Adams*, 60 Mass. (6 Cush.) 87.

³ *Glidden v. Bennet*, 43 N. H. 306. See : *Washburn v. Sproat*, 16 Mass. 449.

⁴ *Ogden v. Stock*, 34 Ill. 522 s.c. 85 Am. Dec. 332 ; *Hemenway v. Cutler*, 51 Me. 407 ; *Pullen v. Bell*, 40 Me. 314 ; *Russell v. Richards*, 10 Me. 429 ; s.c. 11 Id. 371 ; 26 Am. Dec. 532 ;

Poor v. Oakman, 104 Mass. 309 ; *Eastman v. Foster*, 49 Mass. (8 Met.) 19.

See : *Hinkley & E. Iron Co. v. Black*, 70 Me. 473.

⁵ *Rinteyer v. Morss*, 3 Keyes (N. Y.) 349 ; s.c. 4 Abb. Ct. App. (N. Y.) 55 ; 5 Abb. (N. Y.) Pr. N. S. 44 ; *Christian v. Dripps*, 28 Pa. St. 279 ;

Leland v. Garrett, 17 Vt. 403 ;

Lipsky v. Borgmann, 52 Wis. 256 ; s.c. 9 N. W. Rep. 158.

⁶ *Curtis v. Hoyt*, 19 Conn. 154 ; *Hartwell v. Kelly*, 117 Mass. 235 ; *Inhabitants of Sudbury v. Jones*, 62 Mass. (8 Cush.) 184 ; *Dame v. Dame*, 38 N. H. 429 ; s.c. 75 Am. Dec. 195 ; *Harris v. Gillingham*, 6 N. H. 9 ; s.c. 23 Am. Dec. 701.

⁷ *Central Branch R. Co. v. Fritz*, 20 Kan. 430 ; s.c. 27 Am. Rep. 175 ;

Osgood v. Howard, 6 Me. (6 Greenl.) 452 ; s.c. 20 Am. Dec. 322.

⁸ *Bract*. II. 18 ;

1 Co. Litt. (19th ed.) 20a, 49a.

⁹ 3 Kent. Com. (13th ed.) 402.

See : *Trammall v. Trammall*, 11 Rich. (S. C.) L. 471.

it remain there, so one may own the soil and other parties each own different floors respectively, or a single chamber even, in the building erected thereon, with right of way to and from.¹ Such owners will not be tenants in common, but adjoining tenants, possessing as an essentially separate and distinct interest as if they were one by the side of the other.² They will not be liable to each other for repairs to the roof or stories above, or to the foundation or stories below, or for damages caused because of a want of such repairs.³ This is because of the well-settled rule that the owner of one part of a building has no action to recover damages at law for the willful neglect of the owner of the other part in permitting his part to become ruinous and fall into decay, whereby the other part is injured.⁴ In the case of *Loring v. Bacon*⁵

¹ *Rhodes v. McCormick*, 4 Iowa 368; s.c. 68 Am. Dec. 663; *Cheeseborough v. Green*, 10 Conn. 318; s.c. 26 Am. Dec. 396; *Lowell M. H. v. Lowell*, 42 Mass. (1 Met.) 538;

Loring v. Bacon, 4 Mass. 575; *Humphries v. Brogden*, 12 Q. B. 739, 747, 756; s.c. 64 Eng. C. L. 738;

Doe v. Burt, 1 T. R. 701.

Cheeseborough v. Green, 10 Conn. 318; s.c. 26 Am. Dec. 396;

McCormick v. Bishop, 28 Iowa 237;

Stockwell v. Hunter, 52 Mass. (11 Met.) 448; s.c. 45 Am. Dec. 220, 222;

Proprietors of Meeting-house v. City of Lowell, 42 Mass. (1 Met.) 541;

Loring v. Bacon, 4 Mass. 575.

² *Cheeseborough v. Green*, 10 Conn. 318; s.c. 26 Am. Dec. 396;

Ottumwa Lodge v. Lewis, 34 Iowa 67; s.c. 11 Am. Rep. 135;

Loring v. Bacon, 4 Mass. 575.

See: *Adams v. Marshall*, 188 Mass. 228, 238-9; s.c. 52 Am. Rep. 271;

Calvert v. Aldrich, 99 Mass. 74; s.c. 96 Am. Dec. 693;

Wiggin v. Wiggin, 43 N. H. 561; s.c. 80 Am. Dec. 192.

⁴ *Pierce v. Dyer*, 109 Mass. 374; s.c. 12 Am. Rep. 716.

Remedy at common law.—In such

cases, the remedy at common law is by writ *de reparatione facienda*.

Wiggin v. Wiggin, 43 N. H. 561; s.c. 80 Am. Dec. 192, 195.

Citing: *Bowles' Case*, 11 Co. 83;

Tenant v. Goldwin, 1 Salk. 360;

1 Co. Litt. (19th ed.) 54b, 200b;

4 Kent Com. (13th ed.) 370.

So where one's house is ruinous and likely to fall on his neighbor's house, the same remedy is said to exist.

1 Co. Litt. (19th ed.) 56b, and cases cited.

Same—On action on the case, it is said it will lie at common law, for the neglect to repair, by reason of which a neighbor's house is injured.

Wiggin v. Wiggin, *supra*.

Citing: 1 Co. Litt. (19th ed.) 56b, note 2, and *Fitzh. N. B.* 127, note a.

Same—Remedy in equity.—But in the case of *Cheeseborough v. Green*, 10 Conn. 319; s.c. 26 Am. Dec. 396, the plaintiff owned and occupied the foundation and first and second stories of a building, and the defendant the third story and the roof, which had become leaky and ruinous, whereby the plaintiff's goods were injured, it was held that an action on the

⁵ 4 Mass. 575.

the defendant was seized in fee-simple of the lower floor and the cellar under it, and the plaintiff was seized of a chamber over it and of the remainder of the house. The roof became in such a condition that unless repaired no part of the house could be comfortably occupied. The defendant refused to join in making the repairs. The plaintiff then made the necessary repairs, and brought an action in assumpsit for labor and materials employed and money expended, and the court said: "Although in the case the parties consider themselves as severally seized of different parts of one dwelling, yet in legal contemplation each of the parties has a distinct dwelling-house adjoining together, the one being situated over the other. The lower room and the cellar are the dwelling-house of the defendant; the chamber, roof, and other parts of the edifice are the plaintiff's dwelling-house. And in this action it appears that having repaired his own house, he calls upon the defendant to contribute to the expenses, because his house is so situated that the defendant derives a benefit from his repairs and would have suffered a damage, if he had not repaired. Upon a very full search into the principles and maxims of the common law, we cannot find that any remedy is provided for the plaintiff."¹

case would not lie, but that the remedy must be sought in equity.

See: *Wiggin v. Wiggin*, 43 N. H. 561; s.c. 80 Am. Dec. 192, 196; *Campbell v. Mesier*, 4 John. Ch. (N. Y.) 335; s.c. 8 Am. Dec. 570;

4 Kent Com. (13th ed.) 371, 412.

¹ In the latter case of *Adams v. Marshall*, 138 Mass. 228, 238-9, the court say that in the case of *Pierce v. Dyer*, 109 Mass. 374, "it is assumed that the right of support included that of shelter, but no decisions to that effect have been shown us. Some analogy may perhaps be derived from the reciprocal rights and obligations of the owner of an upper to the owner of a lower tenement in the same building. It has been said that the owner of the lower tenement has no right to destroy the supports of the upper

tenement, and that the owner of the upper tenement has no right to destroy the coverings that protect the lower tenement, although, at common law, neither is bound to the other to repair his tenement. The actual decisions on this subject are meager, except in the case of mines (see: *Post*, § 99), where the right of the owner of the soil to subjacent support is well settled."

Citing: *Cheeseborough v. Green*, 10 Conn. 318; s.c. 26 Am. Dec. 396;

Ottumwa Lodge v. Lewis, 34 Iowa 67; s.c. 11 Am. Rep. 135;

McCormick v. Bishop, 28 Iowa 233;

Calvert v. Aldrich, 99 Mass. 74; s.c. 96 Am. Dec. 693;

Loring v. Bacon, 4 Mass. 574;

Stevens v. Thompson, 17 N. H. 103;

Graves v. Berdan, 26 N. Y. 498;

SEC. 69. **Same—Same—Effect of destruction of building.**—If distributed in the possession of such floors or chamber the owner may maintain ejectment therefor.¹ In such a case each individual proprietor of floor or chamber has an interest in the soil so far as necessary for the enjoyment of the premises, and no further,² and if the building should be destroyed by fire, or otherwise, the interest of the individual owning such floor or chamber in the land on which the house stood will be lost,³ in the absence of a stipulation in the conveyance for re-building.⁴

- Dalton v. Angus*, 6 App. Cas. 740 ; ² *Stockwell v. Hunter*, 52 Mass. (11 s.c. 34 Moak's Eng. Rep. 742 ;
Met.) 448 ; s.c. 45 Am. Dec. 220.
Caledonian R. Co. v. Sprot, 2 ³ *Shawmutt Nat. Bank v. Boston*,
Macq. 449 ;
118 Mass. 125 ;
Harris v. Ryding, 5 Mees. & W.
60 ; *Stockwell v. Hunter*, 52 Mass. (11
Met.) 448 ; s.c. 45 Am. Dec. 220.
Humphries v. Rogden, 12 Q. B. ⁴ *Stockwell v. Hunter*, 52 Mass. (11
739 ; s.c. 64 Eng. C. L. 138. Met.) 448 ; s.c. 45 Am. Dec. 220.
¹ *Otis v. Smith*, 26 Mass. (9 Pick.) See : *McMillan v. Solomon*, 42
293 ;
Ala. 356 ; s.c. 94 Am. Dec. 654 ;
Doe v. Burt, 1 T. R. 701. *Ainsworth v. Ritt*, 38 Cal. 89 ;
Graves v. Berdan, 26 N. Y. 498.

CHAPTER III.

WHAT IS REAL PROPERTY—*continued*.

- SEC. 70. Ice a part of the realty.
- SEC. 71. Same—On navigable streams.
- SEC. 72. Same—Same—Where title extends to the thread of the stream.
- SEC. 73. Same—On non-navigable streams.
- SEC. 74. Same—On ponds—1. "Great ponds."
- SEC. 75. Same—Same—2. Mill-ponds.
- SEC. 76. Same—On canals.
- SEC. 77. Same—Appropriation of ice.
- SEC. 78. Incorporeal hereditaments—Definition and nature.
- SEC. 79. Land usually real estate.
- SEC. 80. Same—Exceptions to the general rule.
- SEC. 81. Leasehold estate.
- SEC. 82. Light and air.
- SEC. 83. Manure—Real estate when.
- SEC. 84. Same—Where made in other than agricultural pursuits.
- SEC. 85. Same—Made on non-agricultural lands.
- SEC. 86. Same—Agreement of parties respecting.
- SEC. 87. Same—New Jersey and North Carolina doctrine.
- SEC. 88. Same—English rule.
- SEC. 89. Market-stalls.
- SEC. 90. Mines and minerals.
- SEC. 91. Same—Common-law doctrine.
- SEC. 92. Same—Royal charters.
- SEC. 93. Same—New York doctrine.
- SEC. 94. Same—Pennsylvania doctrine.
- SEC. 95. Same—Georgia doctrine.
- SEC. 96. Same—California doctrine.
- SEC. 97. Same—Severance and conveyance.
- SEC. 98. Same—Reservation of mineral ores.
- SEC. 99. Same—Surface support.
- SEC. 100. Same—Same—Rights of grantee.
- SEC. 101. Same—Same—When owner retains surface.
- SEC. 102. Same—Same—Where owner grants surface and retains minerals.
- SEC. 103. Money real estate when.
- SEC. 104. Movables realty when.
- SEC. 105. Railroads—Road-bed, rails, etc.
- SEC. 106. Same—Foundations, columns, etc., of railroad.

- SEC. 107. Same—Rolling stock.
 SEC. 108. Sea-weed—Marine increment.
 SEC. 109. Same—When cast between high and low water-marks.
 SEC. 110. Saw-mills, saw-dust, etc., real estate when.
 SEC. 111. Water real estate when.

SECTION 70. **Ice a part of the realty.**—While it is true that a riparian owner has simply a usufructuary interest in the water of a stream flowing through his land, yet when that water is congealed and the ice attaches to the soil it becomes a part of the land.¹ Hence the owner of the soil under the water on which the ice forms is to be regarded as the owner of the ice.² This is true not only of ponds wholly or partially forming or being entirely upon such person's premises, but his riparian ownership of the bed of the stream will carry with it the right of the ice forming upon the surface of such streams, as far as riparian right of the soil extends.³

SEC. 71. **Same—On navigable streams.**—By the common law, where rivers are above the ebb and flow of the tide, but navigable in fact, the title of the riparian owner, *prima facie*, extends to the center of the stream; and this rule has been held in this country to apply to our main rivers.⁴ In some of the states, however, such as

¹ Village of Brooklyn v. Smith, 104 Ill. 429; s.c. 44 Am. Rep. 90;

Brookville & M. Hydraulic Co. v. Butler, 91 Ind. 134; s.c. 46 Am. Rep. 580, 584;

State v. Pottmeyer, 33 Ind. 402; s.c. 5 Am. Rep. 224.

² Washington Ice Co. v. Shortall, 101 Ill. 146; s.c. 40 Am. Rep. 196;

State v. Pottmeyer, 33 Ind. 402; s.c. 5 Am. Rep. 224;

Edgerton v. Huff, 26 Ind. 35;

Paine v. Woods, 108 Mass. 160, 173;

Cummings v. Barrett, 64 Mass. (10 Cush.) 186;

Higgins v. Kusterres, 41 Mich. 318; s.c. 32 Am. Rep. 160; 2 N. W. Rep. 13;

Lorman v. Benson, 8 Mich. 18; 32 s.c. 77 Am. Dec. 435;

Myer v. Whitaker, 55 How. (N. Y.) Pr. 376; see comment on, in 21 Am. L. Rep. 320.

³ Bigelow v. Shaw, 65 Mich. 341; s.c. 8 Am. Rep. 902; 32 N. Y. Rep. 800.

See: Village of Brooklyn v. Smith, 104 Ill. 429; s.c. 44 Am. Rep. 90;

Washington Ice Co. v. Shortall, 101 Ill. 46; s.c. 40 Am. Rep. 196;

People's Ice Co. v. The Excelsior, 44 Mich. 229; s.c. 38 A. R. 246;

Lorman v. Benson, 8 Mich. 18; s.c. 77 Am. Dec. 435.

⁴ See: Adams v. Pease, 2 Conn. 481; Houck v. Yates, 82 Ill. 179;

Braxon v. Bressler, 64 Ill. 488;

City of Chicago v. McGinn, 51 Ill. 266; s.c. 2 Am. Rep. 295;

City of Chicago v. Laffin, 49 Ill. 172;

Middleton v. Pritchard, 3 Scam. (Ill.) 510, 516; s.c. 38 Am. Dec. 112;

Bay City Gaslight Co. v. Industrial Works, 28 Mich. 182;

Ryan v. Brown, 18 Mich. 196; s.c. 100 Am. Dec. 154;

Iowa,¹ Kansas,² Missouri,³ North Carolina,⁴ Pennsylvania,⁵ and perhaps elsewhere,⁶ it has been held that the soil under rivers navigable in fact, though not subjected to the ebb and flow of the tide, does not belong to the riparian owner, but to the state. And where there is no ownership of the subjacent soil, a riparian owner has no title to the ice forming on the surface of the river.⁷ The title of the soil being in the state, and the stream being a public highway, the ownership of the ice is held to rest in the general public, or in the state as the representative of that public. The riparian proprietor is said to have no more title to the ice than he has to the fish. "It is simply this, that his land joins the land of the state. The fact that it so joins gives him no title to that land or to anything formed or grown upon it, any more than it does to anything formed or grown or found upon the land of any individual neighbor."⁸ In those states where this view obtains the doctrine is that the ice belongs to the first appropriator, when such appropriation is effected by marking, surveying, and staking off of the ice.⁹

Lorman v. Benson, 8 Mich. 18 ;
s.c. 77 Am. Dec. 439 ;

Schurmeier v. St. Paul & Pac. R. Co., 10 Minn. 82 ; s.c. 83 Am. Dec. 59 ;

Magnolia v. Marshall, 39 Miss. 109 ;

Morgan v. Reading, 11 Miss. 366 ;

Garit v. Chambers, 3 Ohio, 496 ;

Hart v. Hill, 1 Whart. (Pa.) 124 ;

Arnold v. Elmore, 16 Wis. 509 ;

Rundle v. Delaware, etc., Canal Co., 1 Wall. Jr. C. C. 275, 294.

"Fresh rivers, of whatsoever kind, do of common right belong to the owners of the soil adjacent," is the expressive language of the common law, and is of universal application. Chief Justice RUGER, in *Smith v. City of Rochester*, 92 N. Y. 463, 473 ; s.c. 44 Am. Rep. 393.

Citing : *Chenango Bridge Co. v. Paige*, 83 N. Y. 178 ; s.c. 38 Am. Rep. 407 ;

Clinton v. Myers, 46 N. Y. 511 ; s.c. 7 Am. Rep. 373.

¹ *Houghton v. Chicago R. Co.*, 47 Iowa 370 ;

Musser v. Hershey, 42 Iowa 356 ;

Tomlin v. Dubuque & M. R. Co., 32 Iowa 106 ; s.c. 7 Am. Rep. 176 ;

McManus v. Carmichael, 3 Iowa 1.

² *Wood v. Fowler*, 26 Kans. 682 ; s.c. 40 Am. Rep. 330.

³ *Benson v. Morrow*, 61 Mo. 345 ;
Hickey v. Hazard, 3 Mo. App. 480.

⁴ *Wilson v. Forbes*, 2 Dev. (N. C.) L. 30 ;

State v. Glen, 7 Jones (N. C.) L. 321.

⁵ *Cuson v. Blazer*, 2 Binn. (Pa.) 475 ;
Shrunk v. Schuylkill Nav. Co., 14 Serg. & R. (Pa.) 71.

⁶ See : *Barney v. Keokuk*, 94 U. S. 324 ; bk. 24 L. ed. 224 ;
Railroad Co. v. Schurmeier, 74 U. S. (7 Wall.) 272 ; bk. 19 L. ed. 74.

⁷ *Wood v. Fowler*, 26 Kans. 682 ; s.c. 40 Am. Rep. 330, 335.

⁸ *Id.*

⁹ *Woodman v. Pitman*, 79 Me. 456 ; s.c. 1 Am. St. Rep. 342 ; 10 Atl. Rep. 321 ;

Hickey v. Hazard, 3 Mo. App. 480.

SEC. 72. Same—Same—Where title extends to thread of stream.—In those states where the title of the riparian owner extends to the thread of the stream, the common-law rule of ownership prevails, and the adjoining proprietors own the banks and bed of the stream, and have a right to make such use of the land, and of all the benefits of the stream, as will not interfere with the public easement or servitude ;¹ and the ice formed on the water over the land of such proprietor is regarded as his exclusive property.² To this rule, however, there are some exceptions. In Maine³ and Massachusetts,⁴ the right of harvesting ice upon a navigable river is not an absolute right in any person, but is a public right common to all persons who have a right to go upon the stream ; and depends very much upon first appropriation,⁵ as one man's possession may exclude others.

SEC. 73. Same—On non-navigable waters.—The general rule applicable to and governing as to ice formed on fresh navigable waters applies more universally to ice formed on fresh non-navigable streams flowing in a natural channel,⁶ for the reason that most, if not all, those states which deny to the riparian proprietors the ownership of or right to the soil of the navigable fresh-water rivers do not hesitate to accord such right to the riparian proprietors along non-navigable fresh-water streams.

SEC. 74. Same—On ponds—1. "Great ponds."—It is on the theory that the soil beneath the water of certain bodies of fresh water, known as "Great Ponds," is the

¹ *Fletcher v. Thunder Bay River Boom Co.*, 51 Mich. 277, 284 ; s.c. 16 N. W. Rep. 645 ;

Maxwell v. Bay City Bridge Co., 41 Mich. 453, 466 ; s.c. 2 N. W. Rep. 639 ;

Ryan v. Brown, 18 Mich. 207 ; s.c. 100 Am. Dec. 154 ;

Lorman v. Bensin, 8 Mich. 18 ; s.c. 77 Am. Dec. 439.

² *Village of Brooklyn v. Smith*, 104 Ill. 429 ; s.c. 44 Am. Rep. 90 ;

Washington Ice Co. v. Shortall, 101 Ill. 46 ; s.c. 40 Am. Rep. 196 ;

State v. Pottmeyer, 33 Ind. 432 ; s.c. 5 Am. Rep. 224 ;

Edgerton v. Huff, 26 Ind. 36.

³ See : *Woodman v. Pitman*, 79 Me. 456 ; s.c. 1 Am. St. Rep. 342 ; 10 Atl. Rep. 321.

⁴ See : *Paine v. Woods*, 108 Mass. 160, 173 ;

Inhabitants of West Roxbury v. Stoddard, 89 Mass. (7 Allen) 158.

⁵ See : *Post*, § 77.

⁶ See : *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134 ; s.c. 46 Am. Rep. 580, 584 ;

Smith v. The City of Rochester, 92 N. Y. 463 ; s.c. 44 Am. Rep. 393.

property of the state, that the Supreme Judicial Court of Massachusetts have declared that the ice forming on such bodies of water belongs to whoever can get access to and cut it,¹ so long as he does not interfere with the reasonable exercise by others of the like rights in the pond.² The same rule prevails in Maine.³ But where the ice has formed on water over the land of a private proprietor, and not within the natural limits of a "great pond,"—the soil of the bed of which is held to be public property,—the ice will be the individual property of the owner of the shores and bottom of the pond or stream.⁴

SEC. 75. Same—Same—2. Mill-ponds.—A riparian owner whose title runs to the center of a natural or artificial pond has the right to cut the ice on the water over his land, notwithstanding the right of another to flood such land for mill purposes, so long as he does not thereby actually and perceptibly injure the mill-owner in his privilege.⁵ This right results from and grows out of the title to the bed of the stream or pond, and such right to the use of the water as results therefrom.⁶ The right of a

¹ See : *Rowell v. Doyle*, 131 Mass. 474 ; s.c. 38 Am. Rep. 255, note ; *Gage v. Steinkrauss*, 131 Mass. 222 ; *Hittinger v. Eames*, 121 Mass. 539 ; *Fay v. Salem & D. Aqueduct Co.*, 111 Mass. 27 ; *Commonwealth v. Vincent*, 108 Mass. 441, 446 ; *Paine v. Woods*, 108 Mass. 160, 169, 173 ; *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158 ; *Cummings v. Barrett*, 64 Mass. (10 Cush.) 186.

² *Rowell v. Doyle*, 131 Mass. 474 ; s.c. 38 Am. Rep. 225, note ; *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158.

³ See : *Brastow v. Rockport Ice Co.*, 77 Me. 100.

⁴ See : *Paine v. Woods*, 108 Mass. 160, 173.

⁵ *Brookville & M. Hydraulic Co. v. Butler*, 19 Ind. 134 ; s.c. 46 Am. Rep. 580 ; *Dodge v. Berry*, 26 Hun (N. Y.) 246.

See : *Washington Ice Co. v. Shortall*, 101 Ill. 46 ; s.c. 40 Am. Rep. 196 ;

Julien v. Woodsmall, 82 Ind. 568 ; *Edgerton v. Huff*, 26 Ind. 35 ;

State v. Pottmeyer, 33 Ind. 402 ; s.c. 5 Am. Rep. 224 ;

Paine v. Woods, 108 Mass. 160, 173 ; *Elliot v. Fitchburg R. Co.*, 64 Mass. (10 Cush.) 191 ;

Cummings v. Barrett, 64 Mass. (10 Cush.) 186 ;

Bigelow v. Shaw, 65 Mich. 341 ; s.c. 8 Am. St. Rep. 902 ; 32 N. W. Rep. 800 ;

Brown v. Brown, 30 N. Y. 519 ; s.c. 86 Am. Dec. 406 ;

Marshall v. Peters, 12 How. (N. Y.) Pr. 218 ;

De-Baun v. Bean, 29 Hun (N. Y.) 236 ;

Merritt v. Brinkerhoff, 17 John. (N. Y.) 306 ; s.c. 8 Am. Dec. 404.

⁶ *Bigelow v. Shaw*, 65 Mich. 341 ; s.c. 8 Am. St. Rep. 902 ; 32 N. W. Rep. 800.

Citing : *Washington Ice Co. v. Shortall*, 101 Ill. 46 ; s.c. 40 Am. Rep. 196 ;

mill-owner to pond water on the land of another is simply a license or an easement,¹ and does not take from the owner of the fee the right to make any profitable use he can of the land thus flooded, whether the right of flowage is acquired by agreement under statute, or through prescription; for in either case no right is acquired to the land itself, or to the profits which a use of it will produce.² The owner of the servient estate has a right to all the profits which may arise from the soil, and may make such use of the soil as is not inconsistent with the license or easement.³ The owner of the land flooded must not indeed draw off by canals, aqueducts, or ditches the water which has been raised by the dam,⁴ but he may use it for watering his cattle, irrigating his crops and garden, or any other reasonable purpose which does not particularly and in a perceptible and substantial degree impair the right to run the mill; and he may therefore take and carry away the water, when formed into ice, for use or for sale, so long as he does not thereby appreciably diminish the head of water at the dam of the mill-owner.⁵

- Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134; s.c. 46 Am. Rep. 580;
Stevens v. Kelley, 78 Me. 445; s.c. 57 Am. Rep. 813;
Paine v. Woods, 108 Mass. 160, 172;
Marshall v. Peters, 12 How. (N. Y.) Pr. 218;
Dodge v. Berry, 26 Hun (N. Y.) 246.
¹ *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134; s.c. 46 Am. Rep. 580, 583;
Snowden v. Wilas, 19 Ind. 10; s.c. 81 Am. Dec. 370;
Baer v. Martin, 8 Blackf. (Ind.) 317.
² *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134; s.c. 46 Am. Rep. 580.
 See: *Julien v. Woodsmall*, 82 Ind. 568;
State v. Pottmeyer, 33 Ind. 402; s.c. 5 Am. Rep. 224;
Edgerton v. Huff, 26 Ind. 35;
Snowden v. Wilas, 19 Ind. 10;
Baer v. Martin, 8 Blackf. (Ind.) 317;
Maxwell v. McAtee, 9 B. Mon. (Ky.) 20; s.c. 48 Am. Dec. 409;
Baker v. Frick, 45 Md. 337, 339; s.c. 24 Am. Rep. 506;
Paine v. Woods, 108 Mass. 160;
Storm v. Manchang Co., 95 Mass. (13 Allen) 10;
Williams v. Nelson, 40 Mass. (23 Pick.) 141; s.c. 34 Am. Dec. 45;
O'Linda v. Lathrop, 38 Mass. (21 Pick.) 292;
Earl v. De Hart, 12 N. J. Eq. (1 Beas.) 280; s.c. 72 Am. Dec. 395;
Bean v. Coleman, 44 N. H. 539;
Emons v. Turnbull, 2 John. (N. Y.) 313;
Mason v. Hill, 5 Barn. & Ad. 1; s.c. 27 Eng. C. L. 1.
³ *Julien v. Woodsmall*, 82 Ind. 568.
 See: *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134; s.c. 46 Am. Rep. 580, 582;
Mason v. Hill, 5 Barn. & Ad. 1; s.c. 27 Eng. C. L. 1.
⁴ *Paine v. Woods*, 108 Mass. 160, 173.
 See: *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134; s.c. 46 Am. Rep. 580, 584;
Storm v. Manchang Co., 95 Mass. (13 Allen) 10;
Cook v. Hull, 20 Mass. (3 Pick.) 269; s.c. 15 Am. Dec. 208.
⁵ *Paine v. Woods*, 108 Mass. 160, 173;

SEC. 76. Same—On canals.—Where the public has condemned and taken land for the purpose of constructing a canal, the owners of the fee of the lands through or over which the canal passes, like the riparian proprietors along a river or pond, are entitled to harvest the ice therefrom, provided the taking does not interfere with the use of the water for navigation and hydraulic purposes.¹ But where the legislature or the constitution of the state has authorized the seizure of the fee when required for public purposes, and the fee is taken, the owner will not have the right to the ice forming on the water of the canal adjoining and attaching to his premises. The reason of this is because in such case the owner must be awarded, as compensation for the taking, the value of his land; and the payment of this award deprives him not only of the land itself, but also of all the rights and privileges attaching thereto.²

Where the state condemns the fee for the construction of a canal, and afterwards, for a consideration, lets the canal and the waters thereof for a specified time, transferring for that time “all tolls and revenues to be derived, or which may accrue from” the use of such canal, this will give to the transferees as much right to the ice forming on such canal, and to the proceeds thereof, as to the tolls and water-rents.³

SEC. 77. Same—Appropriation of ice.—In those states in which the title to the soil of the bed of the navigable streams and large ponds is in the state, the ice forming

Cumming v. Barrett, 64 Mass. (10 Cush.) 186.

Mill River Co. v. Smith, and *Myer v. Whitker*, criticised.—In the case *Brookville & M. Hydraulic Co. v. Butler*, 91 Ind. 134; s.c. 46 Am. Rep. 580, 584, Judge ELLIOT, after reviewing the authorities and giving his adherence to the doctrine laid down in the text, says: “With the exception of the cases of *Mill River, etc., Co. v. Smith*, 34 Conn. 462, and *Myer v. Whitaker*, 5 Abbott (N. Y.) N. Cas. 172, we have found none asserting a contrary doctrine.

Of the latter case we need only say it is confessedly against the weight of authority, is condemned by the courts of the same state, is the decision of a single judge, and is not well reasoned. The decision in the first of these cases is that of a divided court, and the reasoning upon which it is founded is unsatisfactory.”

¹ *Edgerton v. Huff*, 26 Ind. 36.

² *Water Works Co. v. Burkhart*, 41 Ind. 364.

³ *Cromie v. Trustees Wabash & Erie Canal Co.*, 71 Ind. 208.

thereon belongs to the public at large, and any one who can gain access to the same may appropriate and cut it.¹ But to entitle one person to property in any portion of the ice on such a stream or pond, as against any other comer, there must be definite acts of appropriation ; such as staking off and definitely marking, scraping off the snow, or otherwise preparing the ice for harvesting.² It is said by the Supreme Judicial Court of Maine in the recent case of *Woodman v. Pitman*,³ that ice-fields on navigable rivers, after being staked, fenced, and scraped, are so far the property of the appropriator that an action will lie against one who willfully disturbs his right. A different rule, however, seems to be applied in Massachusetts and Maine to what are known as "Great Ponds."⁴ It is said that the right to cut ice on these ponds is common to all the public ; but that no person can, by his own act, appropriate a part of such a pond by scraping it or setting up stakes, and thereby exclude the public from it.⁵

SEC. 78. Incorporeal hereditaments—Definition and nature.—Incorporeal hereditaments are certain inheritable rights which are not, strictly speaking, of a corporeal nature, or land, but are, by their nature or by use, annexed to corporeal inheritances, and certain rights issuing out of them, or concerning them ;⁶ such as a freehold right to a pew in a church,⁷ or a seat in a board of exchange,⁸ or a stall in a public market.⁹ The incorporeal rights known to our laws are air, annuities, aquatic rights, commons, easements, franchises, licenses, light, offices, routes, and ways, and are all fully treated elsewhere.

SEC. 79. Land usually real estate.—Land is usually regarded as real estate, but where by will,¹⁰ contract, mar-

¹ *Wood v. Fowler*, 36 Kans. 682 ; s.c. 40 Am. Rep. 330.

² See : *Barrett v. Rockport Ice Co.*, 84 Me. 155 ; s.c. 25 Atl. Rep. 802 ; 46 Alb. L. J. 295.

³ 79 Me. 456 ; s.c. 1 Am. St. Rep. 342 ; 10 Atl. Rep. 321.

⁴ See : *Ante*, § 74.

⁵ See : *People's Ice Co. v. Davenport*, 149 Mass. 322 ;

Rowell v. Doyle, 131 Mass. 474.

⁶ 3 Kent Com. (13th ed.) 402.

⁷ 2 Add. Eccl. 419 ;

3 Kent Com. (13th ed.) 402.

See : *Ante*, §§ 39-43.

⁸ *Hyde v. Woods*, 94 U. S. 523 ; bk. 24 L. ed. 264.

⁹ See : *Post*, § 89.

¹⁰ *Rinkin v. Rinkin*, 36 Ill. 293 ; s.c. 87 Am. Dec. 205 ;

riage articles, settlements, or otherwise, land may have been directed to be sold and converted into money, it will be regarded as personal property and not real estate,¹ and

Jennings v. Smith, 29 Ill. 122 ;
Baker v. Copenbarger, 15 Ill. 103 ;
s.c. 58 Am. Dec. 600 ;

Heslet v. Heslet, 8 Ill. App. 26 ;
Meily v. Wood, 71 Pa. St. 488 ; s.c.
10 Am. Rep. 719 ;

Neeley v. Grantham, 58 Pa. St.
443 ;

Smilie v. Biffle, 2 Pa. St. 52 ; s.c.
44 Am. Dec. 156 ;

Simpson v. Kelso, 8 Watts (Pa.)
252 ;

Burr v. Sim, 1 Whart. (Pa.) 252 ;
s.c. 29 Am. Dec. 48 ;

Kane v. Gott, 24 Wend. (N. Y.)
641 ; s.c. 35 Am. Dec. 641 ;

Proctor v. Ferebee, 1 Ired. (N. C.)
Eq. 143 ; s.c. 36 Am. Dec. 34 ;

Tazewell v. Smith, 1 Rand. (Va.)
313 ; s.c. 10 Am. Dec. 533.

A conversion of realty into personalty occurs where a testator devises realty to his executors in trust to sell and to apply the proceeds to certain uses, as to create a fund out of which to pay debts and legacies (Proctor v. Ferebee, 1 Ired. (N. C.) Eq. 143 ; s.c. 36 Am. Dec. 34), or is applied to the use of one for life, and afterwards distributed among certain parties in remainder.

Smilie v. Biffle, 2 Pa. St. 52 ; s.c.
44 Am. Dec. 156.

In such a case property becomes personalty immediately upon the testator's death, for all purposes of the disposition, as effectually as if the testator had himself sold the land and bequeathed the proceeds in the same way.

Kane v. Gott, 24 Wend. (N. Y.)
641 ; s.c. 35 Am. Dec. 641.

Where land is directed by will to be sold equity will treat it as money unless some one, having a right to do so, elect to take the land.

Tazewell v. Smith, 1 Rand. (Va.)
313 ; s.c. 10 Am. Dec. 533.

Thus where proceeds of land are devised the devisee may elect to take the land.

Stuck v. Mackey, 4 Watts & S.
(Pa.) 196 ;

Smith v. Starr, 3 Whart. (Pa.)
62, 66 ; s.c. 31 Am. Dec. 498 ;

Burr v. Sein, 1 Whart. (Pa.) 252 ;
s.c. 29 Am. Dec. 48 ;

Ashby v. Palmer, 1 Meriv. 296.
Election to take lands regarded as a new acquisition of the title to such lands.

Proctor v. Ferebee, 1 Ired. (N. C.)
Eq. 143 ; s.c. 36 Am. Dec. 34 ;

Foster's Appeal, 74 Pa. St. 391,
399 ; s.c. 15 Am. Rep. 553 ;

Simpson v. Kelso, 8 Watts (Pa.)
252 ;

Hannah v. Swarner, 3 Watts &
S. (Pa.) 223 ; s.c. 38 Am. Dec.
754 ;

Burr v. Sim, 1 Whart. (Pa.) 252 ;
s.c. 29 Am. Dec. 48.

Same—Where there are several distributees the election to take the land must be made by all.

Nicoll v. Scott, 99 Ill. 539 ;
Ridgeway v. Underwood, 67 Ill.

419, 430 ;

Jennings v. Smith, 29 Ill. 122 ;
Baker v. Copenbarger, 15 Ill. 103 ;

s.c. 58 Am. Dec. 600 ;
Heslet v. Heslet, 8 Ill. App. 26.

¹ See : Neall v. Hill, 16 Cal. 145 ;
Collins v. Chaman's Heir, 15 B.

Mon. (Ky.) 118 ; s.c. 61 Am.
Dec. 179 ;

Loughborough's Ex. v. Lough-
borough's Devisees, 14 B. Mon.

(Ky.) 549 ;

Bliss v. Matteson, 45 N. Y. 22 ;
Manice v. Manice, 43 N. Y. 303,

372 ;

Butts v. Wood, 37 N. Y. 317 ;
Flanagan v. Flanagan, 8 Abb.

(N. Y.) N. Cas. 413, 417 ;
Johnson v. Bennett, 39 Barb.

(N. Y.) 251 ; s.c. 7 N. Y. Leg.
Obs. 209, reversing 3 Sandf. Ch.

(N. Y.) 531 ;
Arnold v. Gilbert, 5 Barb. (N. Y.)

195, 196 ;
Eells v. Lynch, 8 Bosw. (N. Y.)

465, 482 ;
Grant v. Grant, 3 Redf. (N. Y.)

283, 286 ;
Kane v. Gott, 24 Wend. (N. Y.)

641 ; s.c. 35 Am. Dec. 641 ;
Proctor v. Ferebee, 1 Ired. (N. C.)

Eq. 143 ; s.c. 36 Am. Dec. 34 ;
Parkinson's Appeal, 32 Pa. St.

458 ;
Burr v. Sim, 1 Whart. (Pa.) 252 ;
s.c. 29 Am. Dec. 48 ;

passes by gift or under general or residuary bequest of personal property,¹ and in the absence of a will becomes assets in the hands of executors or administrators.² This doctrine of equitable conversion is founded upon the familiar rule of equity according to which that which is agreed to be done, and which should be done, is regarded as having been done.³

- Tazewell v. Smith, 1 Rand. (Va.) 313; s.c. 10 Am. Dec. 533;
 Koehler v. Black River Falls Iron Co., 67 U. S. (2 Black.) 715; bk. 17 L. ed. 339;
 Dodge v. Woolsey, 59 U. S. (18 How.) 331, 341; bk. 15 L. ed. 401;
 Hayford v. Benlows, Ambl. 582; s.c. Prec. Ch. 451; 2 Vern. 718; Gibb. Exch. Rep. 125;
 Morret v. Paske, 2 Atk. 51;
 Fox v. Mackreth, 2 Bro. Ch. 400; s.c. 2 Cox Eq. 320; 1 Eq. Lead. Cas. 111;
 Gt. Luxembourg R. Co. v. Magnay, 25 Beav. 586;
 Gresley v. Mousley, 4 DeG. & J. 78; s.c. 3 DeG. F. & J. 433;
 Knight v. Bowyer, 2 DeG. & J. 421, 445;
 Hesse v. Briant, 6 DeG. M. & G. 623;
 Holman v. Loynes, 4 DeG. M. & G. 270;
 Savery v. King, 5 H. L. Cas. 627;
 Knox v. Gye, L. R. 5 H. L. 656, 675; s.c. 4 Moak's Eng. Rep. 44;
 Wedderburn v. Wedderburn, 4 Myl. & Cr. 41;
 Docker v. Somes, 2 Myl. & K. 665;
 Bent v. Stamford, 1 Salk. 154;
 Keech v. Sandford, 1 Sel. Cas. in Ch. temp. King, 61; s.c. 1 Eq. Lead. Cas. 48;
 Powell v. Glover, 3 Pr. Wms. 252.
Compare: Ware v. Murph, 1 Rich. (S. C.) L. 54; s.c. 33 Am. Dec. 97;
 Evans v. Kingsberry, 2 Rand. (Va.) 120; s.c. 14 Am. Dec. 779.
¹ Fisher v. Banta, 66 N. Y. 468;
 Estate of Dobson, 11 Phila. (Pa.) 81;
 Chandler v. Pocock, L. R. 16 Ch. Div. 648; s.c. 15 Id. 491;
 Blake v. Blake, L. R. 15 Ch. Div. 481;
 Farrar v. Winterton, 5 Beav. 1;
 Wall v. Colshead, 2 DeG. & J. 683;
 Stead v. Newdigate, 2 Meriv. 521.
² Loftis v. Glass, 15 Ark. 680;
 Rawlings' Ex'r v. Landes, 2 Bush (Ky.) 158;
 Smithers v. Hooper, 23 Md. 273;
 Maddox v. Dent, 4 Md. Ch. 543;
 Carr v. Ireland, 4 Md. Ch. 251;
 Hurtt v. Fisher, 1 Harr. & G. (Md.) 88, 96;
 Wurt's Ex'rs v. Page, 19 N. J. Eq. (4 C. E. Gr.) 365;
 Hood v. Hood, 85 N. Y. 561;
 Fisher v. Banta, 66 N. Y. 468;
 Van Vechten v. Keator, 63 N. Y. 52;
 Moncrief v. Ross, 50 N. Y. 431;
 Harris v. Slaght, 46 Barb. (N. Y.) 470;
 Johnson v. Bennett, 39 Barb. 237;
 Freeman v. Smith, 60 How. (N. Y.) Pr. 311;
 Ex parte McBee, 63 N. C. 332;
 Croom v. Herring, 4 Hawks. (N. C.) 393;
 Brothers v. Cartwright, 2 Jones (N. C.) Eq. 113; s.c. 64 Am. Dec. 563;
 Collier v. Collier's Ex'rs, 3 Ohio St. 369;
 Ferguson v. Stuart's Ex'rs, 14 Ohio, 140, 146;
 Jones v. Caldwell, 97 Pa. St. 42;
 Eby's Appeal, 84 Pa. St. 241;
 McClure's Appeal, 72 Pa. St. 414;
 Brolasky v. Gally's Ex'rs, 51 Pa. St. 509;
 Parkinson's Appeal, 32 Pa. St. 455;
 Wilkins v. Taylor, 8 Rich. (S. C.) Eq. 291;
 Washington's Ex'r v. Abraham, 6 Gratt. (Va.), 66, 77;
 Siter v. M'Clanachan, 2 Gratt. (Va.) 280;
 Commonwealth v. Martin's Ex'rs, 5 Munf. (Va.) 117, 127;
 Hoddel v. Pugh, 33 Beav. 489;
 Griffith v. Ricketts, 7 Hare, 299;
 Ashby v. Palmer, 1 Meriv. 296;
 Elliott v. Fisher, 12 Sim. 505.
³ See: Stokes v. Detrick, 75 Md. 256; s.c. 23 Atl. Rep. 846;

SEC. 80. **Same — Exceptions to the general rule.**—But where land is to be converted into money for an especial purpose, it is not to be regarded as personal property to all intents and purposes.¹ Thus where land is directed to be sold on a certain condition, it is not thereby converted into personal estate;² but on valid sale of the estate as directed, the surplus will be considered as personalty.³ It is the established doctrine in the courts of equity that where there is an investment of a part or the whole of the personal estate of a lunatic⁴ or an infant⁵ in lands, it is to be taken as personalty on the death of the one without a recovery of his reason and the demise of the other without attaining majority, and goes to the heir at law.⁶ In England it is said that the reason why an infant's personal estate turned into real estate is considered as personalty is on account of the different ages at which the infant may dispose of personal and real estates, and not in favor of one representative more than another.⁷

SEC. 81. **Lease-hold estate.**—At common law leases of houses or lands for terms of years are not real property but personal estate,⁸ even though the rent be nominal and the term ninety-nine or even one thousand years.⁹ In this country a disposition has been shown to assimilate freeholds for a long term of years to real estate. The

Ripley v. Seligman, 88 Mich. 177; ⁶ Collins v. Champ's Heirs, 15 B. s.c. 50 N. W. Rep. 143; Mon. (Ky.) 118; s.c. 61 Am.

Ashhurst v. Potter, 29 N. J. Eq. Dec. 179, 180.

(2 Stew.) 625, 643; Lunatic's land—In England in the case of a lunatic the land will go to the next of kin and not to the heir at law.

Williamson v. New Jersey S. R. Co., 29 N. J. Eq. (2 Stew.) 311; s.c. 15 Am. Rev. Rep. 572; Awdley v. Awdley, 2 Vern. 192.

Chamberlain v. Taylor, 105 N. Y. 85; s.c. 11 N. E. Rep. 625; ⁷ Pierson v. Shore, 1 Atk. 480.

¹ Gibbs v. Ougier, 12 Ves. 413; s.c. 8 Rev. Rep. 348. In England purchase money paid into court for land of which an infant is seized in fee, remains real estate under Land Clauses Act, 1845, § 69.

² Evans v. Kingsberry, 2 Rand. (Va.) 120; s.c. 14 Am. Dec. 779. Kelland v. Fulford, L. R. 6 Ch. Div. 491; s.c. 25 W. R. 506.

³ Evans v. Kingsberry, 2 Rand. (Va.) 120; s.c. 14 Am. Dec. 779. Freeman v. Dawson, 110 U. S. 264; bk. 28 L. ed. 141.

⁴ Awdley v. Awdley, 2 Vern. 192. See: Bract. l. 2, f. 27a, par. 1;

⁵ Tullit v. Tullit, Ambl. 370; s.c. 1 Co. Litt. (19th ed.) 46a.

Dick. 322; ⁹ Williams on Real Property, 8.

⁷ Pierson v. Shore, 1 Atk. 480.

⁸ Freeman v. Dawson, 110 U. S. 264; bk. 28 L. ed. 141.

⁹ Williams on Real Property, 8.

courts have in some instances construed the terms "land" and "realty" to include them,¹ and some of the states have by statute made them real estate.²

SEC. 82. **Light and air.**—An easement of light and air is an incorporeal hereditament,³ and like all other easements upon or in land is an interest in lands, but not real property.⁴

SEC. 83. **Manure — Real estate when.**—The general rule is that manure made upon a farm in the ordinary course of husbandry, from consumption of the farm produce, consisting of the collection from the stables and barnyard, or of composts formed by an admixture of these with soil and other substances, by usage, practice, and general understanding, are so attached to and connected with the realty as to be a part of it;⁵ and in the absence of an express stipulation to the contrary, passes with a conveyance of the land as appurtenant.⁶ This doctrine rests upon the ground that it is for the interest of good husbandry, and the encouraging of agriculture, that manure produced upon a farm, in the common course of husbandry, should be consumed upon it, and that the farm should not be impoverished by the removal therefrom of the material necessary for its enrichment and the growth

¹ See: *Dawson v. Daniel*, 2 Flipp. C. C. 301, 317, 318.

² See: *Cincinnati College v. Yeatman*, 30 Ohio St. 276; *Alexander v. Miller*, 7 Heisk. (Tenn.) 65.

³ See: *Ante*, § 78.

⁴ *Ray v. Sweeney*, 14 Bush (Ky.) 1; s.c. 29 Am. Rep. 388, 391.

See: *Post*, chapters on "Easements and Servitudes."

⁵ *Daniels v. Pond*, 38 Mass. (21 Pick.) 367; s.c. 32 Am. Dec. 269. See: *Parson v. Camp*, 11 Conn. 525; *Vehue v. Moser*, 76 Me. 469; s.c. 2 Cent. L. J. 93; *Lassell v. Reed*, 6 Me. (6 Greenl.) 222; *Gallagher v. Shipley*, 24 Md. 418; s.c. 87 Am. Dec. 611; *Plumer v. Plumer*, 30 N. H. 558; *Conner v. Coffin*, 27 N. H. 538;

Sawyer v. Twiss, 26 N. H. 345; *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169;

Stone v. Proctor, 2 D. Chip. (Vt.) 113.

⁶ *Strong v. Doyle*, 110 Mass. 92; *Fay v. Muzzey*, 79 Mass. (13 Gray) 53; s.c. 74 Am. Dec. 619.

See: *Haslem v. Lockwood*, 37 Conn. 500; s.c. 9 Am. Rep. 350;

Chase v. Wingate, 68 Me. 204; s.c. 28 Am. Rep. 36;

Hill v. De Rochemont, 48 N. H. 88;

Kittredge v. Woods, 3 N. H. 503; s.c. 14 Am. Dec. 393;

Walker v. Sherman, 20 Wend. (N. Y.) 636;

Goodrich v. Jones, 2 Hill (N. Y.) 142.

of the succeeding crops.¹ This rule holds true no matter what state and condition the manure may be in ; whether scattered about the barnyard and cow-lot,² or piled up in heaps in the barnyard or in the fields where it is to be used as dressing ;³ or on the land where dropped ;⁴ and whether consisting of the collection from the stables and the barnyard, or of composts formed by the admixture of these with the soil and other substances.⁵ The rule applies alike between vendor and vendee,⁶ between mortgagor and mortgagee,⁷ and between landlord and tenant.⁸

SEC. 84. Same — Where made in other than agricultural

- ¹ *Haslem v. Lockwood*, 37 Conn. 500 ; s.c. 9 Am. Rep. 350 ;
Chase v. Wingate, 68 Me. 204 ; s.c. 28 Am. Rep. 36 ;
Fay v. Muzzey, 79 Mass. (13 Gray) 53 ; s.c. 74 Am. Dec. 619.
- ² *Parson v. Camp*, 11 Conn. 530.
- ³ *Chase v. Wingate*, 68 Me. 204 ; s.c. 38 Am. Rep. 36 ;
Lassell v. Reed, 6 Me. 222 ;
Strong v. Doyle, 110 Mass. 92 ;
Fay v. Muzzey, 79 Mass. (13 Gray) 53 ;
Daniels v. Pond, 38 Mass. (21 Pick.) 367 ; s.c. 32 Am. Dec. 269 ;
Kittredge v. Woods, 3 N. H. 503 ; s.c. 14 Am. Dec. 393, 396 ;
Goodrich v. Jones, 2 Hill (N. Y.) 142.
- ⁴ See: *Hill v. De Rochemont*, 48 N. H. 87 ;
French v. Freeman, 43 Vt. 93.
- ⁵ *Daniels v. Pond*, 38 Mass. (21 Pick.) 367 ; s.c. 32 Am. Dec. 269.
- ⁶ *Daniels v. Pond*, 38 Mass. (21 Pick.) 367 ; s.c. 32 Am. Dec. 269 ;
Kittredge v. Woods, 3 N. H. 503 ; s.c. 14 Am. Dec. 393 ;
Goodrich v. Jones, 2 Hill (N. Y.) 142.
- ⁷ *Chase v. Wingate*, 68 Me. 204 ; s.c. 28 Am. Rep. 36.
- ⁸ *Parsons v. Camp*, 11 Conn. 530 ;
Chase v. Wingate, 68 Me. 204 ; s.c. 28 Am. Rep. 36 ;
Lassell v. Reed, 6 Me. 222 ;
Gallagher v. Shipley, 24 Md. 418 ; s.c. 87 Am. Dec. 611 ;
Fay v. Muzzey, 79 Mass. (13 Gray) 55 ; s.c. 74 Am. Dec. 619 ;
Lewis v. Lyman, 39 Mass. (2 Pick.) 437 ; s.c. 74 Am. Dec. 619 ;
Daniels v. Pond, 38 Mass. (21 Pick.) 367 ; s.c. 32 Am. Dec. 269 ;
Perry v. Carr, 44 N. H. 118 ;
Wadley v. Janvin, 41 N. H. 519 ; s.c. 77 Am. Dec. 780 ;
Plumer v. Plumer, 30 N. H. 553 ;
Sawyer v. Twiss, 26 N. H. 345 ;
Kittredge v. Woods, 3 N. H. 503 ; s.c. 14 Am. Dec. 393 ;
Goodrich v. Jones, 2 Hill (N. Y.) 142 ;
Middlebrook v. Corwin, 15 Wend. (N. Y.) 169 ;
Lewis v. Jones, 17 Pa. St. 262 ; s.c. 55 Am. Dec. 550 ;
Brown v. Crump, 2 Swan (Tenn.) 531 ;
Wetherbee v. Ellison, 19 Vt. 379 ;
Stone v. Proctor, 2 D. Chip (Vt.) 103 ;
Onslow v. ———, 16 Ves. 173 ;
Pulteney v. Shelton, 5 Ves. 147 ; s.c. 5 Id. 260, 261.
- Lassell v. Reed* still good law.—The case of *Lassell v. Reed*, 6 Me. 222, is supposed to be impaired by the subsequent one of *Staples v. Emery*, 7 Me. 201, but this case does not profess to call in question the correctness of the decision in the former one ; on the contrary the court affirm it, distinguishing the principle.

pursuits.—This rule, however, applies only to manures made on the premises in the usual course of husbandry. Hence, where a lease is general in its terms, and says nothing of the mode in which the tenant is to use the demised premises, and he constructs thereon a corral for cattle which he feeds with supplies procured from sources foreign to the land, the manure produced thereby will be regarded as his personal property,¹ and he or his assignee may, during his term, remove all such manure that is not co-mingled with the soil,² provided reasonable care and skill are used in removing it from the land, so as to prevent injury thereto.³ But the fact that a tenant furnishes to his live-stock some hay and some grain not raised upon the premises, will not give him any title to the manure made, especially if he does not specify how much of either he supplied, and what proportion they bore to the whole amount of hay, grain, and straw supplied.⁴

SEC. 85. **Same—Made on non-agricultural lands.**—The general rule does not apply to manure made in a livery stable,⁵ or in any manner not connected with agriculture, or not made in the ordinary course of husbandry.⁶ Where the lands are not agricultural the reason for the

¹ *Gallagher v. Shipley*, 24 Md. 418; s.c. 87 Am. Dec. 611;

Corey v. Bishop, 48 N. H. 146.

Manure made raising hogs.—The same is true where the manure is made in the business of raising hogs, not fed upon the products of the land; and the nature of the manure is not changed from personalty to realty by being mixed with loam drawn from other lands.

Snow v. Perkins, 68 Me. 493; s.c. 49 Am. Rep. 333.

² *Higgon v. Mortimer*, 6 Car. & P. 616; s.c. 25 Eng. C. L. 604.

In North Carolina, where manure is declared to be personal property and not real estate, it is held that soil mixed with the manure, in the operation of heaping it up, may be removed therewith.

Smithwick v. Ellison, 2 Ired. (N. C.) L. 326; s.c. 38 Am. Dec. 697.

³ *Gallagher v. Shipley*, 24 Md. 418; s.c. 87 Am. Dec. 611;

Corey v. Bishop, 48 N. H. 146; *Carroll v. Newton*, 17 How. (N. Y.) Pr. 189.

May remove soil with manure.—Some of the cases hold that the tenant may remove the soil that becomes mixed with the manure in the process of heaping it up.

See: *Snow v. Perkins*, 68 Me. 493; s.c. 49 Am. Rep. 333; *Smithwick v. Ellison*, 2 Ired. (N. C.) L. 326; s.c. 38 Am. Dec. 697.

⁴ *Lewis v. Jones*, 17 Pa. St. 267; s.c. 55 Am. Dec. 550.

⁵ *Dowels v. Pond*, 38 Mass. (21 Pick.) 367; s.c. 32 Am. Dec. 269.

⁶ *Snow v. Perkins*, 60 N. H. 493; s.c. 49 Am. Rep. 333; *Plumer v. Plumer*, 30 N. H. 558; *Needham v. Allison*, 24 N. H. 355;

Lewis v. Jones, 17 Pa. St. 267; s.c. 55 Am. Dec. 550.

rule ceases, and the rule itself does not apply. Thus where a teamster owning a small house and stable, with a small yard, sold them, the Supreme Court of New Hampshire held that the manure made by the team and stored in the cellar was personal property and did not pass with the land.¹ Where manure is dropped in the streets the fee to which is in the corporation, or on other lands the fee to which is in the public, it will belong to the first taker.²

SEC. 86. *Same—Agreement of parties respecting.*—While the general rule set out is applied in whatever situation or condition manure may be found before it is finally expended upon the soil, it is, until such application to the soil, an incident of the real estate of such peculiar character that, while it remains consecutively annexed, it will be personal property if the parties interested agree to so treat it.³ Thus, it has been held that a verbal sale of manure will constitute a severance and passes the title to it as personal property, and that a subsequent conveyance of the farm will not carry such manure as appurtenant to the premises, or divest the title of the purchaser to the same.⁴ It seems that where manure is so made as to be, or by agreement is, the personal property of an outgoing tenant, it does not necessarily become real estate by being left upon the premises after the expiration of the tenancy.⁵

SEC. 87. *Same—New Jersey and North Carolina doctrine.*—The general rule, that manure made upon a farm in the course of husbandry is a part of the real estate, does not prevail in New Jersey and North Carolina, where it is regarded as personal property, and on the sale of the land does not pass therewith as incident to or part of it.⁶

¹ Proctor v. Gilson, 49 N. H. 62.

² Haslem v. Lockwood, 37 Conn. 500; s.c. 9 Am. Rep. 350.

³ Strong v. Doyle, 110 Mass. 92.

See: Ford v. Cobb, 20 N. Y. 344;

Noble v. Sylvester, 42 Vt. 146.

⁴ Strong v. Doyle, 110 Mass. 92;

French v. Freeman, 43 Vt. 93.

⁵ Fletcher v. Herring, 112 Mass. 382.

⁶ Ruckman v. Outwater, 28 N. J. L. (4 Dutch.) 581.

In the absence of a contract or a custom to the contrary, such manure may be removed or sold by an outgoing tenant, where made by him on the premises, because it is regarded as his personal estate.¹ The rule is the same in New Brunswick.

SEC. 88. **Same—English rule.**—Under the English rule, it seems that, by the custom of the country, the tenant is entitled to claim compensation for the manure made during his occupancy and as yet unappropriated to the soil.²

SEC. 89. **Market stalls.**—The stalls in a public market, like the pews in a church, do not carry with them absolute property, but a qualified right only. The right acquired is in the nature of an easement in, not a title to, a freehold in the land ; and such right or easement is limited in duration to the existence of the market, and is to be understood as acquired subject to such changes and modifications in the market during its existence as the public needs may require. The purchase of such stalls confers an exclusive right to occupy them, with their appendages, for the purposes of the market, and none other. If the owner be disturbed in the possession of the stalls, at common law, he may maintain case or trespass, according to the nature and circumstance of the injury, against the wrong-doer. But he cannot convert them to any other use than that for which they were sold ; and in the use of them he is required to conform to the regulations of the market, as prescribed by the ordinances of the city. This is by analogy to the principles applied in respect to the rights of pew-holders,³ and it is thought that the analogy between those rights and the right acquired in market stalls is sufficiently exact to make the principle applicable in the one case

¹ *Smithwick v. Ellison*, 2 Ired. (N. C.) L. 326 ; s.c. 38 Am. Dec. 697.

Citing : *Roberts v. Baker*, 1 Crompt. & M. 808 ;
Beaty v. Gibbons, 16 East 116.

See : *Sanders v. Ellington*, 77 N. C. 255.

² See : *Roberts v. Baker*, 1 Crompt. & M. 808.

³ See : *Ante*, §§ 40, 41.

equally applicable in the other.¹ And market stalls, like church pews, in the absence of statutes controlling, partake of the nature of realty, although the ownership is that of an exclusive easement for special purposes only.²

SEC. 90. **Mines and minerals.**—It is a general maxim of the common law that he who owns the soil owns all above and beneath the surface, *cujus est solum, ejus est usque ad cælum, et al infra*.³ He owns not only what is growing upon or affixed to the soil, as trees, and the like, but also all mines and minerals beneath the surface in a direct line to the center of the earth, including all mines or veins of metal,⁴ or minerals,⁵ coal,

¹ *Jackson v. Roonesville*, 46 Mass. (5 Met.) 127;

Howard v. First Parish in North Bridgewater, 24 Mass. (7 Pick.) 138;

Daniel v. Wood, 18 Mass. (1 Pick.) 102; s.c. 11 Am. Dec. 151;

Gay v. Baker, 17 Mass. 435; s.c. 9 Am. Dec. 159;

Shaw v. Beveridge, 3 Hill (N. Y.) 26;

Hinde v. Chorlton, L. R. 2 C. P. 104.

² *Trustees of the First Baptist Church of Ithaca v. Bigelow*, 16 Wend. (N. Y.) 28.

See: *Daniel v. Wood*, 18 Mass. (1 Pick.) 102;

Gay v. Baker, 17 Mass. 439; s.c. 9 Am. Dec. 159;

Church v. Wells, 24 Pa. St. 249.

³ Kerr's "Adjudicated Words, Phrases, and Applied Maxims."

See: *Canfield v. Ford*, 28 Barb. (N. Y.) 336, 338;

Rowan v. Kelsey, 18 Barb. (N. Y.) 484, 489;

Dows v. Congdon, 16 How. (N. Y.) Pr. 571, 573;

Mahone v. Brown, 13 Wend. (N. Y.) 261, 263; s.c. 28 Am. Dec. 461;

Patterson v. Philadelphia & R. R. Co. (Pa.), 26 W. N. C. 327.

⁴ A gold mine is real estate and can be transferred only by an instrument in writing.

Melton v. Lambard, 51 Cal. 258.

⁵ An elaborate inquiry into the various senses in which the word "mineral" may be used was made by Vice-Chancellor Kindersly in *Darvill v. Roper*, 3 Drew, 294.

The word "metals" used before "minerals" indicates that the latter word is to be given its full meaning.

The word "minerals," though more frequently applied to substances containing metal, in its proper sense includes all fossil bodies or matter dug out of mines.

Rosse v. Waimman, 14 Mees. & W. 859.

Gas, oil, and water are to be classified as minerals.

Westmoreland & Cambria Natural Gas Co. v. DeWitt, 130 Pa. St. 235; s.c. 18 Atl. R. 724; 5 L. R. A. 731.

See: 1 Ball. Ann. L. of R. P., § 317.

Gold and sand are not included. *Attorney-General v. Mylchrest*, 40 L. T. N. S. 767.

See: 9 Cent. L. J. 221.

Compare: *Moore v. Snaw*, 17 Cal. 199; s.c. 79 Am. Dec. 123.

Petroleum is a species of mineral.

Keir v. Peterson, 41 Pa. St. 362.

Stones dug from a quarry are also. *Michlethwait v. Winter*, 6 Ex. 644; s.c. 20 L. J. Ex. 313.

china clay or kaolin,¹ freestone,² gas,³ gold,⁴ iron,⁵ oil,⁶ paint-stone,⁷ quarry-stone,⁸ silver,⁹ and water,¹⁰ and all fossil and water formations.¹¹ The owner of the freehold is, *prima facie*, entitled to all the minerals and strata of coal, clay, ore, lime, marble, and the like, not as a separate estate, but as a part of the fee and inheritance, and they will all pass by descent, or by conveyance, without special designation,¹² in the absence of a severance of the mine, and a distinct estate and interest created in them by grant or reservation.¹³ But a grant or reservation of "mines and minerals" does not embrace everything in the mineral kingdom, as distinguished

¹ *Hext v. Gill*, L. R. 7 Ch. App. 699; s.c. 26 L. T. N. S. 502; 3 Moak's Eng. Rep. 574; 7 Alb. L. J. 60.

² *Bell v. Wilson*, L. R. 1 Ch. App. 303; s.c. 14 L. T. N. S. 115.

³ Gas is a mineral, and while *in situ* is part of the land. But while a mineral, gas has peculiar attributes, and may be classed with water and oil—if the analogy be not too fanciful—as *ferce naturæ*. Their furtive and wandering existence within the limits of a particular tract is uncertain. They belong to the owner of the land, and are a part of it, so long as they are on or in it, and are under his control; but when they escape and go on other land, or come under another's control, the title of the former owner is gone.

See: *Westmoreland & Cambria Natural Gas Co. v. DeWitt*, 130 Pa. St. 235; s.c. 18 Atl. Rep. 724; 5 L. R. A. 731; 1 Ball. Ann. L. of R. P. 1892, § 317.

Brown v. Vandergrift, 80 Pa. St. 147, 148.

⁴ *Moore v. Smaw*, 17 Cal. 199; s.c. 79 Am. Dec. 123.

Compare: Attorney-General v. Mylchrest, 4 L. T. N. S. 767; s.c. 9 Cent. L. J. 221.

⁵ *Lee v. Baumgardener*, 86 Va. 315; s.c. 10 S. E. Rep. 3; 1 Ball. Ann. L. of R. P. 1892, 415, § 314.

⁶ *Kier v. Peterson*, 41 Pa. St. 347, 362. Oil, like water, is not the subject of property except while in actual occupancy.

Dark v. Johnson, 55 Pa. St. 164; s.c. 93 Am. Dec. 732.

Same—Part of land.—But is a part of the land while *in situ*.

Westmoreland & Cambria Natural Gas Co. v. DeWitt, 130 Pa. St. 235; s.c. 18 Atl. Rep. 724; 5 L. R. A. 731;

Brown v. Vandergrift, 80 Pa. St. 147, 148.

⁷ **Paint-stone**.—The term "mines and minerals" in a grant will pass paint-stone obtained by the ordinary means of mining, and found below the surface of the soil in strata distinct from the ordinary earth.

Hartwell v. Camman, 10 N. J. Eq. (2 Stockt.) 128; s.c. 64 Am. Dec. 448.

⁸ *Michlethwait v. Winter*, 6 Ex. Ch. 313; s.c. 20 L. J. Ex. 313.

⁹ *Moore v. Smaw*, 17 Cal. 199; s.c. 73 Am. Dec. 123.

¹⁰ Water is to be classified as a mineral.

Westmoreland & Cambria Natural Gas Co. v. DeWitt, 130 Pa. St. 235; s.c. 18 Atl. Rep. 724; 5 L. R. A. 731; 1 Ball. Ann. L. of R. P. 1892, § 317.

¹¹ *Bourne v. Taylor*, 10 East 189, 205; s.c. 10 Rev. Rep. 267, 279; *Townley v. Gibson*, 2 T. R. 705; s.c. 1 Rev. Rep. 600;

Grey v. Northumberland, 17 Ves. 282.

See: *Eardley v. Granville*, 3 Ch. Div. 826; s.c. 4 L. J. Ch. 669; 34 L. T. 609.

¹² *Adams v. The Briggs Iron Co.*, 61 Mass. (7 Cush.) 361, 366.

¹³ *Riddle v. Brown*, 20 Ala. 412; s.c. 56 Am. Dec. 202.

from all other things that belong to the vegetable and animal kingdom, nor is confined to any of the divisions into which chemists separate the minerals.¹ All mines and minerals pass with the land unless expressly reserved in the grant.²

SEC. 91. **Same—Common-law doctrine.**—In the laws of England it has always been regarded as a fundamental principle that the king, by his prerogative, is entitled to all mines of gold and silver within the realm, whether they be in the lands of the king or of the subjects, and he has a right to dig and carry away these ores, with such incidents thereto as are necessary for the getting of the ore.³ This doctrine had its origin in the king's duty to defend the realm, and to coin and furnish the currency required for this purpose, and for the use of trade and commerce. To be enabled to do this the right to the mines of gold and silver was indispensably necessary.⁴ But a mine royal, either of base metal, containing gold and silver, or of pure gold and silver only, may be severed from the crown by grant of the king, and conveyed to another by apt and precise words.⁵ Such right will not pass under a grant of land from the crown, however, unless there was an intention that it should pass, and this intention is expressed by apt and precise words.⁶

SEC. 92. **Same—Royal charters.**—By most of the royal charters under which this country was settled, the grant of the soil expressly includes "all mines," as well as every other thing included in or borne in or upon it; reserving as rent only, in the *reddendum*, one-fifth part of all the gold and silver ore, to be delivered at the pit's mouth, free of charge. Such were the charters of Con-

¹ Hartwell v. Camman, 10 N. J. Eq. (2 Stockt.) 128; s.c. 64 Am. Dec. 448.

² See: Moore v. Smaw, 17 Cal. 199; s.c. 79 Am. Dec. 123.

³ See: Moore v. Smaw, 17 Cal. 199; s.c. 79 Am. Dec. 123, 132-133; Lyddall v. Weston, 2 Atk. 19;

Queen v. Northumberland, 1 Plowd. 310;

2 Bl. Com. 294, 295;

2 Co. Inst. 577, 578;

3 Kent. Com. (13th ed.) 378, note.

⁴ Queen v. Northumberland, 1 Plowd. 310, 315-316;

1 Bl. Com. 294.

⁵ Queen v. Northumberland, 1 Plowd. 310.

⁶ Woolley v. Attorney-General of Victoria, 36 L. T. Rep. (N. S.) 121.

necticut, Maryland, Massachusetts, Rhode Island, Pennsylvania, and Virginia. In the charter of North Carolina one-fourth was thus reserved; and in that of Massachusetts one-fifth of the precious stones was also included. By the charter of Charles II. to the Duke of York, March 12, 1663, granting the territory extending from Nova Scotia to Delaware Bay, all the mines were expressly granted without any reservation; and for this reason a reservation is expressly found in the statutes of New York, New Jersey, and Delaware. It being conceded and declared¹ that a mine royal may by the king's grant be severed from the crown and granted to a private party, it follows that upon the separation of these states from Great Britain, the former did not succeed to the prerogative right to gold and silver mines in these states where the mines were included in the terms of the charters. Whether the states could demand the fifth or fourth parts reserved as rent as the assignees of the crown at law, or by force of the treaty of peace; and whether the federal government of the United States may claim the same proportion as the assignee of the states, under the constitution, or the whole people by their own prerogative, on the original grounds as above set forth, are questions that have been raised,² but avail naught to discuss here.

SEC. 93. *Same*.—*New York doctrine*.—The doctrine of royal mines is adopted in New York. The state's right as sovereign, to the gold and silver mines in the commonwealth was asserted at an early date,³ and re-asserted by legislative act as late as 1828;⁴ and all letters patent issued by the state have contained an exception and reservation to the people of the state of all gold and silver mines on the land conveyed.⁵ But by statute the discoverers of such mines, as a reward for their discoveries,

¹ Case of Mines, 1 Plowd. 336.

² See: *State of Georgia v. Canatoo*, National Intelligencer, October 24, 1843;

³ Kent Com. (13th ed.) 378, note.

⁴ Stat. Feb. 6, 1789; Sess. L. 12, c. 18.

⁴ See: N. Y. Rev. Stat., pt. I., c. 9, tit. 11; 1 N. Y. Rev. Stat. (8th ed.) § 817; 2 Rev. Stat. Codes & L., p. 1982.

⁵ See: 1 N. Y. Rev. Stat. (8th ed.) 1618, § 5; 2 Rev. Stat. Codes & L. p. 1781, § 5.

are permitted to enjoy their produce free from any compensation to the state for the period of twenty-one years.¹

SEC. 94. **Same—Pennsylvania doctrine.**—The royal charter granted to William Penn reserved as rent one-fifth of the precious metals found in the land granted, and the patents granted by Penn reserved two-fifths. It is only since the statute of 1843 that the patents granted by the state of Pennsylvania pass the entire estate of the commonwealth.²

SEC. 95. **Same—Georgia doctrine.**—In an early Georgia case it was held that the right and title to land includes the right to all the minerals therein, unless they were separated from the land by positive grant or exception; and that if the state made a grant of public lands to an individual without excepting the mines and minerals, such mines and minerals pass to the grantee as part and parcel of the land granted.³

SEC. 96. **Same—California doctrine.**—In California it was formerly held that the state, by virtue of its sovereignty, was the sole owner of the gold and silver mines found in the public lands within its limits, and declared that similar mines found in the lands of private citizens also belonged to the state government by the same right, assuming that the several states of the Union, in virtue of their respective sovereignties, were entitled to the *jura regalia* which pertained to the king at common law.⁴ But this doctrine has been overruled, Chief Justice FIELD remarking in *Moore v. Smaw*⁵ that it is in the assumption as to the *jura regalia* that the error of the doctrine consists. After much discussion it seems to have been finally settled in California that the ownership of precious metals, found in private or public lands in that state, is incident to the ownership of the

¹ 1 N. Y. Rev. Stat. (8th ed.), p. 1818.
§ 4; 2 Rev. Stat. Codes & L., p.
1963, § 4.

² See: 2 Bouv. L. Dic. (15th ed.)
236.

³ *State v. Canatoo*, National Intel-
ligencer, October 24, 1843.

See: 3 Kent Com. (13th ed.) 378,
note b.

⁴ *Hicks v. Bell*, 3 Cal. 219.

See: *Stoakes v. Barrett*, 5 Cal. 36.

⁵ 17 Cal. 119; s.c. 79 Am. Dec. 123,
132.

soil, and that the metals do not belong to the government as an incident of its sovereignty.¹

SEC. 97. **Same — Severance and conveyance.**—Metals and minerals in place are land,² and may be conveyed by deed distinct from the right to the surface.³ They are incorporeal hereditaments distinct from the surface,⁴ and pass by apt words in a deed, although not susceptible of livery of seisin, delivery and registry of the deed being substituted therefor.⁵ Thus one person may own the surface, and another may be entitled, by conveyance, to the iron, another to the limestone, and another still to a stratum of coal.⁶ Where so severed mines and minerals are still regarded as real estate,⁷ and are governed by

¹ *Ah Hee v. Crippen*, 19 Cal. 491.
See: *Ah Lew v. Choate*, 24 Cal. 562;

Moore v. Smaw, 17 Cal. 199; s.c. 79 Am. Dec. 123, 193;

Merced. Mining Co. v. Boggs, 14 Cal. 279; s.c. 70 U. S. (3 Wall.) 304; bk. 18 L. ed. 245;

United States v. Castillero, 67 U. S. (2 Black.) 1; bk. 17 L. ed. 360;

Fremont v. The United States, 58 U. S. (17 How.) 442; bk. 15 L. ed. 241;

United States v. Parrott, 1 McA. C. C. 271.

² *Knight v. Indiana Coal & Iron Co.*, 47 Ind. 105; s.c. 17 Am. Rep. 692, 696;

Caldwell v. Fulton, 31 Pa. St. 475; s.c. 72 Am. Dec. 760.

³ *Stewart v. Chadwick*, 8 Iowa (8 Clarke) 463;

Green v. Putnam, 62 Mass. (8 Cush.) 21;

Adams v. Briggs Iron Co., 61 Mass. (7 Cush.) 361;

Canfield v. Ford, 28 Barb. (N. Y.) 336;

Caldwell v. Fulton, 31 Pa. St. 475; s.c. 72 Am. Dec. 760;

Harris v. Ryding, 5 Mees. & W. 60;

Stoughton v. Leigh, 1 Taunt. 402.

See: *Pennsylvania Salt Co. v. Neel*, 54 Pa. St. 9;

Armstrong v. Caldwell, 53 Pa. St. 284;

Brown v. Corey, 43 Pa. St. 495.

Kier v. Peterson, 41 Pa. St. 357;

Caldwell v. Copeland, 37 Pa. St. 427; s.c. 78 Am. Dec. 436;

Harlan v. Lehigh Coal Co., 35 Pa. St. 287.

⁴ *Lee v. Baumgardener*, 86 Va. 315; s.c. 1 Ball. Ann. L. of R. P. 415.

See: *Knight v. Indiana Coal & Iron Co.*, 47 Ind. 105; s.c. 17 Am. Rep. 692, 696;

Whitaker v. Brown, 46 Pa. St. 197;

Harlan v. Lehigh Coal Co., 35 Pa. St. 287;

Caldwell v. Fulton, 31 Pa. St. 475; s.c. 72 Am. Dec. 760;

Barnes v. Mawson, 1 M. & S. 77.

⁵ *Caldwell v. Fulton*, 31 Pa. St. 475; s.c. 72 Am. Dec. 760.

See: *Knight v. Indiana Coal & Iron Co.*, 47 Ind. 110; s.c. 17 Am. Rep. 692;

Hartwell v. Camman, 10 N. J. Eq. (2 Stockt.) 128; s.c. 64 Am. Dec. 448;

Johnstown Iron Co. v. Cambria Iron Co., 32 Pa. St. 241, 246;

Rutland Marble Co. v. Ripley, 77 U. S. (10 Wall.) 339, 366; bk. 19 L. ed. 955;

French v. Brewer, 3 Wall., Jr., C. C. 346;

⁶ *Knight v. Indiana Coal & Iron Co.*, 47 Ind. 175; s.c. 17 Am. Rep. 692, 696.

⁷ *Adams v. Briggs Iron Co.*, 61 Mass. (7 Cush.) 361, 367.

the same laws that are applied to surface real estate.¹ Thus they are capable of being held, conveyed by deed, transferred by will or inheritance,² and are subjected to dower interest³ and partition;⁴ and all other rules regulating title to real estate, so far as they are applicable, will apply thereto.⁵ Where the mines and minerals have been separated from the surface by conveyance of such surface to one person and of the minerals to another, incident to the ownership of such mines and minerals is the double duty of furnishing support to the surface⁶ and of keeping the entrance to the mine so guarded or protected as not to imperil the safety of the animals lawfully upon the surface.⁷

SEC. 98. **Same—Reservation of mineral ores.**—The owner of the fee may grant the land, excepting and reserving the mines and minerals to himself and his heirs,⁸ and they may pass by his deed to a third person,⁹ but they will not pass as appurtenant to other land.¹⁰ Such a transfer of the surface and of all profit that can be obtained from cultivating it, or building on it, or otherwise using it,¹¹ with a reservation in the same conveyance to the grantor of the minerals, an important part of the general estate,

¹ See: *Riddle v. Driver*, 12 Ala. 590; *Trustees of Hawesville v. Hawes*, 6 Bush (Ky.) 232;

Neel v. Neel, 19 Pa. St. 323.

² See: *Merritt v. Judd*, 14 Cal. 59; *Adams v. Briggs Iron Co.*, 61 Mass. (7 Cush.) 361, 367; *Caldwell v. Fulton*, 31 Pa. St. 475; s.c. 72 Am. Dec. 760.

³ *Moore v. Rollins*, 45 Me. 493; *Adams v. Briggs Iron Co.*, 61 Mass. (7 Cush.) 361, 367; *Billings v. Taylor*, 27 Mass. (10 Pick.) 460; s.c. 20 Am. Dec. 533; *Coates v. Cheever*, 1 Cow. (N. Y.) 460; *Stoughton v. Leigh*, 1 Taunt. 402.

See: *Post*, Chapters on "Dower."

⁴ *Dall v. Confidence Silver Mining Co.*, 3 Nev. 531; s.c. 93 Am. Dec. 419.

⁵ See: *Adams v. Briggs Iron Co.*, 61 Mass. (7 Cush.) 361, 367.

⁶ See: *Post*, § 99.

⁷ *Williams v. Groucott*, 4 Best & S. 149; s.c. 116 Eng. C. L. 149.

⁸ *Adams v. Briggs Iron Co.*, 61 Mass. (7 Cush.) 361; *Benson v. Miners' Bank*, 20 Pa. St. 370.

⁹ *Lee v. Baumgardener*, 86 Va. 315; s.c. 10 S. E. Rep. 2; 1 Ball. Ann. L. of F. P. 1892, 415.

¹⁰ *Lebnard v. White*, 7 Mass. 6; s.c. 5 Am. Dec. 19;

Jackson v. Hathaway, 15 John. (N. Y.) 447; s.c. 8 Am. Dec. 263;

Harris v. Elliot, 35 U. S. (10 Pet.) 25; bk. 9 L. ed. 333;

1 Co. Litt. (19th ed.) 121, 126.

¹¹ *Hext v. Gill*, L. R. 7 Ch. App. 700; s.c. 3 Moak's Eng. Rep. 574.

if the reserve is effectual and still operative, there is imposed upon the estate conveyed a serious servitude; though it, in its turn, becomes to a certain extent dominant over the estate reserved.¹ Such a reservation, in a deed of land, of the minerals therein, involves the right to penetrate the surface for the minerals, and to use such means in mining and removing the same as are necessary;² but the means used must be necessary as distinguished from convenient or reasonable, and the surface owner is entitled to subjacent support for the soil in its natural state.³ Some of the cases go so far as to hold that the defendant's right rising from such a reservation covers the whole portion conveyed, and that he cannot be restrained from removing, within the boundaries described, such material, even though it be required for necessary surface support;⁴ but this is not the prevailing doctrine.

Marvin v. Brewster Iron Mining Co., 55 N. Y. 538; s.c. 14 Am. Rep. 322, 327;

See: *Caledonian Ry. Co. v. Sprot*, 2 Macq. Scot. App. Cas. 449.

Construction of reservation in grant of mines and minerals.—It is said, in the case of *Marvin v. Brewster Iron Co.*, *supra*, that a reserve of minerals and mining rights is construed as in an actual grant thereof. It differs not, whether the right to mine is by an exception from a deed of the surface, or by a grant of the mine by the owner of the whole estate, therein reserving to himself the surface.

Dand v. Kingscote, 6 M. & W. 174;

Williams v. Bagnall, 15 W. R. 272;

Shep. Touch. 100.

See: *Wickham v. Hawker*, 7 M. & W. 78; and comment thereon in *Proud v. Bates*, 37 L. J. Ch. 406; s.c. 5 Am. Law Reg. N. S. 171-174.

A reservation of mineral and mining rights from a grant of the estate, followed by a grant to another of all that which was first reserved, vests in the sec-

ond grantee an estate as broad as if the entire estate had been granted to him, with a reservation of the surface.

Arnold v. Stevens, 41 Mass. (24 Pick.) 106; s.c. 35 Am. Dec. 305.

² *Marvin v. Brewster Iron Co.*, 55 N. Y. 538; s.c. 14 Am. Rep. 322;

Hext v. Gill, L. R. 7 Ch. App. 700; s.c. 3 Moak's Eng. Rep. 574;

Goold v. Great Western Coal Co., 2 DeG. J. & S. 600; s.c. 12 L. T. 842; 13 L. T. 109;

Cardington v. Armitage, 2 Barn. & C. 179; s.c. 9 Eng. C. L. 93.

See: *Hodgson v. Field*, 7 East 613; s.c. 3 Smith, 538; 8 Rev. Rep. 701.

³ *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538; s.c. 14 Am. Rep. 322.

See: *Post*, § 99.

⁴ *Byckman v. Gills*, 57 N. Y. 68; s.c. 15 Am. Rep. 464.

See: *Buccleuch v. Wakefield*, L. R. 4 H. L. 377;

Rowbotham v. Wilson, 8 H. L. Cas. 348;

Eadon v. Jeffcock, 42 L. J. Rep. (N. S.) Ex. Ch. 39.

SEC. 99. **Same — Surface support.**—It is the general rule that where the owner of the whole fee severs the surface by selling the same and retaining the minerals, or by selling the minerals and retaining the surface, without restraint or restriction in the conveyance or contract, the owner of the surface is, *ex jure nature*,¹ entitled to support, and the subterranean or mining property is subservient to the surface to the extent of sufficient support to sustain the latter.² The upper and under ground estates

¹ **General presumption.**—Vice-Chancellor MALINS, in the case of *Wakefield v. The Duke of Buccleuch*, 36 L. J. Rep. (N. S.) Ch. 763, clearly held that the general presumption existed. He says, at page 775: "Upon principle, and apart from authority, I should say that the surface, having at all times been enjoyed by man, must be protected at the expense of the mines, which have never been so enjoyed; that is, that the mines, in my opinion, must be regarded as a tenement subservient to the surface." But this view was certainly not acquiesced in by the Lord Chancellor, or Lord Chelmsford, who gave judgment in the same case on appeal to the House of Lords.

See: 39 Law J. Rep. (N. S.) Ch. 441.

Same—Lord Hartley's comments.—

After referring to the Vice-Chancellor's opinion, the Lord Chancellor (Lord HATHERLY) says (37 L. J. Rep. p. 451): "That certainly is a general proposition which, I confess, does not help one much to a solution of the case. The rights of the parties, I apprehend, must be determined according to what we find in the instruments creating those rights, or in the customs, if there be any, which may be proved in support of those rights. I apprehend that those rights cannot be rested upon any such abstract proposition as that."

Same—Lord Chelmsford's comments.

—Lord CHELMSFORD says, at page 454: "It is difficult to imagine a case in which this principle can be thus abstract-

ly applied. The surface of the land and all beneath it must originally have been the property of one and the same person. He was, of course, at liberty to grant the surface, reserving the minerals; or grant the minerals only, reserving the surface. In either case the grant might be made upon conditions which would be proved by the grant itself, or established by evidence of the invariable exercise of the respective rights of the parties. If no proof could be given of the mode in which each party was to enjoy his property, the owner of the surface might prevent the owner of the mines from working so as to take away the support from the surface, and the owner of the mines would be entitled to all the minerals which he could obtain by ordinary and proper working without obstruction by the owner of the surface. The only principle which could be applied in the case last supposed is contained in the maxim *sic utere tuo ut alienum non ledas*."

² *Carlin v. Chappel*, 101 Pa. St. 348; s. c. 47 Am. Rep. 722.

See: *Wilms v. Jess*, 94 Ill. 464; s. c. 34 Am. Rep. 242;

Yandes v. Wright, 66 Ind. 319; s. c. 32 Am. Rep. 109;

Jones v. Wagner, 66 Pa. St. 429; s. c. 5 Am. Rep. 385, 387;

Horner v. Watson, 79 Pa. St. 242; s. c. 21 Am. Rep. 55;

Rehm v. Chadwick (Pa.), 6 Pitts. L. J. N. S. 98;

Smart v. Morton, 5 El. & Bl. 30; s. c. 26 L. J. (N. S.) Q. B. 260; 85 Eng. C. L. 30;

being several, they are governed by the same maxim which limits the use of property otherwise situated, *sic utere tuo ut alienum non lædas*.¹

SEC. 100. **Same — Same — Rights of grantee.**—It is held in a number of well-considered cases that the grantee of the minerals will be entitled only to such of the minerals granted as he can remove without injury to the surface.² In such a case the owner of the mineral strata must so occupy and use his property as not to interfere with the superincumbent soil in its natural state,³ or with such buildings as are upon it at the time of the purchase; but the owner of the surface will not be permitted to impose upon it additional burdens to be supported by the mine-owner.⁴

- Pinnington v. Galland*, 9 Ex. Ch. 1;
Rowbotham v. Wilson, 8 H. L. Cas. 348; s.c. 30 L. J. Rep. (N. S.) Q. B. 49;
Glasgow (Earl) v. Hurlet Alm. Co., 3 H. L. Cas. 25; s.c. 8 Eng. L. & Eq. 13;
The Caledonian Ry. Co. v. Sprot, 2 Macq. 449;
Harris v. Ryding, 5 Mees. & W. 60; s.c. 8 L. J. Rep. (N. S.) Ex. 18;
Humphries v. Brogden, 12 Q. B. 743; s.c. 1 Eng. L. & Eq. 251;
Smith v. Darby, L. R. 72 B. 716; s.c. 42 L. J. Q. B. 140; 26 L. T. 762; 20 W. R. 982; 3 Moak's Eng. Rep. 281;
Milton v. Granville, 13 L. J. Rep. (N. S.) Q. B. 193; s.c. 5 Q. B. 701.
- ¹ *Jones v. Wagner*, 66 Pa. St. 429; s.c. 5 Am. Rep. 385, 388.
 See: Kerr's "Adjudicated Words, Phrases and Applied Maxims."
- ² *Yandes v. Wright*, 66 Ind. 319; s.c. 32 Am. Rep. 109;
Marvin v. Brewster Iron Mining Co., 55 N. Y. 538; s.c. 14 Am. Rep. 322;
Coleman v. Chadwick, 80 Pa. St. 81, 93;
Horner v. Watson, 79 Pa. St. 242; s.c. 21 Am. Rep. 55;
Jones v. Wagner, 66 Pa. St. 429; s.c. 5 Am. Rep. 385;
Wakefield v. Buccleuch, L. R. 4 Eq. Cas. 613;
- Dugdale v. Robertson*, 3 Kay & J. 695;
Harris v. Ryding, 5 Mees & W. 60.
Grantee not liable for loss of springs.
 —But the grantee of minerals beneath the surface is not liable to the owner of the surface for the loss of springs occasioned by the ordinary working of the mine.
Coleman v. Chadwick, 80 Pa. St. 81; s.c. 21 Am. Rep. 93.
³ *Wilms v. Jess*, 94 Ill. 464; s.c. 34 Am. Rep. 242, 244;
Zinc Co. v. Franklinites Co., 13 N. J. Eq. (2 Beas.) 322, 342;
Ryckman v. Gillis, 57 N. Y. 68; s.c. 15 Am. Rep. 464;
Coleman v. Chadwick, 80 Pa. St. 81;
Horner v. Watson, 79 Pa. St. 242, 251; s.c. 21 Am. Rep. 55;
Jones v. Wagner, 66 Pa. St. 429; s.c. 5 Am. Rep. 385;
Smart v. Morton, 5 El. & Bl. 30; s.c. 26 L. J. (N. S.) Q. B. 260; 85 Eng. C. L. 30;
Harris v. Ryding, 5 Mees. & W. 60;
Humphries v. Brogden, 12 Q. B. 743; s.c. 1 Eng. L. & Eq. 241.
⁴ *Zinc Co. v. Franklinites Co.*, 13 N. J. Eq. (2 Beas.) 322;
Marvin v. Brewster Iron Mining Co., 55 N. Y. 538; s.c. 14 Am. Rep. 322, 334;
Lasala v. Holbrook, 4 Paige Ch. (N. Y.) 169;

SEC. 101. Same — Same — Where owner retains surface.—Where the owner of the fee grants the surface and retains the minerals the construction is the same as where he grants the minerals and retains the surface,¹ except that the instrument by which the conveyance is made will be more strictly construed against the grantor than against the grantee.²

SEC. 102. Same — Same — Where owner grants surface and retains minerals.—While it is true that when the grantor of the surface reserves the mines beneath it, he by implication reserves everything that is necessary for working them,³ and has an easement to do such acts as are reasonably necessary to get out the minerals and remove them from the mine;⁴ yet a mere reservation of the mineral as such, or a reservation with the right of mining, must always respect surface right of support, and will not, standing alone, permit the surface to be

Grubb v. Bayard, 2 Wall Jr. C. 81;

Humphries v. Brogden, 12 Ad. & E. (N. S.) 739; s.c. 64 Eng. C. L. 738;

Wilkinson v. Proud, 11 Mees. & W. 33.

Compare: Wilms v. Jess, 95 Ill. 464; s.c. 34 Am. Rep. 242.

¹ *Dand v. Kingscote*, 6 Mees. & W. 174;

Shep. Touch. 100.

See: *Wickham v. Hawker*, 7 Mees. & W. 78;

Proud v. Bates, 37 L. J. Ch. 406; s.c. 13 L. T. 61; 5 Am. Law Reg. N. S. 171.

² *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538; s.c. 14 Am. Rep. 322, 328.

Construction—There will be retained in the grantor all that which was the clear meaning and intention of the parties to reserve from the conveyance.

Marvin v. Brewster Iron Mining Co., 55 N. Y. 538; s.c. 14 Am. Rep. 322, 328;

Harris v. Ryding, 5 Mees. & W. 60, 70.

³ *Cardigan v. Armitage*, 2 Barn. & C. 197; s.c. 9 Eng. C. L. 93.

See: *Goold v. Great Western*

Deep Coal Co., 12 L. T. Rep. N. S. 842;

Proud v. Bates, 37 L. Ch. 416; s.c. 13 L. T. 61; 5 Am. L. Reg. N. S. 171.

⁴ *Erickson v. Michigan Land & Iron Co.*, 50 Mich. 604; s.c. 16 N. W. Rep. 161.

See: *Cardigan v. Armitage*, 2 Barn. & C. 197; s.c. 9 Eng. C. L. 93;

Smart v. Murton, 5 El. & Bl. 30, 46; s.c. 26 L. J. (N. S.) Q. B. 260; 85 Eng. C. L. 30;

Rowbotham v. Wilson, 8 H. L. Cas. 348; s.c. 30 L. J. Q. B. 49; 6 Jur. N. S. 965; 36 Eng. L. & Eq. 236;

Rogers v. Taylor, 1 Hurl. & N. 828; s.c. 26 L. J. Ex. 203; 38 Eng. L. & Eq. 574;

Harris v. Ryding, 5 Mees. & W. 60;

Aspden v. Seddon, L. R. 10 Ch. App. Cas. 394; s.c. 12 Moak's Eng. Rep. 773;

Smith v. Darby, L. R. 7 Q. B. 716; s.c. 42 L. J. Q. B. 140; 26 L. T. 762; 20 W. R. 982; 3 Moak's Eng. Rep. 281;

Eaton v. Jeffcock, L. R. 7 Ex. 379; s.c. 42 L. J. (N. S.) Ex. Ch. 39; 3 Moak's Eng. Rep. 428.

destroyed without some additional statutory or contract authority, and such statute or contract authority will be carefully construed to prevent the destruction of surface rights.¹ If the grantor intends to get the minerals in such a way as will destroy the surface, he must so frame the reservation as to show clearly that he intended to have that power.²

SEC. 103. **Money real estate when.**—On the principle heretofore stated,³ money which, according to will or agreement, is to be invested in land, is regarded in equity as real estate.⁴ This doctrine also rests on the assumption that property takes the form into which it is turned by its owner, provided he be at the time an adult of sound and disposing mind.⁵ Under some circumstances the money arising from the sale of land is invested with all the incidents and attributes of real estate. Thus, where land has been mortgaged and is sold under the mortgage after the mortgagor's death, the surplus arising from such sale will be regarded and treated as real estate.⁶ And where by order of court land of a decedent,⁷

¹ *Erickson v. Michigan Land & Iron Co.*, 50 Mich. 604; s.c. 16 N. W. Rep. 161.

Citing: *Roberts v. Haines*, 6 El. & Bl. 643; s.c. 88 Eng. C. L. 641;

Smart v. Morton, 5 El. & Bl. 30, 46; s.c. 26 L. J. (N. S.) Q. B. 260; 85 Eng. C. L. 30, 45;

Harris v. Ryding, 5 Mees. & W. 60; *Humphries v. Brogden*, 12 Q. B. 739; s.c. 64 Eng. C. L. 738;

Jeffries v. Williams, 20 L. J. (N. S.) Exch. 14; s.c. 1 Eng. L. & Eq. 423;

Hilton v. Granville, 5 Q. B. 701; s.c. 48 Eng. C. L. 699;

Smith v. Darby, L. R. 7 Q. B. 716; s.c. 42 L. J. Q. B. 140; 26 L. T. 762; 20 W. R. 982; 3 Moak's Eng. Rep. 281;

Hext v. Gill, L. R. 7 Ch. App. Cas. 699; s.c. 3 Moak's Eng. Rep. 574;

Bell v. Wilson, L. R. 1 Ch. App. Cas. 303.

² See: *Wilms v. Jess*, 94 Ill. 464; s.c. 34 Am. Rep. 242, 244;

Hext v. Gill, L. R. 7 Ch. App. 699; s.c. 3 Moak's Eng. Rep. 574.

³ See: *Ante*, § 79.

⁴ *Anstice v. Brown*, 6 Paige Ch. (N. Y.) 448;

Seymour v. Freer, 75 U. S. (18 Wall.) 202, 214; bk. 19 L. ed. 306, 310.

See: *Rankin v. Rankin*, 36 Ill. 293; s.c. 87 Am. Dec. 205;

Foreman v. Foreman, 7 Barb. (N. Y.) 215;

Peter v. Beverly, 35 U. S. (10 Pet.) 532, 536; bk. 9 L. ed. 522;

Trelawney v. Booth, 2 Atk. 307;

Fletcher v. Ashburner, 1 Bro. C. C. 497;

Biddulph v. Biddulph, 12 Ves. 161.

⁵ See: *Horton v. McCoy*, 47 N. Y. 21;

Denham v. Cornell, 67 N. Y. 556, affirming 7 Hun (N. Y.) 662.

⁶ *Dunning v. The Ocean National Bank*, 61 N. Y. 497; s.c. 19 Am. Rep. 293; 6 Lans. (N. Y.) 296.

See: *Denham v. Cornell*, 7 Hun (N. Y.) 664;

Bogert v. Furman, 10 Paige Ch. (N. Y.) 496;

McCarthy's Estate, 11 Phila. (Pa.) 85.

⁷ *Oberly v. Lerch*, 18 N. J. Eq. (3 C. E. Gr.) 346, 354.

a lunatic,¹ or an infant,² is sold for the payment of debts, or other particular purposes, the surplus after paying such debts retains the character of real estate. Where real estate which is owned by tenants in common, of whom one is an infant,³ or a lunatic,⁴ is sold under and in pursuance of a judgment in a partition suit, instituted by others of the tenants in common, the portion of the proceeds belonging to the infant or lunatic, remains impressed with the character of real estate.⁵ The money arising from the sale of timber cut on lands of which an infant⁶ or a lunatic⁷ has the fee, is regarded as real estate; and so also is the money arising from the condemnation of such lands under the power of eminent domain.⁸

An heir's interest in the land of his father is interest in realty, even after an order of sale has been made by the probate court, until the sale has actually taken place.

Withers' Appeal, 14 Serg. & R. (Pa.) 185; s.c. 16 Am. Dec. 488.

¹ Lloyd v. Hart, 2 Pa. St. 473; s.c. 45 Am. Dec. 612.

See: Wright's Appeal, 8 Pa. St. 57;

Hart's Appeal, 8 Pa. St. 32, 36;

Anandale v. Anandale, 2 Ves. Sr. 381;

Ex parte Bromfield, 1 Ves. Jr. 455.

In Pennell's Appeal 20 Pa. St. 515, 518, the court say that the case of Lloyd v. Hart, *supra*, was decided "upon peculiar provisions of the statute relating to the estates of lunatics, and upon the idiosyncrasy of the state and condition of the unfortunate objects of that statute."

² Collins v. Champ's Heirs, 4 B. Mon. (Ky.) 118; s.c. 61 Am. Dec. 179.

See: Ware v. Polhill, 11 Ves. 278; s.c. 8 Rev. Rep. 144.

³ Horton v. McCoy, 47 N. Y. 21.

⁴ *Re* Barker, L. R. 17 Ch. Div. 241; s.c. 50 L. J. Ch. 334; 44 L. T. N. S. 33; 29 W. R. 873.

See: *Re* Smith, L. R. 10 Ch. 79; s.c. 23 W. R. 297.

⁵ Horton v. McCoy, 47 N. Y. 21.

In Steed v. Preece, L. R. 18 Eq. 192; s.c. 22 W. R. 432; 43 L.

J. Ch. 687, land was conveyed to trustees upon trust for two infants, as tenants in common in tail, with cross-remainders between them. A suit was instituted by the trustees against the *cestuis que trustent* for the administration of the trust, and a decree was made after one of the infants had attained twenty-one by which a sale was ordered. A sale was made under the decree and the purchase money paid in the court; and upon further conditions the adult's share was paid to him, and the infant's share carried to a separate account. The infant afterwards died without having attained twenty-one. The court held that the money was not to be treated as realty.

⁶ Tullit v. Tullit, Ambl. 370; s.c. 1 Dick. 322.

⁷ *Ex parte* Bromfield, 1 Ves. Jr. 455.

⁸ See: Kelland v. Fulford, L. R. 6 Ch. Div. 491; s.c. 25 W. R. 506; Midland Counties R. Co. v. Oswin, 1 Colly. 74; s.c. 3 Rail. Cas. 497; 13 L. J. (N. S.) Ch. 209; 8 Jur. 138.

Where lunatic not in care of law.—

It seems, however, that where the land taken is that of a person in a state of mental imbecility, who is not the subject of a commission of lunacy, or otherwise cared for by the law, the money will be regarded as personality.

SEC. 104. **Movables realty when.**—Although things in themselves movable, and having the character of personal property, standing alone, are to be regarded as personalty,¹ yet they may take on the characteristics of and be treated as realty, by being fitted and applied to use as a part of the realty,² although at the time temporarily disannexed therefrom,³ such as the doors of a house,⁴ a key to the lock upon the doors of a building,⁵ or blinds to the windows of a dwelling-house,⁶ hop-poles,⁷ fence-rails,⁸ and the like.⁹ Where a house or other building has been blown down by a wind-storm, the fragments of such house are to be regarded as realty.¹⁰

SEC. 105. **Railroads — Road-bed, rails, etc.**—There can be no doubt that the road-bed and buildings erected at the station or elsewhere on railroads, such as depot-houses, station-houses, water-tanks, and the like, are real estate,¹¹ and so also are ties and rails,¹² where laid upon the road-bed and fastened thereto so that engines and cars can pass

See : *Re East Lincolnshire R. Co.*,
1 Sim. N. S. 260.

¹ See: *Penniman v. French*, 34
Mass. (17 Pick.) 404; s.c. 28 Am.
Dec. 309.

² See: *Post*, chapters on "Fixtures."

³ *Richardson v. Copeland*, 72 Mass.
(6 Gray.) 536; s.c. 66 Am. Dec.
424;

Winslow v. Merchants' Ins. Co.,
45 Mass. (4 Met.) 306; s.c. 38
Am. Dec. 368;

Sweetzer v. Jones, 35 Vt. 317; s.c.
82 Am. Dec. 639;

Harris v. Haynes, 34 Vt. 220;

Malmsby v. Milne, 7 C. B. N. S.
115; s.c. 97 Eng. C. L. 114.

Criterion for determining class to
which belong.—In the case of
Hill v. Wentworth, 28 Vt.
428, it is said that "whether
the articles in question were
personal property or fixtures
should be determinable and
plainly appear from an inspec-
tion of the property itself, tak-
ing into consideration their
nature, the mode and extent of
their annexation, and their
purpose and object, from which
the intention would be in-
dicted."

⁴ *Peck v. Batchelder*, 40 Vt. 233.

⁵ See: 3 Cent. L. J. 617.

⁶ *Peck v. Batchelder*, 40 Vt. 233.

⁷ *Bishop v. Bishop*, 11 N. Y. 123;
s.c. 62 Am. Dec. 68.

⁸ *Goodrich v. Jones*, 2 Hill (N. Y.)
142.

⁹ *McLaughlin v. Johnson*, 46 Ill.
163;

House v. House, 10 Paige Ch. (N.
Y.) 158.

See: *Colegrave v. Dias Santos*, 2
B. & C. 76; s.c. 9 Eng. C. L. 42;
Walmsby v. Milne, 7 C. B. N. S.
115; s.c. 97 Eng. C. L. 114.

¹⁰ *Rogers v. Gilinger*, 30 Pa. St. 185;
s.c. 72 Am. Dec. 694.

¹¹ See: *McLaughlin v. Johnson*, 46
Ill. 163;

Salmer v. Forbes, 23 Ill. 301;

Strickland v. Parker, 54 Me. 206,
267;

Van Keuren v. Central R. Co. of
N. J., 38 N. J. L. (9 Vr.) 165.

¹² *Hunt v. Bay State Iron Co.*, 97
Mass. 279;

People ex rel. The N. Y. & H. R.
Co. v. Commissioners of Taxes,
101 N. Y. 322; s.c. 4 N. E. Rep.
127;

Smyth v. Mayor of New York,
68 N. Y. 552.

over them, in the absence of any agreement to the contrary.¹ But where rails are laid under an agreement that they shall be put down on a specified part of the road-bed, and remain the property of the vendor until paid for, they do not lose their character as personalty and become a part of the land until such obligation is discharged.²

SEC. 106. **Same — Foundation, columns, viaducts, etc., of railroad.**—The question whether the foundations, columns, and superstructure of an elevated railway are within the statutory definition of land, and liable to taxation as realty, came up in the case *People ex rel. The New York Elevated Railroad Company v. Commissioners of Taxes*,³ and it was held that they are real estate,⁴ the court remarking “that they would be fixtures at common law, as articles annexed to the freehold, is plain both upon principle and authority.”⁵ And that the same is true of the tunnels, tracks, substructures, superstructures, stations, viaducts, and masonry of a railroad company was determined by the New York Court of Appeals in the case of *People ex rel. New York and Harlem River Railroad Company v. Commissioners of Taxes*.⁶

SEC. 107. **Same — Rolling stock.**—Whether the rolling stock of a railroad company, such as engines, cars, and the like, are to be regarded as personal property or real estate is an unsettled question. In several of the states it is held that the rolling stock and appliances of a railroad company, being essential to its operation, although movable in fact, are a part of the structure, and to be re-

¹ *Hunt v. Bay State Iron Co.*, 97 Mass. 279. ² See: *Hunt v. Bay State Iron Co.*, 97 Mass. 279.

See: *Richardson v. Copeland*, 72 Mass. (6 Gray) 536; s.c. 66 Am. Dec. 424;

Butler v. Page, 48 Mass. (7 Met.)

40; s.c. 39 Am. Dec. 755;

Winslow v. Merchants' Ins. Co., 45 Mass. (4 Met.) 306; s.c. 38 Am. Dec. 368;

Peirce v. Goddard, 39 Mass. (22 Pick.) 559; s.c. 33 Am. Dec. 764.

Haven v. Emery, 33 N. H. 66; *Pierce v. Emery*, 32 N. H. 484.

³ 82 N. Y. 459, 461.

⁴ The same is true of electric poles and wires. See: *Ante*, § 47.

⁵ See: *McRea v. Central National Bank of Troy*, 66 N. Y. 439; *Walker v. Sherman*, 20 Wend. (N. Y.) 655.

⁶ 101 N. Y. 322; s.c. 4 N. E. Rep. 127.

garded as a part of the realty.¹ But the weight of decision and the better doctrine is thought to be that the rolling stock of a railroad is personal property. This doctrine prevails in Alabama,² Iowa,³ New Hampshire,⁴ New Jersey,⁵ New York,⁶ Ohio,⁷ Wisconsin,⁸ and perhaps other states.

SEC. 108. **Sea-weed—Marine increment.**—Sea-weed, which has been thrown upon land by the sea, is regarded as a marine accretion, and belongs to the owner of the soil. The rule is, that if the marine increase be by small and imperceptible degrees it goes to the owner of the land; but if it be by sudden and considerable, it belongs to the sovereign.⁹ The sea-weed must be supposed to have

¹ *Palmer v. Forbes*, 23 Ill. 300, 302; (*Compare* : *Sangamon and M. R. Co. v. Morgan Co.*, 14 Ill. 163; s.c. 56 Am. Dec. 497);

Coe v. McBrown, 22 Ind. 252;

Douglass v. Cline, 12 Bush (Ky.) 608;

Phillips v. Winslow, 18 B. Mon. (Ky.) 431; s.c. 68 Am. Dec. 729;

State v. Northern R. Co., 18 Md. 193;

Youngman v. Elmira & W. R. Co., 65 Pa. St. 278;

Covey v. Pittsburgh, F. W. & C. R. Co., 3 Phila. (Pa.) 173;

Milwaukee & M. R. Co. v. James, 73 U. S. (6 Wall.) 750; bk. 18 L. ed. 854;

Minnesota Co. v. St. Paul Co., 69 U. S. (2 Wall.) 609; s.c. *sub nom.* *Milwaukee & Minnesota Co. v. Soutter*, bk. 17 L. ed. 886;

Gue v. Tidewater Canal Co., 65 U. S. (24 How.) 257; bk. 16 L. ed. 635;

Pennock v. Coe, 64 U. S. (23 How.) 117; bk. 16 L. ed. 436;

Scott v. Clinton & S. R. Co., 6 Biss. C. C. 529;

Farmers' Trust & Loan Co. v. St. Jo. & D. R. Co., 3 Dill. C. C. 412.

² *Meyer v. Johnston*, 53 Ala. 237, 253.

³ *Neilson v. Iowa Eastern R. Co.*, 51 Iowa 184; s.c. 33 Am. Rep. 124; 1 N. W. Rep. 434.

⁴ *Boston, C. & M. R. Co. v. Gilmore*, 37 N. H. 410.

See: *Pierce v. Emery*, 32 N. H. 484.

⁵ *Williamson v. New Jersey & S. R. Co.*, 29 N. J. Eq. (2 Stew.) 311; s.c. 15 Am. R. W. Rep. 572.

Engines and Cars—New Jersey doctrine.—In the case of the *State Treasurer v. Summerville & E. R. Co.*, 28 N. J. L. (4 Dutch.) 21, the court say that engines and cars are no more appendages of the railroad than are wagons and carriages of the highway; that both are equally essential to the enjoyment of the road, but that neither constitute a part of it.

⁶ *People ex rel. N. Y. & H. R. R. Co. v. Commissioner of Taxes*, 101 N. Y. 322;

Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314; s.c. 13 Am. Rep. 595;

Randall v. Elwell, 52 N. Y. 521; s.c. 11 Am. Rep. 747;

Stevens v. Buffalo & N. Y. C. R. Co., 31 Barb. (N. Y.) 590.

⁷ *Coe v. Columbus, P. & Ind. R. Co.*, 10 Ohio St. 372; s.c. 75 Am. Dec. 518.

⁸ *Chicago & N. W. R. Co. v. Borough of Ft. Howard*, 21 Wis. 44; s.c. 91 Am. Dec. 458.

⁹ *Emans v. Turnbull*, 2 John. (N. Y.) 313, 323; s.c. 3 Am. Dec. 427, 430-431;

2 Bl. Com. 261;

Harg. Law Tracts, 28.

See: *Mather v. Chapman*, 40 Conn. 382; s.c. 16 Am. Rep. 46.

accumulated gradually. The slow increase, and its usefulness as a manure, and as a protection to the bank, will, upon every just and equitable principle, vest the property of the weed in the owner of the land. It forms a reasonable compensation to him for the gradual encroachment of the sea, to which other parts of his estate may be exposed. This is only one reason for vesting the maritime increments in the proprietor of the shore. The *jus alluvionis* ought, in this respect, to receive a liberal encouragement in favor of private right.

SEC. 109. **Same — When cast between high and low water-mark.**—According to the common law of England the sea-shore, between high and low water-mark, belongs to the sovereign, in trust for his subjects,¹ and consequently when the sea-weed is cast upon the shore between high and low water-mark it belongs to the public at large and becomes the property of the first occupant or taker.² This rule does not apply in those states where, by virtue of statute, the title of proprietors adjoining navigable waters extends to low water-mark as in Maine, Massachusetts, and New Hampshire by virtue of the colonial ordinance of 1641, since adopted as law by statutory enactment.³

SEC. 110. **Saw-mill, saw-dust, etc., real estate when.**—A building erected upon the land of another may or may not be a permanent improvement according to the agreement and intentions of the parties.⁴ Thus it has been said that a steam saw-mill placed upon the land of another, conditionally, may be the personal property of the builder, and liable for his obligations,⁵ if the owner of the land has failed to perform his part of the contract.⁶ And the off-fall from such a mill,—such as saw-

¹ *Barker v. Bates*, 30 Mass. (13 Pick.) 255; s.c. 23 Am. Dec. 678.

² *Mather v. Chapman*, 40 Conn. 382; s.c. 16 Am. Rep. 46.

³ See: *Mather v. Chapman*, 40 Conn. 382; s.c. 16 Am. Rep. 46; *Lapish v. Bangor Bank*, 8 Me. 85; *Barker v. Bates*, 23 Mass. (13

Pick.) 255; s.c. 23 Am. Dec. 278; *Parker v. Smith*, 17 Mass. 413; s.c. 9 Am. Dec. 157;

Storer v. Freeman, 6 Mass. 435; s.c. 4 Am. Dec. 155.

⁴ See: *Post*, chapters on "Fixtures."

⁵ See: *State v. Bonham*, 18 Ind. 233.

⁶ *Yater v. Mullen*, 23 Ind. 562.

dust, slabs, shavings, and other refuse,—when used to fill up low or marshy ground, becomes real property ; but when piled up on the land to be removed for fire-wood, or other purposes, remains personal property.¹

SEC. 111. *Water real estate when.*—Water is a movable thing of a wandering nature, and incapable of absolute ownership.² It is in no proper sense real estate, although it is sometimes classified with oil and gas as a kind of mineral,³ and is invested with some of the attributes of real property when congealed to ice.⁴ If water can properly be classed as a mineral at all, it is a mineral of peculiar attributes, and, unlike its volatile sisters, gas and oil, the rules and regulations of mines, and the decisions in ordinary cases relating to mining rights, have no application to either running, standing, or percolating waters.⁵ Water and oil, and still more appropriately gas, may be classified by themselves,—if the analogy be not too fanciful,—as minerals *feræ naturæ*, because, in common with animals, and unlike other mineral substances, they have the power and the tendency to escape without the volition of the owner.⁶ Their fugitive and wandering existence within the limits of a particular tract of land is always uncertain.⁷ They belong to the owner of the land and are a part of it, so long, and only so long, as they are in or on it, and are subject to his control, but when they escape and go into or onto other land, or come under another's control, the title of the former owner is gone.⁸ Being of a movable and wandering nature, with a tendency to escape from any and every particular tract of land, water of necessity continues common by the law of nature ; so that one can

¹ *Jenkins v. McCurdy*, 48 Wis. 628; s.c. 33 Am. Rep. 841; 4 N. W. Rep. 807.

² *Brown v. Best*, 1 Wils. 174; 1 Co. Litt. (19th ed.) 4a.

³ *Westmoreland & Cambria Natural Gas Co. v. DeWitt*, 130 Pa. St. 235; s.c. 18 Atl. Rep. 724; 5 L. R. A. 731; 1 Ball. Am. L. of R. P. 1892, § 317.

⁴ See: *Ante*, § 70.

⁵ *Westmoreland & Cambria Nat-*

ural Gas Co. v. DeWitt, 130 Pa. St. 235; s.c. 18 Atl. Rep. 724; 5 L. R. A. 731; 1 Ball. Am. L. of R. P. 1892, § 317.

⁶ *Brown v. Vandergrift*, 80 Pa. St. 147, 148.

⁷ *Westmoreland & Cambria Natural Gas Co. v. DeWitt*, 130 Pa. St. 235; s.c. 18 Atl. Rep. 724; 5 L. R. A. 731; 1 Ball. Am. L. of R. P. 1892, § 317.

only have a temporary, uncertain, transient, usufructuary property in it.¹ While the grant of a parcel of land passes the property in a stream of water which runs over it, as much as it does the property in the stones that are upon the surface,² yet the right of the grantee to the uninterrupted and full use of the water as it flows naturally past his land is not an absolute right, but a natural one, qualified and limited by the existence of like rights in others. His enjoyment must necessarily be according to his opportunities, prior to those below him, and subsequent to those above him, and liable to be modified or abridged by the reasonable use of the stream by others.³

¹ 2 Bl. Com. 14, 18.

² *Browne v. Kennedy*, 5 Har. & J. (Md.) 195; s.c. 9 Am. Dec. 503; *Elliot v. Fitchburg R. Co.*, 64 Mass. (10 Cush.) 191, 193; *Canal Commissioners v. People*, 5 Wend. (N. Y.) 423; *Buckingham v. Smith*, 10 Ohio 288.

³ *Red River Roller Mills v. Wright*,

30 Minn. 249; s.c. 44 Am. Rep. 194, 196;

Merrifield v. City of Worcester, 110 Mass. 216; s.c. 14 Am. Rep. 592;

Palmer v. Mulligan, 3 Cai. (N. Y.) 307; s.c. 2 Am. Dec. 270;

Platt v. Johnson, 15 John. (N. Y.) 213; s.c. 8 Am. Dec. 233.

CHAPTER IV.

FIXTURES.

- SEC. 112. Definition of fixture.
- SEC. 113. What fixtures pass with the realty.
- SEC. 114. Criteria for determining.
- SEC. 115. Same—1. Actual annexation.
- SEC. 116. Same—Same—Manner of annexation and character of article.
- SEC. 117. Same—2. Appropriation to use.
- SEC. 118. Same—3. Adaptation to the use.
- SEC. 119. Same—4. Policy of the law.
- SEC. 120. Same—5. Intention of the parties.
- SEC. 121. Same—Same—Permanency of attachment controlled by intent.
- SEC. 122. Kinds or classes of fixtures.
- SEC. 123. Same—1. Agricultural fixtures.
- SEC. 124. Same—2. Domestic fixtures—a. Useful fixtures.
- SEC. 125. Same—Same—b. Ornamental fixtures.
- SEC. 126. Same—3. Ecclesiastical fixtures.
- SEC. 127. Same—4. Trade fixtures.
- SEC. 128. Same—5. Mixed fixtures.
- SEC. 129. Between whom the question of fixtures may arise.
- SEC. 130. Same—1. Assignee in bankruptcy and for benefit of creditors.
- SEC. 131. Same—2. Debtor and execution creditor.
- SEC. 132. Same—3. Executor and heir-at-law.
- SEC. 133. Same—4. Executor of tenant for life and remainderman.
- SEC. 134. Same—5. Heir-at-law and devisee.
- SEC. 135. Same—6. Landlord and tenant.
- SEC. 136. Same—Same—Removal of fixtures by tenant.
- SEC. 137. Same—Same—Renewal of lease without removal of fixtures.
- SEC. 138. Same—7. Mortgagor and mortgagee.
- SEC. 139. Same—8. Personal representative and devisee.
- SEC. 140. Same—9. Tenants in common.
- SEC. 141. Same—10. Vendor and vendee.
- SEC. 142. Same—Same—Gas-fixtures, chandeliers, etc.
- SEC. 143. Same—Same—Fixtures annexed by one in possession under contract of purchase.
- SEC. 144. Agreement in relation to fixtures.
- SEC. 145. Same—Limitation of doctrine.
- SEC. 146. Removal of fixtures.
- SEC. 147. Same—Exceptions to the rule.

SECTION 112. Definition of fixture.—The word “fixture” is a substantive term of modern origin,¹ and is applied to articles of the nature of personal property. It includes any article which was a chattel, but which, by being physically annexed or affixed to the realty, becomes accessory to, and part and parcel of it;² and if on the premises at the time of the execution of a deed, pass with the conveyance.³ Fixtures, though attached to the soil, are not for all purposes, and between all parties who may be concerned, a part of the freehold.⁴

SEC. 113. What fixtures pass with the realty.—Those fixtures which are incident to the land and used in connection therewith, although temporarily detached, pass by a deed of the realty, notwithstanding an oral exception and reservation made at the time of the execution of the deed;⁵

¹ *Hutchins v. Masterson*, 46 Tex. 551; s.c. 26 Am. Rep. 286.

For a full discussion, see 3 Alb. L. J. 407, 421.

² *Teaff v. Hewitt*, 1 Ohio St. 511; s.c. 59 Am. Dec. 634.

See: *Farrar v. Stackpole*, 6 Me. (6 Greenl.) 155; s.c. 19 Am. Dec. 201;

Mather v. Fraser, 2 Kay & J. 536.

³ *Stockwell v. Campbell*, 39 Conn. 362; s.c. 12 Am. Rep. 393;

Potter v. Cromwell, 40 N. Y. 287; s.c. 100 Am. Dec. 485;

Green v. Phillips, 26 Gratt. (Va.) 752; s.c. 21 Am. Rep. 323;

Holland v. Hodgson, L. R. 7 C. P. 328; s.c. 2 Moak's Eng. Rep. 655;

D'Eyncourt v. Gregory, L. R. 3 Eq. Cas. 382.

See: *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa 57; s.c. 24 Am. Rep. 719;

Bringingolf v. Munzemaier, 20 Iowa 513;

Corliss v. McLagin, 29 Me. 115;

Turl v. Fuller, 28 Me. 545;

Union Bank v. Emerson, 15 Mass. 152;

Wadleigh v. Janvrin, 41 N. H. 503; s.c. 77 Am. Dec. 780;

Miller v. Plumb, 6 Cow. (N. Y.) 665;

Fryatt v. Sullivan County, 5 Hill (N. Y.) 116;

Powell v. Monson & B. Mfg. Co., 3 Mas. C. C. 347, 459.

⁴ See: *Kerr's Benjamin on Sales*, vol. I., p. 108, § 131;

Blackburn on Sales, 9, 10.

⁵ *Brock v. Smith*, 14 Ark. 431;

Parson v. Camp, 11 Conn. 525;

McLaughlin v. Johnson, 46 Ill. 163;

Smith v. Price, 39 Ill. 28;

Palmer v. Forbes, 25 Ill. 300;

Redlon v. Barker, 4 Kan. 445;

Fulton v. Norton, 64 Me. 410;

Turl v. Fuller, 28 Me. 545;

Lassell v. Reed, 6 Me. (6 Greenl.) 222;

Farrar v. Stackpole, 6 Me. (6 Greenl.) 157; s.c. 19 Am. Dec. 201;

Winslow v. Merchants' Ins. Co., 45 Mass. (4 Met.) 306; s.c. 38 Am. Dec. 368;

Daniels v. Pond, 38 Mass. (21 Pick.) 367; s.c. 32 Am. Dec. 269;

Noble v. Bosworth, 36 Mass. (19 Pick.) 314.

Glidden v. Bennett, 43 N. H. 306;

Wadleigh v. Janvrin, 41 N. H. 503; s.c. 77 Am. Dec. 780;

Conner v. Coffin, 27 N. H. 542;

Sawyer v. Twiss, 26 N. H. 345;

Needham v. Allison, 24 N. H. (4 Fost.) 355;

Kittredge v. Woods, 3 N. H. 503; s.c. 14 Am. Dec. 393;

Snedeker v. Warring, 12 N. Y. 170;

Bishop v. Bishop, 11 N. Y. 123; s.c. 62 Am. Dec. 68;

such as a bell hung upon a frame, and fastened to it by a hasp, the frame being nailed to the cupola of a barn ;¹ the boiler of a cotton mill ;² the blinds to the windows of a dwelling ;³ a cider-mill ;⁴ a copper kettle boiler in a brew-house ;⁵ a cotton-ginn,⁶ attached to the gears in the ginn-house ;⁷ the doors of a building ;⁸ a dye-kettle affixed in brick in a fulling-mill ;⁹ a dye-house ;¹⁰ the engine of a cotton mill,¹¹ and the engine, utensils and implements, whether attached or loose, used in working a mine ;¹² everything put into and forming a part of a building ;¹³ a factory bell hung in a tower built upon the factory to receive it ;¹⁴ fences,¹⁵ fence rails or material placed along the line of a contemplated fence and not yet used,¹⁶ or temporarily detached ;¹⁷ frames filled with satin and attached to the walls ;¹⁸ fruit trees and ornamental shrubbery, though growing in a nursery ;¹⁹ gar-

- Austin v. Sawyer, 9 Cow. (N. Y.) 39 ;
 Raymond v. White, 7 Cow. (N. Y.) 319.
 Miller v. Plumb, 6 Cow. (N. Y.) 665 ; s.c. 16 Am. Dec. 456 ;
 Goodrich v. Jones, 2 Hill (N. Y.) 142 ;
 Cresson v. Stout, 17 Johns (N. Y.) 116 ; s.c. 8 Am. Dec. 373 ;
 Heermance v. Vernoy, 6 Johns. (N. Y.) 5 ;
 Walker v. Sherman, 20 Wend. (N. Y.) 636 ;
 Middlebrook v. Corwin, 15 Wend. (N. Y.) 169 ;
 Bond v. Coke, 71 N. C. 97 ;
 Latham v. Blakely, 70 N. C. 368 ;
 Meig's Appeal, 62 Pa. St. 28 ; s.c. 1 Am. Rep. 372 ;
 Hill v. Sewald, 53 Pa. St. 271 ; s.c. 91 Am. Dec. 209, 211 ;
 Voorhis v. Freeman, 2 Watts & S. (Pa.) 116 ; s.c. 37 Am. Dec. 490 ;
 Ripley v. Paige, 12 Vt. 353.
¹ Weston v. Weston, 101 Mass. 514. See: Alvord Carriage Mfg. Co. v. Gleason, 36 Conn. 86.
² McKim v. Mason, 3 Md. Ch. 186.
³ Peck v. Batchelder, 40 Vt. 233.
⁴ Wadleigh v. Janvrin, 41 N. H. 503 ; s.c. 77 Am. Dec. 780.
⁵ Gray v. Holdship, 17 Serg. & R. (Pa.) 413 ; s.c. 17 Am. Dec. 680.
⁶ Bond v. Coke, 71 N. C. 97 ;
 Latham v. Blakely, 70 N. C. 368.
⁷ Farris v. Walker, 1 Bail. (S. C.) L. 540.
⁸ Peck v. Batchelder, 40 Vt. 233.
⁹ See: Union Bank v. Emerson, 15 Mass. 159.
¹⁰ Noble v. Bosworth, 36 Mass. (19 Pick.) 314.
¹¹ McKim v. Mason, 3 Md. Ch. 106.
¹² Fisher v. Dixon, 12 Cl. & Fin. 312 ; s.c. 9 Jur. 883.
¹³ See: Farrar v. Stackpole, 6 Me. (6 Greenl.) 154 ; s.c. 19 Am. Dec. 201 ;
 Noble v. Bosworth, 36 Mass. (10 Pick.) 314 ;
 Richardson v. Borden, 42 Miss. 71 ; s.c. 2 Am. Rep. 595 ;
 Tabor v. Robinson, 36 Barb. (N. Y.) 483 ;
 Main v. Schwarzwælder, 4 E. D. Smith (N. Y.) 273 ;
 Lynde v. Russell, 1 Barn. & Adol. 394 ; s.c. 20 Eng. C.L. 532.
 Compare: Peck v. Batchelder, 40 Vt. 233 ;
¹⁴ Alvord Carriage Mfg. Co. v. Gleason, 36 Conn. 86.
 See: Weston v. Weston, 102 Mass. 514.
¹⁵ Gliddin v. Bennett, 43 N. H. 306.
¹⁶ Conklin v. Parsons, 1 Chand. (Wis.) 240.
¹⁷ Goodrich v. Jones, 2 Hill (N. Y.) 142.
¹⁸ D'Eyncourt v. Gregory, L. R. 5 Eq. Cas. 382 ; s.c. 36 L. J. Ch. 107 ; 15 W. R. 186.
¹⁹ Smith v. Price, 39 Ill. 28 ; s.c. 89 Am. Dec. 284.

den-seats of stone ;¹ gasoliers ;² gas-fixtures are a "permanent fixture" between the vendor and vendee where the latter are to remain ;³ gas-pipes which run through the walls and under the floors of a house ;⁴ a hat-rack, where attached to the building in the course of its erection, and as a part of the process ;⁵ hay scales ;⁶ hop-poles, though detached from the ground and stacked in a pile ;⁷ a hotel sign attached to the building or a post ;⁸ the key to a building ;⁹ a kitchen range ;¹⁰ lumber hauled for a building ;¹¹ machinery put in a building fitted up as a manufactory by the owner of the fee, where it is essential to the manufactory ;¹² machinery in a shop and necessary

¹ *D'Eyncourt v. Gregory*, L. R. 3 Eq. Cas. 382 ; s.c. 36 L. R. Ch. 107 ; 15 W. R. 186.

² *Sewell v. Angerstein*, 18 L. T. N. S. 301.

³ *Fratt v. Whittier*, 58 Cal. 126 ; s.c. 41 Am. Rep. 251.

Compare : *Towne v. Fiske*, 127 Mass. 125, 127 ; s.c. 34 Am. Rep. 353.

McKeage v. Hanover Fire Ins. Co., 81 N. Y., 38 ; s.c. 37 Am. Rep. 471.

⁴ *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38 ; s.c. 37 Am. Rep. 471.

⁵ *Ward v. Kilpatrick*, 85 N. Y. 413.

⁶ *Dudley v. Foote*, 63 N. H. 57 ; s.c. 56 Am. Rep. 489.

See : *Arnold v. Crowder*, 81 Ill. 56.

⁷ *Bishop v. Bishop*, 11 N. Y. 123.
Compare : *Noyes v. Terry*, 1 Lans. (N. Y.) 219, 222.

⁸ *Redlon v. Barker*, 4 Kan. 382 ; s.c. 96 Am. Dec. 180.

Compare : *Woodward v. Lasar*, 21 Cal. 448 ; s.c. 82 Am. Dec. 751

Ex parte Sheen, Re Thomas, 43 L. T. N. S. 638.

⁹ *See* : 3 Cent. L. J. 617.

¹⁰ *Fratt v. Whittier*, 58 Cal. 126 ; s.c. 41 Am. Rep. 251.

¹¹ *McLaughlin v. Johnson*, 46 Ill. 163.

¹² *Ottumwa Woollen Mill Co. v. Hawley*, 44 Iowa, 57 ; s.c. 24 Am. Rep. 719 ;

Farrar v. Stackpole, 6 Me. (6 Greenl.) 154 ;

Green v. Phillips, 26 Gratt. (Va.) 752 ; s.c. 21 Am. Rep. 323 ;

Longbottom v. Berry, L. R. 5 Q. B. 123 ;

Queen v. Inhabitants of Parish of Lee, L. R. 1 Q. B. 241 ; s.c. 14 W. R. 311 ;

Hubbard v. Bagshaw, 4 Sim. 326.

As to when machinery is a fixture.—*See* : *Hancock v. Jordan*, 7 Ala. 448 ; s.c. 42 Am. Dec. 600 ;

Swift v. Thompson, 9 Conn. 63 ; s.c. 21 Am. Dec. 718 ;

Taffe v. Warnick, 3 Blackf. (Ind.) 111 ; s.c. 23 Am. Dec. 383 ;

Goddard v. Bolster, 6 Me. (6 Greenl.) 427 ; s.c. 20 Am. Dec. 320 ;

Farrar v. Stackpole, 6 Me. (6 Greenl.) 154, 157 ; s.c. 19 Am. Dec. 201 ;

Kirwan v. Latour, 1 Har. & J. (Md.) 289 ; s.c. 2 Am. Dec. 519 ;

Winslow v. Merchants' Ins. Co., 45 Mass. (4 Met.) 406 ; s.c. 38 Am. Dec. 368 ;

Gale v. Ward, 14 Mass. 352 ; s.c. 7 Am. Dec. 223 ;

Hunt v. Mullanphy, 1 Mo. 508 ; s.c. 14 Am. Dec. 300 ;

Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205 ; s.c. 37 Am. Dec. 203 ;

Randolph v. Gwynne, 7 N. J. Eq. (3 Halst.) 88 ; s.c. 51 Am. Dec. 265 ;

Miller v. Plumb, 6 Cow. (N. Y.) 665 ; s.c. 16 Am. Dec. 456 ;

Holmes v. Tremper, 20 John. (N. Y.) 29 ; s.c. 11 Am. Dec. 238 ;

Cresson v. Stout, 17 John. (N. Y.) 116 ; s.c. 8 Am. Dec. 373 ;

Harlan v. Harlan, 15 Pa. St. 507 ; s.c. 53 Am. Dec. 612 ;

Gray v. Holdship, 17 Eng. & R. (Pa.) 413 ; s.c. 17 Am. Dec. 680 ;

Pyle v. Pennock, 2 Watts & S.

to its usefulness ;¹ machinery of a marine railway ;² machinery used in carrying on business, where part is attached to the soil, and the other parts not attached are necessary to the use of the parts so attached ;³ machinery for manufacturing purposes where essential to the manufacture ;⁴ machinery in a mill⁵ for manufacturing purposes ;⁶ manure⁷ made on a farm in the usual course of husbandry ;⁸ the mill-wheel and gearing of a factory, attached to the same, and necessary for the operation of such factory ;⁹ mirrors built into a house ;¹⁰ mosquito screens ;¹¹ pictures in panels on the wall ;¹² platform

- (Pa.) 390 ; s.c. 37 Am. Dec. 517 ;
Voorhis v. Freeman, 2 Watts & S. (Pa.) 116 ; s.c. 37 Am. Dec. 490 ;
McKenna v. Hammond, 3 Hill. (S. C.) L. 331 ; s.c. 30 Am. Dec. 366 ;
Degraffenreid v. Scruggs, 4 Hump. (Tenn.) 451 ; s.c. 40 Am. Dec. 658 ;
Tobias v. Francis, 3 Vt. 425 ; s.c. 23 Am. Dec. 217.
South Bridge Savings Bank v. Stevens Tool Co., 130 Mass. 547.
Compare : *Hubbell v. East Cambridge Five Cent Savings Bank*, 132 Mass. 447 ; s.c. 42 Am. Rep. 446.
² *Tyson v. Post*, 108 N. Y. 217 ; s.c. 2 Am. St. Rep. 409.
³ *Dudley v. Hurst*, 67 Md. 44 ; s.c. 1 Am. St. Rep. 368 ; 8 Atl. Rep. 901.
⁴ *Gray v. Holdship*, 17 Serg. & R. (Pa.) 413.
See : *Pea v. Pea*, 35 Ind. 387 ;
Bowen v. Wood, 35 Ind. 268 ;
Stanhope v. Suplee, 2 Brewst. (Pa.) 455 ;
Climie v. Wood, L. R. 3 Ex. 257.
⁵ *Farrar v. Stackpole*, 6 Me. (6 Greenl.) 154, 157 ; s.c. 19 Am. Dec. 201 ;
Winslow v. Merchants' Ins. Co., 45 Mass. (4 Met.) 306 ; s.c. 38 Am. Dec. 368 ;
Robertson v. Corset, 39 Mich. 777 ;
Hill v. Sewald, 53 Pa. St. 271 ; s.c. 91 Am. Dec. 209 ;
Voorhis v. Freeman, 2 Watts & S. (Pa.) 116 ; s.c. 37 Am. Dec. 490.
⁶ *Capen v. Peckham*, 35 Conn. 88 ;
Pierce v. George, 108 Mass. 78 ; s.c. 11 Am. Rep. 310 ;
Jones v. Detroit Chair Co., 38 Mich. 92 ; s.c. 31 Am. Rep. 314 ;
Coleman v. Stearns Mfg. Co., 38 Mich. 30 ;
Case v. Arnett, 26 N. J. Eq. (11 C. E. Gr.) 959 ;
Grimshawe v. Burnham, 25 U. C. Q. B. 147 ;
McLaren v. Coombs, 16 Grant U. C. 587.
⁷ *Parsons v. Camp*, 11 Conn. 525 ;
Chase v. Wingate, 68 Me. 204 ; s.c. 6 Rep. 749 ;
Staples v. Emery, 7 Me. 201 ;
Lassell v. Reed, 6 Me. 222 ;
Daniels v. Pond, 38 Mass. (21 Pick.) 367 ; s.c. 32 Am. Dec. 369 ;
Sawyer v. Twiss, 26 N. H. 345.
Needham v. Allison, 24 N. H. (4 Fost.) 355 ;
Conner v. Coffin, 22 N. H. 538 ;
Kittredge v. Woods, 3 N. H. 503 ; s.c. 14 Am. Dec. 393 ;
Goodrich v. Jones, 2 Hill (N. Y.) 142 ;
Middlebrooke v. Corwin, 15 Wend. (N. Y.) 169.
⁸ *Parsons v. Camp*, 11 Conn. 525 ;
Kittredge v. Woods, 3 N. H. 503 ; s.c. 14 Am. Dec. 393 ;
Goodrich v. Jones, 2 Hill (N. Y.) 142.
⁹ *Powell v. Monson & B. Mfg. Co.*, 3 Mas. C. C. 347, 459.
¹⁰ *Mackie v. Smith*, 5 La. An. 717 ;
Ward v. Kilpatrick, 85 N. Y. 413 ; s.c. 39 Am. Rep. 674 ;
Lockwood v. Lockwood, 3 Redf. (N. Y.) 330.
¹¹ *Fratt v. Whittier*, 58 Cal. 126 ; s.c. 41 Am. Rep. 251.
¹² *D'Eyncourt v. Gregory*, L. R. 3

scales,¹ where bolted and fastened to sills, laid upon a brick wall, set in the ground, and intended for permanent farm use ;² rails and materials prepared for a fence ;³ rollers of a marine railway ;⁴ salt-pans erected by the owner of a salt spring for the profitable enjoyment of the inheritance ;⁵ a saw-mill with such appurtenances as the mill-chain, dogs, and bars ;⁶ seats in a theater, where made after a pattern furnished with special reference to the size and shape of the auditorium, and screwed to the floor ;⁷ shafting of a marine railway ;⁸ shutters to the windows of a dwelling ;⁹ a smutter, lent to the owner of a grist-mill and fastened therein in the usual manner ;¹⁰ statuettes ;¹¹ stoves, permanently attached to the brick-work of chimneys,¹²—but it is otherwise where they have been disconnected and put away for the summer,¹³ or are merely connected by a pipe ;¹⁴ a sugar-mill on a plantation ;¹⁵ a sun-dial ;¹⁶ tanks ;¹⁷ tapestry on the wall ;¹⁸ a threshing machine affixed by the owner in a barn by means of screws and bolts ;¹⁹ tip-hammers firmly attached to blocks set in the ground, and especially adapted to use in connection with the freehold ;²⁰ vases ;²¹ a varnish-house ;²² a water filter ;²³ the windows of a

- Eq. Cas. 382 ; s.c. 36 L. J. Ch. 107 ; 15 W. R. 186.
- ¹ *Arnold v. Crowder*, 81 Ill. 56 ; s.c. 25 Am. Rep. 260.
See : *Dudley v. Foote*, 63 N. H. 57 ; s.c. 56 Am. Rep. 489.
- ² *Arnold v. Crowder*, 81 Ill. 56 ; s.c. 25 Am. Rep. 260.
- ³ *McLaughlin v. Johnson*, 46 Ill. 163 ; *Goodrich v. Jones*, 2 Hill (N. Y.) 142 ;
Ripley v. Paige, 17 Vt. 353.
- ⁴ *Tyson v. Post*, 108 N. Y. 217 ; s.c. 2 Am. St. Rep. 409.
- ⁵ *Lawton v. Salmon*, 1 H. Bl. 260 ; s.c. 2 Rev. Rep. 764.
- ⁶ *Farrar v. Stackpole*, 6 Me. (6 Greenl.) 154 ; s.c. 19 Am. Dec. 201.
- ⁷ *Gross v. Jackson*, 6 Daly (N. Y.) 463 ; s.c. 17 Alb. L. J. 479.
- ⁸ *Tyson v. Post*, 108 N. Y. 217 ; s.c. 2 Am. St. Rep. 409.
- ⁹ *Peck v. Batchelder*, 40 Vt. 283.
- ¹⁰ *Stillman v. Flenniken*, 58 Iowa 450 ; s.c. 43 Am. Rep. 120 ; 10 N. W. Rep. 482.
- ¹¹ *D'Eyncourt v. Gregory*, L. R. 3 Eq. Cas. 382 ; s.c. 36 L. J. Ch. 107 ; 15 W. R. 186.
- ¹² *Blethen v. Towle*, 40 Me. 310.
See : *Folsom v. Moore*, 19 Me. 252 ; *Smith v. Heiskell*, 1 Cr. C. C. 99.
- ¹³ *Blethen v. Towle*, 40 Me. 310.
- ¹⁴ *Freeland v. Southworth*, 24 Wend. (N. Y.) 191.
- ¹⁵ *Hutchins v. Masterson*, 46 Tex. 551 ; s.c. 26 Am. Rep. 286.
- ¹⁶ *Snedeker v. Warring*, 12 N. Y. 170.
- ¹⁷ *Fratt v. Whittier*, 58 Cal. 126 ; s.c. 41 Am. Rep. 251.
- ¹⁸ *D'Eyncourt v. Gregory*, L. R. 3 Eq. Cas. 382 ; s.c. 36 L. J. Ch. 107 ; 15 W. R. 186.
- ¹⁹ *Wiltshier v. Cottrell*, 1 El. & Bl. 674 ; s.c. 72 Eng. C. L. 674.
- ²⁰ *McLaughlin v. Nash*, 96 Mass. (14 Allen) 136.
- ²¹ *D'Eyncourt v. Gregory*, L. R. 5 Eq. Cas. 382 ; s.c. 36 L. J. Ch. 107 ; 15 W. R. 186.
- ²² *Penton v. Robart*, 2 East 88 ; s.c. 6 Rev. Rep. 376.
- ²³ *Fratt v. Whittier*, 58 Cal. 126 ; s.c. 41. Am. Rep. 251.

house ;¹ and the like. But it has been held otherwise as to aviaries ;² a Baltimore heater ;³ a boiler built into a frame erected for that purpose in a house, but capable of removal without injury to the building ;⁴ a carding-machine in a wool-carding factory,⁵ fastened to the floor with cleats and nails,⁶ even though not capable of being taken out of the building without being first taken to pieces ;⁷ a church-bell ;⁸ a cider-mill ;⁹ conservatories ;¹⁰ cord-wood ;¹¹ a cupboard fitted into a recess ;¹² a ferry-boat run by a chain fastened to the shore on either side ;¹³ frames to carding and spinning machines ;¹⁴ a gin-head, though attached to the gin-house by a brace ;¹⁵ a heater in a tannery vat ;¹⁶ hot-houses ;¹⁷ a hotel sign ;¹⁸ gas-fixtures in a house, although connected with the house in the usual manner,¹⁹ whether in the shape of chandeliers suspended from the ceiling, or as

¹ *Peck v. Batchelder*, 40 Vt. 233.

² *Martin v. Roe*, 7 El. & Bl. 237, 245 ; s.c. 90 Eng. C. L. 235, 245 ;

Wire v. Mitchell, 10 Barn. & C. 299, 314 ; s.c. 21 Eng. C. L. 132, 133.

³ *Harmony Building Association v. Berger*, 99 Pa. St. 320.

⁴ *Hunt v. Mullanphy*, 1 Mo. 508 ; s.c. 14 Am. Dec. 300.

⁵ *Gale v. Ward*, 14 Mass. 352 ; s.c. 7 Am. Dec. 223 ;

Sturgis v. Warren, 11 Vt. 33 ;

Tobias v. Francis, 3 Vt. 425.

⁶ *Swift v. Thomson*, 9 Conn. 63 ;

Taffe v. Warwick, 3 Blackf. (Ind.) 111 ;

Vanderpool v. Van Allen, 10 Barb. (N. Y.) 157 ;

Cresson v. Stout, 17 John. (N. Y.) 116 ;

Walker v. Sherman, 20 Wend. (N. Y.) 636.

⁷ *Gale v. Ward*, 14 Mass. 352 ; s.c. 7 Am. Dec. 223.

⁸ *Congregational Society v. Fleming*, 11 Iowa 533 ; s.c. 79 Am. Dec. 511.

⁹ *Holmes v. Tremper*, 20 John. (N. Y.) 29, where erected by a tenant holding from year to year at his own expense, and for his own use, in making cider on the farm.

¹⁰ *Martin v. Roe*, 7 El. & Bl. 237, 245 ; s.c. 90 Eng. C. L. 237, 245 ;

Wise v. Metcalf, 10 Barn. & C. 314 ; s.c. 21 Eng. C. L. 132.

¹¹ *Brock v. Smith*, 14 Ark. 431.

¹² *Blethen v. Towle*, 40 Me. 310.

¹³ *Cowart v. Cowart*, 3 Lea (Tenn.) 57.

¹⁴ *Cresson v. Stout*, 17 John. (N. Y.) 116 ; s.c. 8 Am. Dec. 373.

¹⁵ *Hancock v. Jordan*, 7 Ala. 448 ; s.c. 42 Am. Dec. 600.

¹⁶ *Raymond v. White*, 7 Cow. (N. Y.) 319.

¹⁷ *Martin v. Roe*, 7 El. & Bl. 237, 245 ; s.c. 90 Eng. C. L. 237, 245 ;

Wise v. Metcalf, 10 Barn. & C. 299, 314 ; s.c. 21 Eng. C. L. 132, 133.

¹⁸ *Woodward v. Lazar*, 21 Cal. 448 ; s.c. 82 Am. Dec. 751 ;

Ex parte Sheen, Re Thomas, 43 L. T. N. S. 638.

Compare: Redlon v. Barker, 4 Kan. 382 ; s.c. 96 Am. Dec. 180.

¹⁹ *Towne v. Fiske*, 127 Mass. 125 ; s.c. 33 Am. Rep. 353. But not as between mortgagor and mortgagee.

McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38 ; s.c. 37 Am. Rep. 471. Although they are held to be "permanent fixtures" as between vendor and vendee, where they are to remain.

Fratt v. Whittier, 58 Cal. 126 ; s.c. 41 Am. Rep. 251.

brackets from the side-walls, though attached to the gas-pipes by screws and made tight by cement;¹ a loom used in a building,² such as a woolen factory, and fastened to the floor by screws, connected with the motive powers by leathern bands, and capable of being removed without injury to the building or themselves;³ machinery in a factory, heavy and screwed to the floor, and connected with the shafting, but removable without injury to the building, and serviceable elsewhere;⁴ menageries;⁵ mirrors supported by hooks driven into the wall,⁶—but it will be otherwise where the mirror frames are actually annexed to the building during the course of its erection and as a part of the process;⁷ but mirrors put in after a house is built, kept in their place by hooks and supports, some of which are fastened with screws to the wood-work, and others driven in the wall, capable of being detached without injuring the walls, are not fixtures;⁸ observatories;⁹ a packing machine

¹ *McConnell v. Blood*, 123 Mass. 47; s.c. 25 Am. Rep. 12; *Guthrie v. Jones*, 108 Mass. 191; *Rogers v. Crow*, 40 Mo. 91; s.c. 93 Am. Dec. 299.

Shaw v. Lenke, 1 Daly (N. Y.) 487;

Lawrence v. Kemp, 1 Duer (N. Y.) 363;

Heysham v. Dettre, 89 Pa. St. 506; s.c. 29 Am. Rep. 403, note;

Jarechi v. Philharmonic Society, 79 Pa. St. 403; s.c. 21 Am. Rep. 78;

Montague v. Dent, 10 Rich. (S. C.) L. 135.

² *Walker v. Sherman*, 20 Wend. (N. Y.) 363;

Teaff v. Hewitt, 1 Ohio St. 511; s.c. 59 Am. Dec. 639;

Hutchinson v. Kay, 23 Beav. 413. Compare: *In re Dawson*, 16 W. R. 424.

³ *Murdock v. Gifford*, 18 N. Y. 28.

⁴ *Hubbell v. East Cambridge Five Cent Savings Bank*, 132 Mass. 447; s.c. 42 Am. Rep. 446.

⁵ *Martin v. Roe*, 7 El. & Bl. 237, 245; s.c. 90 Eng. C. L. 237, 245; *Wise v. Metcalf*, 10 Barn. & C. 214; s.c. 21 Eng. C. L. 132.

⁶ *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38; s.c. 37 Am. Rep. 471.

See: *Winslow v. Merchants' Ins. Co.*, 45 Mass. (4 Met.) 306, 311; *Rogers v. Crow*, 40 Mo. 91; s.c. 93 Am. Dec. 299;

Shaw v. Lenke, 1 Daly (N. Y.) 487;

Lawrence v. Kemp, 1 Duer (N. Y.) 363;

Vaughen v. Haldeman, 33 Pa. St. 523;

Montague v. Dent, 10 Rich. (S. C.) L. 135;

Beck v. Rebow, 1 Pr. Wms. 94.

⁷ *Ward v. Kilpatrick*, 85 N. Y. 413.

⁸ *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38; s.c. 37 Am. Rep. 471.

See: *Winslow v. Merchants' Ins. Co.*, 45 Mass. (4 Met.) 34;

Rogers v. Crow, 40 Mo. 91; s.c. 93 Am. Dec. 299;

Shaw v. Lenke, 1 Daly (N. Y.) 487;

Lawrence v. Kemp, 1 Duer (N. Y.) 363;

Vaughen v. Haldeman, 33 Pa. St. 523;

Montague v. Dent, 10 Rich. (S. C.) L. 135;

Beck v. Rebow, 1 Pr. Wms. 94.

⁹ *Martin v. Roe*, 7 El. & Bl. 237, 245; s.c. 90 Eng. C. L. 237, 245;

Wise v. Metcalf, 10 Barn. & C.

used in a building ;¹ pineries ;² a portable air-furnace, although connected with the house in the usual manner ;³ a safe ;⁴ salt-kettles, though imbedded in brick arches, but capable of being removed without injury to themselves ;⁵ settees used as seats in a church ;⁶ a saw-mill erected on land by one other than the owner of the fee ;⁷ a shearing-machine used in a building ;⁸ show-cases in a store, though resting on the floor and nailed or screwed to the wall, but furnishing no part of the room ;⁹ a sign-board screwed to a block in the wall ;¹⁰ spinning-jennies used in a building ;¹¹ spinning-frames fastened to the floor by cleats and nails ;¹² stones for grinding bark, affixed to a bark-mill ;¹³ a steam-engine erected by a tenant for life for the purposes of trade ;¹⁴ stones reserved and removed to another part of the premises ;¹⁵ stone piers and abutments for a bridge built by a

299, 314 ; s.c. 21 Eng. C. L. 132, 138.

¹ *Walker v. Sherman*, 20 Wend. (N. Y.) 636.

See : *Teaff v. Hewitt*, 1 Ohio St. 511 ; s.c. 59 Am. Dec. 634.

² *Martin v. Roe*, 7 El. & Bl. 237, 245 ; s.c. 90 Eng. C. L. 237, 245 ;

Wise v. Metcalf, 10 Barn. & C. 314 ; s.c. 21 Eng. C. L. 132.

³ *Towne v. Fiske*, 127 Mass. 125 ; s.c. 34 Am. Rep. 353.

A portable iron furnace used for heating a church has been held not to be a fixture within a mortgage of the land.

Rahway Savings Institution v. Irving Street Baptist Church, 36 N. J. Eq. (9 Stew.) 61.

Compare : *Stockwell v. Campbell*, 39 Conn. 362.

⁴ *Moody v. Aiken*, 50 Tex. 65.

See : *Dostal v. McCadden*, 35 Iowa 318 ;

Folger v. Kenner, 24 La. An. 436.

⁵ *Ford v. Cobb*, 20 N. Y. 344.

See : *Sheldon v. Edwards*, 35 N. Y. 279.

⁶ *Chapman v. Union Mutual Life Ins. Co.*, 4 Bradw. (Ill.) 292.

Special seats.—It is otherwise, however, where the seats are made of a pattern and size furnished with especial reference to the size, shape, and plan of the room, and are screwed to the floor.

See : *Gross v. Jackson*, 6 Daly (N. Y.) 463 ; s.c. 17 Alb. L. J. 497.

⁷ *Brown v. Lillie*, 6 Nev. 244.

⁸ *Walker v. Sherman*, 20 Wend. (N. Y.) 636.

See : *Teaff v. Hewitt*, 1 Ohio St. 511 ; s.c. 59 Am. Dec. 634.

⁹ *Kimball v. Masters Grand Lodge of Masons*, 131 Mass. 59.

See : *Towne v. Fiske*, 127 Mass. 125 ; s.c. 34 Am. Rep. 353 ;

Guthrie v. Jones, 108 Mass. 191 ;

Park v. Baker, 89 Mass. (7 Allen) 78 ; s.c. 83 Am. Dec. 668 ;

Wall v. Hinds, 70 Mass. (4 Gray) 256 ; s.c. 64 Am. Dec. 64.

¹⁰ *Ex parte Sheen, Re Thomas*, 43 L. T. N. S. 638.

Compare : *Woodward v. Lazar*, 21 Cal. 448 ; s.c. 82 Am. Dec. 751.

¹¹ *Walker v. Sherman*, 20 Wend. (N. Y.) 636.

See : *Teaff v. Hewitt*, 1 Ohio St. 511 ; s.c. 59 Am. Dec. 634.

¹² *Cresson v. Stout*, 17 John. (N. Y.) 116.

See : *Swift v. Thompson*, 9 Conn. 63 ;

Vanderpool v. Van Allen, 10 Barb. (N. Y.) 157.

¹³ *Heermance v. Vernoy*, 6 John. (N. Y.) 5.

¹⁴ *Estates of Hinds*, 5 Whart. (Pa.) 138 ; s.c. 34 Am. Dec. 542.

¹⁵ *Fulton v. Norton*, 64 Me. 410.

railroad company upon lands over which it had acquired the right of way;¹ the stools in a store;² stoves connected to a house by means of pipes;³ weather-vanes;⁴ wooden structures or buildings resting by their weights on flat stones laid upon the surface of the grounds,⁵ and the like.

SEC. 114. **Criteria for determining.**—As to what constitutes a fixture, when an article in the nature of a chattel is annexed to the realty and passes with it, and when it retains its original character, there is not a little doubt and uncertainty, consequent upon the conflict in the decided cases. A guide which is thought to furnish a test of general and uniform application,—one by means of which the essential quality of a fixture can, in most instances, at least, be certainly and easily ascertained, and one which tends to harmonize the apparent conflict in the authorities relating to the subject,—will be found in the following criteria:⁶

1. Actual annexation⁷ to the realty, or to something appurtenant thereto;⁸

2. Appropriation to the use or purpose of that part of the realty with which it is connected;⁹

3. Adaptability of the use to which appropriated, and to the realty to which connected;¹⁰

¹ *Wagner v. Cleveland & T. R. Co.*, 22 Ohio St. 563; s.c. 10 Am. Rep. 770.

² *Lawrence v. Kemp*, 1 Duer (N. Y.) 363.

³ *Freeland v. Southworth*, 24 Wend. (N. Y.) 191.

⁴ *Harmony Building Association v. Berger*, 99 Pa. St. 320.

⁵ *Carlin v. Ritter*, 68 Md. 478; s.c. 6 Am. St. Rep. 467.

⁶ *Rogers v. Crow*, 40 Mo. 91; s.c. 93 Am. Dec. 299.

⁷ *Teaff v. Hewitt*, 1 Ohio St. 511; s.c. 59 Am. Dec. 634.

See: *Voorhees v. McGinnis*, 48 N. Y. 278, 282.

Exceptions to this rule there are in those articles which are themselves annexed but are deemed to be of the freehold from their use and character, such as mill-stones, fences, statutory, and the like.

Capon v. Peckham, 35 Conn. 88; *Voorhees v. McGinnis*, 48 N. Y. 278, 282;

Potter v. Cromwell, 40 N. Y. 287; s.c. 100 Am. Dec. 485;

Teaff v. Hewitt, 1 Ohio St. 511; s.c. 59 Am. Dec. 634.

⁸ *Ward v. Kilpatrick*, 85 N. Y. 413, 419;

McRea v. Central National Bank of Troy, 66 N. Y. 489.

⁹ *Ward v. Kilpatrick*, 85 N. Y. 413, 419;

McRea v. Central National Bank of Troy, 66 N. Y. 489;

Teaff v. Hewitt, 1 Ohio St. 511; s.c. 59 Am. Dec. 634.

¹⁰ *Voorhees v. McGinnis*, 48 N. Y. 278, 282;

Potter v. Cromwell, 40 N. Y. 287, 297; s.c. 100 Am. Dec. 485;

Pyle v. Pennock, 2 Watts & S. (Pa.) 390; s.c. 37 Am. Dec. 517;

Voorhis v. Freeman, 2 Watts &

4. The policy of the law connected with the purpose of the annexation ;¹

5. The intention of the parties at the time of making the annexation to make the article a permanent accession to the freehold or inheritance.²

Let us consider each of these essentials in their turn.

SEC. 115. *Same*.—1. *Actual annexation*.—To give chattels the character of fixtures, and deprive them of that of personality, they must be so attached to the realty as to become, for the time being, a part of the freehold as contradistinguished from a mere chattel.³ Some of the cases hold that they must be so firmly attached to the realty that they cannot be removed without injury to the freehold by the act of removal and apart from the abstracting of the thing removed ;⁴ but the better doctrine is thought to be the one which regards as a fixture everything that has been attached to the realty, with a view to the purpose for which it is employed or held, however slight or temporary the physical connection may be.⁵ Some

S. (Pa.) 116 ; s.c. 37 Am. Dec. 490.

¹ Meig's Appeal, 62 Pa. St. 28 ; s.c. 1 Am. Rep. 372.

² Capon v. Peckham, 35 Conn. 88 ; Swift v. Thompson, 9 Conn. 63 ; Congregational Society v. Fleming, 11 Iowa 533 ; s.c. 79 Am. Dec. 511 ;

Winslow v. Merchants' Ins. Co., 45 Mass. (4 Met.) 306 ;

Ward v. Kilpatrick, 85 N. Y. 413, 419 ;

McRea v. Central National Bank of Troy, 66 N. Y. 489 ;

Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314 ;

Voorhees v. McGinnis, 48 N. Y. 282 ;

Potter v. Cromwell, 40 N. Y. 287 ; 100 Am. Dec. 485.

Murdock v. Gifford, 18 N. Y. 28 ; Gross v. Jackson, 6 Daly (N. Y.)

463 ; s.c. 17 Alb. L. J. 479 ; Funk v. Brigaldi, 4 Daly (N. Y.)

359, 361 ; Teaff v. Hewitt, 1 Ohio St. 511 ;

s.c. 59 Am. Dec. 634.

³ Carlin v. Ritter, 68 Md. 478 ; s. c. 6 Am. St. Rep. 467 ; 13 Atl. Ry. 370 ; 16 Id. 301 ;

Walker v. Sherman, 20 Wend. (N. Y.) 636 ;

Teaff v. Hewitt, 1 Ohio St. 511 ; s.c. 59 Am. Dec. 513.

See : Clary v. Owen, 81 Mass. (15 Gray) 522 ;

Butler v. Page, 48 Mass. (7 Met.) 40 ; s.c. 39 Am. Dec. 757 ;

Campbell v. Roddy, 44 N. J. Eq. (17 Stew.) 244 ; s.c. 6 Am. St.

Rep. 889 ; 14 Atl. Rep. 279 ;

Murdock v. Gifford, 18 N. Y. 28 ;

Walmsley v. Milne, 7 C. B. N. S. 115 ; s.c. 97 Eng. C. L. 114.

⁴ Swift v. Thompson, 9 Conn. 63, 67 ; s.c. 21 Am. Dec. 718 ;

Johnson's Ex'rs v. Wiseman's Ex'rs, 4 Met. (Ky.) 360 ; s.c. 83 Am. Dec. 475 ;

Gale v. Ward, 14 Mass. 352 ; s.c. 7 Am. Dec. 223 ;

Hunt v. Mullanphy, 1 Mo. 508 ; s.c. 14 Am. Dec. 300 ;

Farrar v. Chauffetete, 5 Den. (N. Y.) 527 ;

Providence Gas Co. v. Thurber, 2 R. I. 15 ; s.c. 55 Am. Dec. 621.

⁵ Johnson's Ex'rs v. Wiseman's Ex'rs, 4 Met. (Ky.) 357 ; s.c. 83 Am. Dec. 475 ;

of the courts have gone so far as to make the appropriation the only test, dispensing with actual or physical annexation,¹ as of no particular consequence;² but those cases go to the other extreme. The golden mean lies midway between; for as a general rule there must be some degree of actual annexation or fixation.³

SEC. 116. *Same—Same—Manner of annexation and character of article.*—There is no doubt but that the question whether chattels are to be regarded as fixtures depends less upon the manner of their annexation to the freehold than upon their own nature, their adaptation to the purpose for which they are used, and the intention of the parties.⁴ While the chattel, in order to become a fixture, should be habitually attached to the land or some structure or building upon it, yet it need not be constantly fastened thereto,⁵ a constructive annexation being sufficient.⁶ The mode of annexation is important, and in the absence of other proof of intent, will be controlling. It may be in itself so inseparable and permanent as to

- Farrar v. Stackpole, 6 Me. (6 GreenL.) 154, 157; s.c. 19 Am. Dec. 201;
 Teaff v. Hewitt, 1 Ohio St. 511; s.c. 59 Am. Dec. 634;
 Gray v. Holdship, 17 Serg. & R. (Pa.) 413; s.c. 17 Am. Dec. 680.
¹ Pyle v. Pennock, 2 Watts & S. (Pa.) 391; s.c. 37 Am. Dec. 517;
 Voorhis v. Freeman, 2 Watts & S. (Pa.) 116; s.c. 37 Am. Dec. 490.
^{*} Peck v. Batchelder, 40 Vt. 233; s.c. 94 Am. Dec. 392.
² See: Pennybecker v. McDougal, 48 Cal. 160;
 Merrit v. Judd, 14 Cal. 59, 64;
 Capon v. Peckham, 39 Conn. 88, 93;
 Stockwell v. Campbell, 34 Conn. 362;
 Baldwin v. Breed, 16 Conn. 60, 66;
 Shoemaker v. Simpson, 16 Kan. 43; s.c. 3 Cent. L. J. 132;
 Brown v. Lillie, 6 Nev. 244;
 Lathrop v. Blake, 23 N. H. 46, 66;
 Despatch Line of Packets v. Belamy Mfg. Co., 12 N. H. 205, 234;
 Quimby v. Manhattan Cloth Co., 8
 24 N. J. Eq. (9 C. E. Gr.) 260;
 Potts v. New Jersey Arms Co., 17 N. J. Eq. (2 C. E. Gr.) 395;
 Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314, 323;
 Voorhees v. McGinnis, 48 N. Y. 278, 282;
 Potter v. Cromwell, 40 N. Y. 287, 295; s.c. 100 Am. Dec. 485;
 Laffin v. Griffiths, 35 Barb. (N. Y.) 58, 62;
 Beardsly v. Ontario Bank, 31 Barb. (N. Y.) 619, 634;
 Stevens v. Buffalo & N. R. Co., 31 Barb. (N. Y.) 590;
 Vanderpool v. Van Allen, 10 Barb. (N. Y.) 157, 162;
 Noyes v. Terry, 1 Lans. (N. Y.) 219, 220;
 Teaff v. Hewitt, 1 Ohio St. 511; s.c. 59 Am. Dec. 634;
 Fairis v. Walker, 1 Bail. (S. C.) L. 540.
⁴ Johnson's Ex'rs v. Wiseman's Ex'rs, 4 Met. (Ky.) 360; s.c. 83 Am. Dec. 475.
⁵ Walker v. Sherman, 20 Wend. (N. Y.) 636.
⁶ Brown v. Lillie, 6 Nev. 246;
 Snedeker v. Warring, 12 N. Y. 170.

render the article necessarily a part of the realty, and in case of less thorough annexation the mode of attachment may afford convincing evidence that the intention was that the attachment should be permanent. As, for instance, where the building is constructed expressly to receive the machine or other article, and it could not be moved without material injury to the building; or where the article would be of no value except for use in that particular building, or could not be removed therefrom without being destroyed, or greatly damaged. These are tests which have been frequently applied in determining whether the annexation was intended to be temporary or permanent, but they are not the only ones, nor is it indispensable that any of these conditions should exist.

SEC. 117. **Same — 2. Appropriation to the use.**—To render an article that is in the nature of personalty a fixture, there must be an appropriation of such article to the use or purpose of that part of the realty with which it is connected.² If the article is attached for the permanent use of the freehold it constitutes an appropriation to the use, and the article becomes a fixture; but if for temporary use only, it is otherwise;³ and for this reason the circumstances of the transaction are always to be taken into consideration, to ascertain whether the annexation was made for the permanent improvement of the freehold or only for a temporary purpose.⁴

SEC. 118. **Same — 3. Adaptation to the use.**—The ancient rule which treated nothing as a fixture except such chattels as were fastened to the realty and more or less immovable, has been modified and remodeled to suit the improvements in the arts and the advancement in

¹ *McRea v. Central National Bank of Troy*, 66 N. Y. 489, 495;
Potter v. Cromwell, 40 N. Y. 287;
s.c. 100 Am. Dec. 485.

² *Teaff v. Hewitt*, 1 Ohio St. 511;
s.c. 59 Am. Dec. 634.

³ See: *McRea v. Central National Bank of Troy*, 66 N. Y. 489.

⁴ *Potter v. Cromwell*, 40 N. Y. 287, 293; s.c. 100 Am. Dec. 485;
Farrar v. Chauffetete, 5 Den. (N. Y.) 527, 531.
See: *Swift v. Thompson*, 9 Conn. 63; s.c. 21 Am. Dec. 718;
McKim v. Mason, 3 Md. Ch. 186;
Gale v. Ward, 14 Mass. 252; s.c. 7 Am. Dec. 223.

the sciences in modern times. At the present time the question whether chattels are to be regarded as fixtures depends less upon the manner of their annexation to the freehold, than upon their own nature and their adaptation to the purposes for which they are used.¹ Actual annexation to the freehold and adaptation to its purposes must both unite in order to render the personal property incident and appurtenant to real estate.²

SEC. 119. *Same* — 4. *Policy of the law.*—The policy of the law is always to be taken into consideration in determining whether the annexation of an article to the estate changes its character from personalty to realty.³ The law presumes that every useful addition to an estate is for the benefit of the inheritance, unless a contrary intention appears. The annexation of chattels to the freehold by a tenant is regarded as an additional gift to the owner of the fee, which may be defeated by removal thereof during the term of the tenancy, but becomes absolute in case the premises are surrendered without its removal.⁴

SEC. 120. *Same* — 5. *Intention of the parties.*—To change the character of an article from a chattel to a fixture there must be not only an annexation or fixation to the

¹ *Johnson's Ex'rs v. Wiseman's Ex'rs*, 4 Met. (Ky.) 360; s.c. 83 Am. Dec. 475;

Ward v. Kilpatrick, 85 N. Y. 413, 419;

Voorhees v. McGinnis, 48 N. Y. 282;

Pyle v. Pennock, 2 Watts & S. (Pa.) 390; s.c. 37 Am. Dec. 517;

Voorhis v. Freeman, 2 Watts & S. (Pa.) 116; s.c. 37 Am. Dec. 490.

² *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 205; s.c. 37 Am. Dec. 203.

³ *Meig's Appeal*, 62 Pa. St. 28, 30; s.c. 1 Am. Rep. 372, 374;

Hill v. Sewald, 53 Pa. St. 271; s.c. 91 Am. Dec. 209.

⁴ See: *Moore v. Smith*, 24 Ill. 512;

McCracken v. Hall, 7 Ind. 30;

Sullivan v. Carberry, 67 Me. 531;

Stockwell v. Marks, 17 Me. 455;

Davis v. Buffum, 15 Me. 160;

Shepard v. Spaulding, 45 Mass. (4 Met.) 416;

Gaffield v. Hapgood, 34 Mass. (17 Pick.) 192; s.c. 28 Am. Dec. 290;

Beckwith v. Boyce, 9 Mo. 560;

State v. Elliot, 11 N. H. 504;

Loughran v. Ross, 45 N. Y. 792; s.c. 6 Am. Rep. 173;

Reynolds v. Shuler, 5 Cow. (N. Y.) 323;

Haflick v. Stober, 11 Ohio St. 482;

Davis v. Moss, 38 Pa. St. 346, 353;

Overton v. Williston, 31 Pa. St. 155;

White v. Arndt, 1 Whart. (Pa.) 91;

Leader v. Homewood, 5 C. B. N. S. 546; s.c. 27 L. J. C. P. 316;

4 Jus. N. S. 1062; 94 Eng. C. L. 544.

real estate, or something appurtenant thereto, as well as an appropriation to the end and an adaptability to the use for which designed, but also an intention on the part of the party causing the annexation to make the article a permanent accession to the freehold.¹ This question of intent enters into and makes an element in each case,² for the purpose of annexation, and the intention with which it was made, are the most important conditions.³ This is often exemplified in questions between landlord and tenant, but is not confined to them.⁴ Where there is any question as to the intent in the annexation, the claimant must show such facts and circumstances as will clearly indicate that the owner intended to change the character of the property from personalty to realty.⁵ This intention is to be inferred from (1) the nature of the article affixed ; (2) the relation and situation of the party making the annexation ; (3) the structure and mode of annexation ; and (4) the purpose or use for which the annexation was made.⁶

¹ *Teaff v. Hewitt*, 1 Ohio St. 511 ;
s.c. 59 Am. Dec. 639, 645.

See : *Sword v. Low*, 122 Ill. 487 ;
s.c. 13 N. E. Rep. 826 ;

Manwaring v. Jenison, 61 Mich.
117 ; s.c. 27 N. W. Rep. 899 ;

Potter v. Cromwell, 40 N. Y. 287 ;
s.c. 100 Am. Dec. 485 ;

Fortman v. Goepper, 14 Ohio St.
558 ;

Hutchins v. Masterson, 46 Tex.
551 ; s.c. 26 Am. Rep. 286 ;

Hill v. Wentworth, 28 Vt. 428 ;

*Walker v. Grand Rapids Flouring
Mill Co.*, 70 Wis. 92 ; s.c. 35
N. W. Rep. 332 ; 26 Cent. L. J.
372.

² *Potter v. Cromwell*, 40 N. Y. 287 ;
s.c. 100 Am. Dec. 485 ;

Farrar v. Chauffetete, 5 Den.
(N. Y.) 527, 531.

³ *Congregational Society v. Flem-
ing*, 11 Iowa 533 ; s.c. 79 Am.
Dec. 511 ;

*McRea v. Central National Bank
of Troy*, 66 N. Y. 495, 499 ; s.c.
50 How. (N. Y.) Pr. 53, 54 ;

Tift v. Horton, 53 N. Y. 377, 383 ;

Hart v. Sheldon, 34 Hun (N. Y.)
45 ; s.c. 20 Week. Dig. 286 ;

Snedeker v. Warring, 12 N. Y.
170 ;

Wright v. O'Brien, 5 Daly (N. Y.)
54, 61.

⁴ *Shoemaker v. Simpson*, 16 Kan.
43 ; s.c. 3 Cent. L. J. 132.

Citing : *Fuller v. Tabor*, 39 Me. 519 ;
Hunt v. Bay State Iron Co., 97
Mass. 279 ;

Hines v. Ament, 43 Mo. 298 ;

Dame v. Dame, 38 N. H. 429 ; s.c.
75 Am. Dec. 195 ;

Haven v. Emery, 33 N. H. 66 ;

Wagner v. Cleveland & T. R. Co.
22 Ohio St. 563.

⁵ *Hunt v. Mullanphy*, 1 Mo. 508 ;
s.c. 14 Am. Dec. 300 ;

Potter v. Cromwell, 40 N. Y. 287 ;
s.c. 100 Am. Dec. 485, 489 ;

Farrar v. Chauffetete, 5 Den. (N.
Y.) 527, 531.

See : *Swift v. Thompson*, 9 Conn.
63 ; s.c. 21 Am. Dec. 718 ;

McKim v. Mason, 3 Md. Ch. 186 ;

Gale v. Ward, 14 Mass. 352 ; s.c.
7 Am. Dec. 223.

⁶ *Teaff v. Hewitt*, 1 Ohio St. 511 ;
s.c. 59 Am. Dec. 634, 645.

See : *Tillman v. DeLacy*, 80 Ala.
103 ;

Capon v. Peckham, 35 Conn. 88 ;

Pea v. Pea, 35 Ind. 387 ;

Eaves v. Estes, 10 Kan. 314 ; s.c.
15 Am. Rep. 345 ;

SEC. 121. **Same—Same—Permanency of attachment controlled by intent.**—It is well established by a large number of adjudicated cases that where an article is attached for temporary use merely, with the intention of removing it, the article does not lose its character as personalty; but if the article is affixed for the permanent improvement of the freehold, it becomes realty.¹ The permanency of the attachment, and its character in law, does not depend so much upon the degree of physical force with which the thing is attached, or the manner or means of its attachment, as upon the motives and intentions of the parties in attaching it. If this intention is that the article shall not by annexation become part of the freehold, as a general rule it does not. The exception to this rule is where the subject or mode of annexation is such that the attributes of personal property cannot be predicated of the thing in controversy;² as where the property cannot be removed without practically destroying it, or when the article, or a part of it, is essential to the support of that to which it is attached.³

- Dudley v. Hurst*, 67 Md. 44; s.c. 8 Atl. Rep. 901;
Weatherby v. Sleeper, 42 Miss. 732;
Rogers v. Crow, 40 Mo. 91; s.c. 93 Am. Dec. 299;
Quimby v. Manhattan Cloth Co., 42 N. J. Eq. (9 C. E. Gr.) 260;
Crane v. Brigham, 11 N. J. Eq. (3 Stockt.) 29;
McRea v. Central Nat. Bank, of Troy, 66 N. Y. 489;
Potter v. Cromwell, 40 N. Y. 287; s.c. 100 Am. Dec. 485;
Hutchins v. Masterson, 46 Tex. 551; s.c. 26 Am. Rep. 286;
Hill v. Wentworth, 28 Vt. 428;
Green v. Phillips, 26 Gratt. (Va.) 752; s.c. 21 Am. Rep. 323;
Taylor v. Collins, 51 Wis. 123; s.c. 8 N. W. Rep. 22;
Hellawell v. Eastwood, 6 Exch. 295.
¹ *Manwaring v. Jenison*, 61 Mich. 117; s.c. 27 N. W. Rep. 899;
Crane v. Brigham, 11 N. J. Eq. (3 Stockt.) 29;
Potter v. Cromwell, 40 N. Y. 287; s.c. 100 Am. Dec. 485;
Walker v. Sherman, 20 Wend. (N. Y.) 636;
Hellawell v. Eastwood, 6 Exch. 295, 312;
Walmsley v. Milne, 7 C. B. N. S. 115; s.c. 97 Eng. C. L. 114;
Lanchester v. Eve, 5 C. B. N. S. 717; s.c. 94 Eng. C. L. 715.
² *Manwaring v. Jenison*, 61 Mich. 117; s.c. 27 N. W. Rep. 899;
Ford v. Cobb, 20 N. Y. 344.
³ *Manwaring v. Jenison*, 61 Mich. 117; s.c. 27 N. W. Rep. 899.
 See: *Wade v. Johnston*, 25 Ga. 331;
Ballou v. Jones, 37 Ill. 95;
Eaves v. Estes, 10 Kan. 314; s.c. 15 Am. Rep., 345.
Trull v. Fuller, 28 Me. 548;
Winslow v. Merchants' Ins. Co., 45 Mass. (4 Met.) 306;
Crane v. Brigham, 11 N. J. Eq. (3 Stockt.) 29, 35;
Sisson v. Hibbard, 75 N. Y. 542;
McRea v. Central Nat. Bank of Troy, 66 N. Y. 489;
Tift v. Horton, 53 N. Y. 377;
Voorhees v. McGinnis, 48 N. Y. 278-282;

SEC. 122. **Kinds or classes of fixtures.**—For the convenience of treatment, fixtures may be divided in five general classes, as follows :

1. Agricultural fixtures ;
2. Domestic fixtures ;
3. Ecclesiastical fixtures ;
4. Trade fixtures ; and
5. Mixed fixtures.

We will take up each of these classes in its turn.

SEC. 123. **Same—1. Agricultural fixtures.**—Agricultural fixtures are such fixtures as are annexed to the freehold for convenience in cultivating the soil. The English common law did not extend to fixtures erected for the purposes of agriculture the same favors and leniency, in respect to the right of removal, that it did to fixtures erected for the purposes of trade.¹ But the common law of England is not to be taken in all respects to be the law of America.² Our ancestors brought with them the general principles of the common law, and claimed it as their birthright ; but they brought with them and adopted only that portion of the common law which was applicable to their condition.³ The rigorous rule regarding agricultural fixtures was one of the principles not adapted to the condition of our forefathers. The country was a wilderness, and the universal policy was to procure its cultivation and improvement. The interest of

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| <p><i>Teaff v. Hewitt</i>, 1 Ohio St. 511;
s.c. 59 Am. Dec. 624;
<i>Hill v. Wentworth</i>, 28 Vt. 428,
436.
<i>Elwes v. Maw</i>, 4 East 38; s.c. 6
Rev. Rep. 523; 2 Smith's Lead.
Cas. (9th Am. ed.) 1423.
See: <i>Gaffield v. Hapgood</i>, 34
Mass. (17 Pick.) 192; s.c. 28
Am. Dec. 290;
<i>Perkins v. Swank</i>, 43 Miss. 349;
<i>Wing v. Gray</i>, 36 Vt. 261.
² <i>Harkness v. Sears</i>, 26 Ala. 493;
s.c. 26 Am. Dec. 742.
³ <i>Harkness v. Sears</i>, 26 Ala. 493;
s.c. 62 Am. Dec. 742.
See: <i>Boyer v. Sweet</i>, 3 Scam.
(Ill.) 121;
<i>Siceloff v. Redman's Admr.</i>, 26
Ind. 251;</p> | <p><i>Pierson v. Lane</i>, 60 Iowa 60; s.c.
14 N. W. Rep. 90;
<i>Wagner v. Bissell</i>, 3 Iowa 396;
<i>Lathrop v. Commercial Bank</i>, 8
Dana (Ky.) 114; s.c. 33 Am.
Dec. 481;
<i>Commonwealth v. York</i>, 50 Mass.
(9 Met.) 93; s.c. 43 Am. Dec.
373;
<i>Going v. Emery</i>, 33 Mass. (16
Pick.) 107; s.c. 26 Am. Dec. 645;
<i>Commonwealth v. Knowlton</i>, 2
Mass. 530, 534;
<i>Stout v. Keyes</i>, 2 Doug. (Mich.)
184; s.c. 43 Am. Dec. 465;
<i>Pennock's Estate</i>, 20 Pa. St. 268;
s.c. 59 Am. Dec. 718;
<i>Lindsley v. Coates</i>, 1 Ohio 243;
<i>Van Ness v. Pacard</i>, 26 U. S. (2
Pet.) 137; bk. 7 L. ed. 374.</p> |
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the owner of the soil, as well as the public policy of the country, which permits the tenant to make the most profitable and comfortable use of the premises demised consistent with the rights of the owner of the freehold,¹ required that all erections for agricultural purposes, put upon the land by the tenant, should receive the same protection in favor of the tenant that was extended by the common law of England to fixtures erected for the purposes of trade.² Thus where hop-poles are put upon a farm by a tenant for his own temporary use, with the intention of removing them, they remain his personal property;³ but when they are put there by the owner of the realty, for permanent use, they become a part of and pass with it the same as do fences.⁴ Where land is leased for nursery purposes, the trees grown remain personal property, as between the lessor and lessee and their assigns,⁵ but if planted by the owner of the soil, they become a part of the realty.⁶

SEC. 124. Same—2. Domestic fixtures—a. Useful fixtures.—Domestic fixtures are such annexations as are made by a tenant to the dwelling-house, or other building occupied by him, to render it more ornamental or convenient

¹ *Gaffield v. Hapgood*, 34 Mass. (17 Pick.) 192, 195; s.c. 28 Am. Dec. 290.

Harkness v. Sears, 26 Ala. 493; s.c. 62 Am. Dec. 742.

See: *Perkins v. Swank*, 43 Miss. 349;

Dubois v. Kelly, 10 Barb. (N. Y.) 496;

Wing v. Gray, 36 Vt. 261;

Leland v. Gasset, 17 Vt. 403;

Van Ness v. Pacard, 27 U. S. (2 Pet.) 137; bk. 7 L. ed. 374.

³ *Wing v. Gray*, 36 Vt. 26.

⁴ *Bishop v. Bishop*, 11 N. Y. 123; s.c. 62 Am. Dec. 68.

⁵ *Miller v. Baker*, 42 Mass. (11 Met.) 27;

King v. Wilcomb, 7 Barb. (N. Y.) 263;

Penton v. Robart, 2 East 88; s.c. 6 Rev. Rep. 376;

Wyndham v. Way, 4 Taunt. 316.

Nursery stock—A part of freehold when.—In the case of *Lee v. Risdon*, 7 Taunt. 791; s.c. 2 Marsh. 495; 2 Eng. C. L. 320, however, GIBBS, C. J., in dis-

cussing the more general question of fixtures, says that "trees in a nursery ground are a part of the freehold until severed," but this applies only in a case where the ownership of the ground and trees unite in one and the same person.

⁶ *Price v. Brayton*, 19 Iowa 309.

See: *Maples v. Millon*, 31 Conn. 598.

Nursery stock—Raised on mortgaged land.—And this is the case even though the nursery stock which was raised on mortgaged realty has been conveyed by chattel mortgage. *Adams v. Beadle*, 47 Iowa 439; s.c. 29 Am. Rep. 487. This is on the principle laid down by Chief Justice GIBBS in *Lee v. Risdon*, 7 Taunt. 191; s.c. 2 Marsh. 495; 2 Eng. C. L. 320, heretofore referred to, that "trees in a nursery are a part of the freehold until severed."

See: *Miller v. Baker*, 42 Mass. (11 Met.) 27, 33.

or comfortable for his use.¹ Fixtures of this kind are divided into two classes, to wit : (a) useful fixtures ; and (b) ornamental fixtures.² Useful domestic fixtures are such as are peculiarly adapted to the house or building in which they are placed, or which are essential to the enjoyment of the estate. Useful fixtures placed in a house or other building by a tenant may or may not become a part of the realty according to the circumstances of the case and the intention of the party ; but when placed in the building by the owner thereof they attach to and become a part of the realty ;³ but not such as are incidental merely to a part of a building or buildings.⁴ Within this principle it has been held that the pipes and bathtubs of a dwelling ; the water-tanks of a building ;⁵ the counters of a store ; the vats, stills, and kettles of a brewery or distillery, are fixtures.⁶

SEC. 125. Same—Same—b. Ornamental domestic fixtures.—Ornamental domestic fixtures are such as are attached to the building for its ornament merely or principally ;⁷ such as panel pictures,⁸ satin adornments,⁹ and the like ; and may at the same time be useful, such as gas-fixtures

¹ Wall v. Hinds, 70 Mass. (4 Gray) 256 ; s.c. 64 Am. Dec. 64.

² Id.

³ Stockwell v. Campbell, 39 Conn. 362 ; s.c. 12 Am. Rep. 393 ; Wall v. Hinds, 70 Mass. (4 Gray) 256 ; s.c. 64 Am. Dec. 64, 73 ; Meigs's Appeal, 62 Pa. St. 28 ; s.c. 1 Am. Rep. 372 ;

Walmsley v. Milne, 7 C. B. N. S. 115 ; s.c. 6 Jur. N. S. 125 ; 29 L. J. C. P. 97 ; 1 L. T. N. S. 92 ; 97 Eng. C. L. 114.

See : McConnell v. Blood, 123 Mass. 47 ;

Hill v. Farmers & Mechanics' Nat. Bk., 97 U. S. 450 ; bk. 24 L. ed. 1051 ; 8 Rep. 577 ;

Hutchinson v. Kay, 23 Beav. 413 ; Holland v. Hodgson, L. R. 7 C. P. 323 ; s.c. 41 L. J. C. P. (N. S.) 146 ; 20 W. R. 990 ; 2 Moak's Eng. Rep. 655 ;

Boyd v. Shorrocks, L. R. 5 Eq. 72 ; s.c. 16 W. R. 102 ;

Mather v. Fraser, 2 K. & J. 536 ; 2 Jur. N. S. 900 ; 25 L. J. Ch. 361 ;

Jenkins v. Gething, 2 Johns. & H. 520 ;

Winn v. Ingilby, 1 Dow & Ry. 247 ; s.c. 5 Barn. & Ald. 625 ; 7 Eng. C. L. 341 ;

Ex parte Reynald, 2 Mont. D. & DeG. 443 ;

Ex parte Montgomery, 4 Ir. Ch. Rep. 520.

⁴ McConnell v. Blood, 123 Mass. 47.

⁵ Wall v. Hinds, 70 Mass. (4 Gray) 256 ; s.c. 64 Am. Dec. 64.

⁶ Rogers v. Crow, 40 Mo. 91, 94 ; s.c. 93 Am. Dec. 299, 302.

See : Cohen v. Kyler, 27 Mo. 122 ;

Tabor v. Rolinson, 36 Barb (N. Y.) 433 ;

Main v. Schwarzwælder, 4 E. D. Smith (N. Y.) 273 ;

Bryan v. Lawrence, 5 Jones (N. C.) L. 337.

⁷ Wall v. Hinds, 70 Mass. (4 Gray) 256 ; s.c. 64 Am. Dec. 64, 73.

⁸ D'Eyncourt v. Gregory, L. R. 3 Eq. Cas. 382 ; s.c. 36 L. J. Ch. 107 ; 15 W. R. 186.

⁹ Id.

and chandeliers,¹ and water-pipes.² The reason for this would seem to be because the gas and water are much more a matter of convenience than a necessity.³

SEC. 126. **Same—3. Ecclesiastical fixtures.**—Ecclesiastical fixtures may be defined as those annexations which are made for the convenience and comfort of the incumbent of an ecclesiastical benefice, or the ornamentation of the property. As a rule the former remain personal estate,⁴ while the latter pass to the successor.⁵ It has been laid down as a general rule that the lamps, chandeliers, candelabras and gas-fixtures of a church are not a part of the realty and do not pass on a sale thereof;⁶ but a church organ fitted into a niche or recess left for that purpose in the erection of the building, which cannot be removed without destroying the architectural design, or finish and symmetry of the structure, and leaving exposed to view the unfinished wall of the building, is to be regarded as a part of the internal finish of the edifice and will pass with it.⁷

SEC. 127. **Same—4. Trade fixtures.**—Trade fixtures are

- ¹ *Montague v. Dent*, 10 Rich. (S. C.) L. 135; s.c. 67 Am. Dec. 572.
 See: *Wall v. Hinds*, 70 Mass. (4 Gray) 256; s.c. 64 Am. Dec. 64, 73;
Keeler v. Keeler, 31 N. J. Eq. (4 Stew.) 181, 191;
McKeage v. Hanover Fire Ins. Co., 81 N. Y. 41; s.c. 37 Am. Rep. 471.
Jarechi v. Philharmonic Soc., 79 Pa. St. 404;
Vaughen v. Halderman, 33 Pa. St. 522; s.c. 75 A. D., 622;
Sewell v. Angerstein, 18 L. T. N. S. 300.
² *Wall v. Hinds*, 70 Mass. (4 Gray) 256; s.c. 64 Am. Dec. 64, 73.
³ *Montague v. Dent*, 10 Rich. (S. C.) L. 135; s.c. 67 Am. Dec. 572.
 See: *Fratt v. Whittier*, 58 Cal. 126; s.c. 41 Am. Rep. 251;
Johnson's Ex'rs v. Wiseman's Ex'rs, 4 Met. (Ky.) 360; s.c. 83 Am. Dec. 475;
Winslow v. Merchants' Ins. Co., 45 Mass. (4 Met.) 311;
Rogers v. Crow, 40 Mo. 91; s.c. 93 Am. Dec. 299;
McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38; s.c. 37 Am. Rep. 471;
Shaw v. Lenke, 1 Daly (N.Y.) 487;
Lawrence v. Kemp, 1 Duer (N. Y.) 363;
Vaughen v. Halderman, 33 Pa. St. 522; s.c. 75 Am. Dec. 622;
Beck v. Rebow, 1 Pr. Wms. 94.
⁴ *Martin v. Roe*, 7 El. & Bl. 237; s.c. 90 Eng. C. L. 236.
 See: *Huntley v. Russell*, 13 Ad. & E. N. S. 572; s.c. 66 Eng. C. L. 570.
⁵ *Corven's Case*, 12 Co. 106.
⁶ *Rogers v. Crow*, 40 Mo. 91; s.c. 93 Am. Dec. 299. This decision is founded upon the following cases:
Wall v. Hinds, 70 Mass. (4 Gray) 256; s.c. 64 Am. Dec. 64;
Lawrence v. Kemp, 1 Duer (N. Y.) 363;
Vaughen v. Halderman, 33 Pa. St. 522; s.c. 75 Am. Dec. 622; and
Montague v. Dent, 10 Rich. (S. C.) L. 135; s.c. 67 Am. Dec. 572.
⁷ *Rogers v. Crow*, 40 Mo. 91; s.c. 93 Am. Dec. 299.

fixtures erected on the premises by a tenant for the purpose of carrying on a trade or manufactory.¹ The erection may be made by the owner of the fee, in which instance the fixture becomes a part of the freehold; or it may be made by the lessee, in which case it remains personal property,² and may be removed by him during the term.³ Where the annexation is made by the tenant or lessee, if such removal is not made before the end of the term, and the lessee surrenders the premises without removal, the law imputes an intention on his part to make a gift of them to the landlord.⁴ This class of fixtures includes buildings,⁵ store fixtures,⁶

¹ Justice Blackstone defines trade or tenant's fixtures as "things which are annexed to the land for the purpose of trade or of domestic convenience or ornament in so permanent a manner as to become part of the land, and yet the tenant who has erected them is entitled to remove them during his term, or it may be within a reasonable time after its expiration."

See: *Holland v. Hodgson*, L. R. 7 C. P. 328, 333; s.c. 2 Moak's Eng. Rep. 665, 666;

Climie v. Wood, L. R. 4 Ex. 328.

² *Walton v. Wray*, 54 Iowa 351; s.c. 6 N. W. Rep. 742;

Cooper v. Johnson, 143 Mass. 108; s.c. 9 N. E. Rep. 33;

Carpenter v. Walker, 140 Mass. 416; s.c. 5 N. E. Rep. 160;

Hubbell v. East Cambridge Five Cent Savings Bank, 132 Mass. 447;

Lamphere v. Lowe, 3 Neb. 131; *Globe Marble Works Co. v. Quinn*, 76 N. Y. 23; s.c. 32 Am. Rep. 259;

Tift v. Horton, 53 N. Y. 377;

Ford v. Cobb, 20 N. Y. 344;

Mott v. Palmer, 1 N. Y. 564;

Kile v. Giebner, 114 Pa. St. 381; s.c. 7 Atl. Rep. 154;

Church v. Griffith, 9 Pa. St. 117, 118; s.c. 49 Am. Dec. 548;

White's Appeal, 10 Pa. St. 252;

Lamar v. Miles, 4 Watts (Pa.) 13, 30.

Compare: *Jones v. Detroit Chair Co.*, 38 Mich. 92; s.c. 31 Am. Rep. 314.

³ *Wall v. Hinds*, 70 Mass. (4 Gray) 256; s.c. 64 Am. Dec. 64;

Hunt v. Mullanphy, 1 Mo. 508; s.c. 14 Am. Dec. 300.

See: *Harkness v. Sears*, 26 Ala. 493; s.c. 62 Am. Dec. 742;

Wattris v. First Nat. Bank of Cambridge, 134 Mass. 571; s.c. 26 Am. Rep. 694;

Holbrook v. Chamberlin, 116 Mass. 155; s.c. 17 Am. Rep. 146;

Perkins v. Swank, 43 Miss. 349;

Weathersby v. Sleeper, 43 Miss. 732;

Hill v. Packard, 27 U. S. (2 Pet.) 137; bk. 7 L. ed. 374.

⁴ *Hall v. Sewald*, 53 Pa. St. 271, 273; s.c. 91 Am. Dec. 209, 211.

See: *Torrey v. Burnett*, 38 N. J. L. (9 Vr.) 457; s.c. 20 Am. Rep. 421;

Josslyn v. McCabe, 46 Wis. 591; s.c. 1 N. W. Rep. 174;

Keogh v. Daniel, 12 Wis. 163;

Van Ness v. Pacard, 27 U. S. (2 Pet.) 137; bk. 7 L. ed. 374.

⁵ *Conrad v. Saginaw Mining Co.*, 54 Mich. 249; s.c. 20 N. W. Rep. 39.

See: *Beers v. St. John*, 16 Conn. 322;

Walton v. Wray, 54 Iowa 531; s.c. 6 N. W. Rep. 742;

McIver v. Eastbrook, 134 Mass. 550;

Beckwith v. Boyce, 9 Mo. 560;

Kissam v. Barclay, 17 Abb. Pr. (N. Y.) 360;

Western N. C. R. Co. v. Deal, 90 N. C. 111;

Krouse v. Ross, 1 Cr. C. C. 368;

Robinson v. Wright, 2 McA. D. C. 54.

⁶ See: *Guthrie v. Jones*, 108 Mass. 191.

machinery,¹ steam-engines and boilers,² gas-fixtures,³ and the like.

SEC. 128. **Same—5. Mixed fixtures.**—There is another class of fixtures in which, as Lord Hardwick says in the case of *Dudley v. Ward*,⁴ “the use is a mixed case

Winslow v. Merchants' Ins. Co.,
45 Mass. (4 Met.) 306; s.c. 38
Am. Dec. 368;

Josslyn v. McCabe, 46 Wis. 591;
s.c. 1 N. W. Rep. 174.

¹ See: *Moore v. Smith*, 24 Ill. 512, 513;
Melhop v. Meinhart, 70 Iowa 685;
s.c. 28 N. W. Rep. 545;
Citizens' Bank v. Knapp, 22 La.
An. 117;

Fuller v. Tabor, 39 Me. 519,

Tapley v. Smith, 18 Me. 12;

Russell v. Richards, 10 Me. 429;

Carpenter v. Walker, 140 Mass.
416; s.c. 5 N. E. Rep. 160;

Maguire v. Park, 140 Mass. 21;
s.c. 1 N. E. Rep. 750;

Pierce v. George, 108 Mass. 78;
s.c. 11 Am. Rep. 310;

Ashmun v. Williams, 25 Mass. (8
Pick.) 402;

Wells v. Bannister, 4 Mass. 514;
Lyle v. Palmer, 42 Mich. 314;

s.c. 3 N. W. Rep. 921;

Wheeler v. Bedell, 40 Mich. 693;

Stokoe v. Upton, 40 Mich. 581;

s.c. 29 Am. Rep. 560;

Ferris v. Quimby, 41 Mich. 202;

s.c. 2 N. W. Rep. 9;

Wolford v. Baxter, 33 Minn. 12;

s.c. 21 N. W. Rep. 744;

Weathersby v. Sleeper, 42 Miss.
732;

Thomas v. Davis, 76 Mo. 72; s.c.
43 Am. Rep. 756;

Priestley v. Johnson, 67 Mo. 632;

Hines v. Ament, 43 Mo. 298;

Dame v. Dame, 38 N. H. 479; s.c.
75 Am. Dec. 195;

Scheifele v. Schmitz, 42 N. J. Eq.
(15 Stew.) 700; s.c. 1 Atl. Rep.
698;

Deane v. Hutchinson, 40 N. J.
Eq. (13 Stew.) 83; s.c. 2 Atl.
Rep. 292;

Cook v. Transportation Co., 1
Den. (N. Y.) 91;

Green v. Phillips, 26 Gratt. (Va.)
752; s.c. 21 Am. Rep. 323;

Van Ness v. Pacard, 27 U. S. (2
Pet.) 137; bk. 7 L. ed. 374;

Weill v. Thompson, 24 Fed. Rep.
14;

Wansbrough v. Maton, 4 Ad. &
El. 884; s.c. 31 Eng. C. L. 386;

King v. Otley, 1 Barn. & Ad. 161;

s.c. 20 Eng. C. L. 438;

Penton v. Robart, 2 East 88; s.c.
6 Rev. Rep. 376.

Building erected without consent.—

But if the building be erected

without the consent of the land-

owner and against his will, it

seems that the building be-

comes a part of the realty.

Cannon v. Copeland, 43 Ala. 252;

Dart v. Hercules, 57 Ill. 446;

Bonney v. Foss, 62 Me. 248;

Washburn v. Sproat, 16 Mass.
449;

Honzik v. Delaglise, 65 Wis. 494;

s.c. 27 N. W. Rep. 171.

² *Merrit v. Judd*, 14 Cal. 60;

Hayes v. N. Y. Mining Co., 2
Colo. 275;

Dobschuetz v. Holliday, 82 Ill.
371;

Cooper v. Johnson, 143 Mass. 108;

Conrad v. Saginaw Mining Co.,
54 Mich. 249; s.c. 52 Am. Rep.
817; 20 N. W. Rep. 39;

Robertson v. Corsett, 39 Mich.
777;

Kelsey v. Durkee, 33 Barb. (N.
Y.) 410;

Lawton v. Lawton, 1 Atk. 13.

Compare: *McNally v. Connolly*,
70 Cal. 3; s.c. 11 Pac. Rep. 320;

Ottumwa Woolen Mill Co. v.
Hawley, 44 Iowa 57; s.c. 24
Am. Rep. 719;

Thomas v. Davis, 76 Mo. 72;

Treadway v. Sharon, 7 Nev. 37;

Scheifeler v. Schmitz, 42 N. J.
Eq. (15 Stew.) 700; s.c. 1 Atl.
Rep. 698.

³ *McCall v. Walter*, 71 Ga. 287;

Towne v. Fiske, 127 Mass. 125;

s.c. 34 Am. Rep. 353;

Guthrie v. Jones, 108 Mass. 191;

Hays v. Doane, 11 N. J. Eq. (3
Stockt.) 84;

Lawrence v. Kemp, 1 Duer (N.
Y.) 363.

⁴ *Amb.* 113.

between enjoying the profits and the lands, and carrying on a species of trade.”¹ This class of fixtures also remains personal property. Thus it has been held that barns erected by a tenant for the purposes of carrying on dairy business, and a cider-mill and press erected by a yearly tenant, at his own expense and for his own use, in making cider on the farm, although firmly attached to the soil, remain the personal property of such tenant;² so also is a fire-engine set up by a tenant for life for the benefit of a colliery, because, as Lord Hardwick says, the operating a colliery is not only the enjoyment of an estate, but in part carrying on a trade.³

SEC. 129. Between whom the question of fixtures may arise.—The parties between whom the various questions respecting fixtures may arise has a great deal to do with the determination of the question whether a particular article, in the nature of a chattel, is personal property or a part of the realty in any given case. The various claimants in cases where the question of fixtures is involved may be divided into ten classes, each of which classes has its peculiar rules that govern the courts in passing upon their respective claims, and will be considered in their order.

These classes are where the questions arise between :

1. An assignee in bankruptcy or for the benefit of creditors and others ;
2. Debtor and execution creditor ;
3. Executor and heir at law ;
4. Executor of tenant for life and remainderman ;
5. Heir and devisee ;
6. Landlord and tenant ;
7. Mortgagor and mortgagee ;
8. Personal representative and devisee ;

¹ See : *Elwes v. Maw*, 3 East 38 ; s.c. 6 Rev. Rep. 523 ; 2 Smith's Lead. Cas. (9th Am. ed.) 1423, 1435.

² *Holmes v. Tremper*, 20 John. (N. Y.) 29 ; s.c. 11 Am. Dec. 238. See : *Culling v. Tuffnall*, Bull. N. P. 34 ;

Elwes v. Maw, 3 East 38 ; s.c. Rev. Rep. 523 ; 2 Smith's Lead. Cas. (9th Am. ed.) 1423, 1435.

Compare : *Wadleigh v. Janvrin*, 41 N. H. 503 ; s.c. 77 Am. Dec. 780.

³ *Lawton v. Lawton*, 3 Atk. 13.

9. Tenants in common ; and
10. Vendor and vendee.

SEC. 130. **Same—1. Assignee in bankruptcy or for benefit of creditors and others.**—Where there has been a general assignment in bankruptcy, or for the benefit of creditors, the assignees, generally speaking, are entitled to whatever interest in the fixtures the assignor himself possessed.¹ The general rule is that the fixtures pass with the real estate and not to the assignee as “goods and chattels” under the statute.² Thus it has been held that the machinery and looms in a worsted mill pass to the mortgagee as fixtures, and not to an assignee in bankruptcy, though merely attached to the floor for the purpose of steadying them.³ Trade fixtures form an exception to this general rule,⁴ however, and may be removed by the assignee, if such removal is made before the landlord takes possession of the premises.⁵

SEC. 131. **Same—2. Debtor and execution creditor.**—The right of a creditor to treat articles in the nature of chattels annexed to the freehold as personal property depends upon the right of the debtor to do so. If the debtor is at liberty to sever and remove the fixtures, an execution creditor may seize upon and remove them.⁶ But fixt-

¹ *Trappes v. Harter*, 3 Tyrwh. 603.
See : *In re Richards*, L. R. 4 Ch. 630 ;

Horn v. Baker, 9 East 215 ; s.c. 9 Rev. Rep. 541 ; 2 Smith's Lead. Cas. (9th Am. ed.) 1467 ;

Ex parte Cotton, 2 Mont. D. & DeG. 725.

² *Bilger v. National Bank of Newburgh*, 26 Hun (N. Y.) 520 ; s.c. 14 Week. Dig. 410 ;

Ryall v. Stevens, 1 Atk. 165 ;
Coombs v. Beaumont, 5 Barn. & Ad. 72 ; s.c. 27 Eng. C. L. 40 ;

Clark v. Crownshaw, 3 Barn. & Ad. 804 ; s.c. 23 Eng. C. L. 352 ;

Storer v. Hunter, 3 Barn. & C. 368 ; s.c. 10 Eng. C. L. 172 ;

Horn v. Baker, 9 East 215 ; s.c. 9 Rev. Rep. 541 ; 2 Smith's Lead. Cas. (9th Am. ed.) 1467.

³ *Holland v. Hodgson*, L. R. 7 C. P.

328 ; s.c. 2 Moak's Eng. Rep. 655 ; 41 L. J. C. P. (N. S.) 146 ; 20 W. R. 999.

Following : *Longbottom v. Berry*, L. R. 5 Q. B. 123 ;

Mather v. Fraser, 2 Kay & J. 536.
See : *Sheldon v. Edwards*, 35 N. Y. 283 ;

Ford v. Cobbs, 20 N. Y. 344 ;
Murdock v. Gifford, 18 N. Y. 28.

⁴ *Trappes v. Harter*, 2 Crompt. & M. 152 ;
Ex parte Barclay, 5 DeG. M. & G. 403 ;

Watefall v. Penistone, 6 El. & B. 876 ; s.c. 88 Eng. C. L. 875.

⁵ *Saint v. Pilley*, L. R. 10 Exch. 137 ; s.c. 12 Moak's Eng. Rep. 577 ;
In re Moser, L. R. 13 Q. B. Div. 738.

See : *Morris' Appeal*, 88 Pa. St. 368.

⁶ See : *State v. Bonham*, 18 Ind. 231 ;

ures which could be removed by a tenant, when annexed by the owner of the freehold for permanent use, become a part thereof,¹ and are not subject to be levied upon and sold as personal property under an execution against him.² Thus it is said in the case of *Voorhis v. Freeman*³ that machinery in a mill or factory built and equipped by the owner is a part of the realty as between the executor and the heirs at law, although as between a tenant and landlord or remainderman a different principle might prevail.

SEC. 132. Same—3. **Executor and heir at law.**—It has been said that there appears to be more uncertainty in the doctrine of fixtures, as it applies to the case of an executor and the heir at law, than to that of any other class of persons,⁴ and also that the rule obtains with most

Walton v. Wray, 54 Iowa 531;
s.c. 6 N. W. Rep. 742;

Kirwan v. Latour, 1 Harr. & J.
(Md.) 289;

O'Donnell v. Hitchcock, 118 Mass.
401;

Gale v. Ward, 14 Mass. 352; s.c.
7 Am. Dec. 223;

Lanphere v. Lowe, ? Neb. 131;

Farrar v. Chauffetete, 5 Den. (N.
Y.) 527;

Cresson v. Stout, 17 John. (N. Y.)
116;

Heffner v. Lewis, 73 Pa. St. 302;
Lemar v. Miles, 4 Watts (Pa.)

330;
Pillow v. Love, 5 Hayw. (Tenn.)

109;
Tobias v. Francis, 3 Vt. 425;

Minshall v. Lloyd, 2 Mees. & W.
450;

Poole's Case, 1 Salk. 368.

¹ See: *Stockwell v. Campbell*, 39
Conn. 362; s.c. 12 Am. Rep.
393;

McConnell v. Blood, 123 Mass. 47;
Meig's Appeal, 62 Pa. St. 28; s.c.
1 Am. Rep. 372;

Voorhis v. Freeman, 2 Watts &
S. (Pa.) 116; s.c. 37 Am. Dec.
490;

Hill v. Farmers & Merchants'
Nat. Bank, 97 U. S. 450; bk.
24 L. ed. 1051; 8 Rep. 577;

Hitchinson v. Kay, 23 Beav. 413;

Walmsley v. Milne, 7 C. B. N. S.
115; s.c. 6 Jur. N. S. 125; 29

L. J. C. P. 97; 1 L. T. N. S.
62; 97 Eng. C. L. 115;

Winn v. Ingilby, 1 D. & R. 247;
s.c. 5 Barn. & Ald. 625; 7 Eng.
C. L. 341;

Ex parte Montgomery, 4 Ir. Ch.
Rep. 520;

Jenkins v. Gething, 2 Johns. &
H. 520;

Mather v. Fraser, 2 Kay & J. 536;
s.c. 2 Jur. N. S. 900; 25 L. J.
Ch. 361;

Holland v. Hodgson, L. R. 7 C.
P. 328; s.c. 2 Moak's Eng. Rep.
655; 4 L. J. C. P., (N. S.) 146;
20 W. R. 990;

Boyd v. Shorrock, L. R. 5 Eq.
72; s.c. 16 W. R. 102;

Ex parte Reynal, 2 Mont. D. &
DeG. 443.

² *Green v. Phillips*, 26 Gratt. (Va.)
752; s.c. 21 Am. Rep. 323;

Winn v. Ingilby, 5 Barn. & Ald.
625; s.c. 7 Eng. C. L. 341;
1 Dow. & Ry. 247.

³ 2 Watts & S. (Pa.) 116; s.c. 37 Am.
Dec. 490.

⁴ See: *Montague v. Dent*, 10 Rich.
(S. C.) L. 135; s.c. 67 Am. Dec.
572.

Rule as to executors—Solo infixum.—

In this case the court say
that "in early times the ex-
ecutor contended with the
heir at disadvantage, and such
was the temper of the courts so
late as the time of Bacon's

rigor in favor of the inheritance, and against the right to consider as a personal chattel anything which has been affixed to the freehold;¹ but it is thought that, in the recent English cases at least,² the law has been construed as favorable for mortgagees as for heirs. The general rule may be said to be that where an article has once been annexed to the freehold it cannot be removed by the executors,³ unless the ancestor manifested an intention,—which intention may be inferred from circumstances,—that the thing affixed should remain personal property; in which case such fixtures may be regarded as personal property and go to the executor instead of the heir.⁴ It may be said to be elementary doctrine that when annexations are made by a stranger to the fee, where the owner has not been at fault in relation thereto, they pass with the freehold to the heir.⁵

SEC. 133. Same.—4. Executor of tenant for life and remainderman.—As between the executor or administrator of a tenant for life, or in tail, and the remainderman, or

Abridgment. The rigor applied to the executor has been relaxed, however, but still, perhaps, mainly upon the clear modern rule which favors a tradesman and his representative. The elementary idea is that the article claimed as part of the freehold must be in some way fixed to the soil or part or parcel of that which is. '*Solo infixum*' are the words of Lord BROGHAM, in *Fisher v. Dixon*, 12 Cl. & Fin. 312."

¹ *Johnson's Ex'rs v. Wiseman's Ex'rs*, 4 Met. (Ky.) 360; s.c. 83 Am. Dec. 475.

See: *Voorhis v. Freeman*, 2 Watts & S. (Pa.) 116; s.c. 37 Am. Dec. 49;

Fisher v. Dixon, 12 Cl. & Fin. 312; s.c. 9 Jur. 883;

Colegrave v. Dias Santos, 2 Barn. & C. 76; s.c. 9 Eng. C. L. 42.

² See: *Climie v. Wood*, L. R. 4 Ex. Cas. 328;

In re Richards, L. R. 4 Ch. 630; *Longbottom v. Berry*, L. R. 5 Q. B. 123;

Holland v. Hodgson, L. R. 7 C. P. 328; s.c. 41 L. J. C. P. (N. S.) 146; 20 W. R. 990.

³ See: *Kinsell v. Billings*, 35 Iowa 154;

Doak v. Wiswell, 38 Me. 569;

Wadleigh v. Janvrin, 41 N. H. 503;

Voorhees v. McGinnis, 48 N. Y. 278, 282;

Buckley v. Buckley, 11 Barb. (N. Y.) 43;

House v. House, 10 Paige Ch. (N. Y.) 158;

McDavid v. Wood, 5 Heisk. (Tenn.) 95;

Winn v. Ingilby, 5 Barn. & Ald. 625; s.c. 7 Eng. C. L. 341; 1

Dow. & Ry. 247;

Fisher v. Dixon, 12 Cl. & Fin. 312; s.c. 9 Jur. 883;

Elwes v. Maw, 3 East 38; s.c. 6 Rev. Rep. 523; 2 Smith's Lead. Cas. (9th Am. ed.) 1423;

Lee v. Risdon, 7 Taunt. 188; s.c. 2 Marsh. 495; 2 Eng. C. L. 320.

⁴ *Fisher v. Dixon*, 12 Cl. & Fin. 312; s.c. 8 Jur. 883;

Harvey v. Harvey, 2 Stra. 1141;

Beck v. Rebow, 1 Pr. Wms. 94;

Culling v. Tuffnall, Bull. N. P. 34.

⁵ See: *Morrison v. Berry*, 42 Mich. 389; s.c. 36 Am. Rep. 446; 4 N. W. Rep. 731.

reversioner, the right to the fixtures is in favor of the executor.¹ While the law as to fixtures between this class of persons is not so strict as between executors and heirs, neither is it so liberal as between landlord and tenant. Yet it may be laid down generally that the representative of the particular tenant is entitled, as against the remainderman or reversioner, to such fixtures as were erected wholly or in part for the furtherance of the trade.²

SEC. 134. **Same—5. Heir at law and devisee.**—As between the heir at law and the devisee of a tenant for life or in tail, the devise of fixtures is void, because the deviser has no power to devise the realty to which they are incident,³ except in those cases where the things devised would pass to his executors.⁴

SEC. 135. **Same—6. Landlord and tenant.**—In the case of landlords and tenants the claiming of articles considered as personal property, which have been annexed to the soil by the tenant, is received with great latitude and indulgence,⁵ from motives of public policy.⁶ It has been said that there are certain rules that may be taken as well settled by the uniform current of judicial decision, the first and leading one of which is that the law regards with peculiar favor the rights of tenants as against landlords, to remove articles annexed by them to the freehold,⁷ and

¹ *Johnson's Ex'rs v. Wiseman's Ex'rs*, 4 Met. (Ky.) 360; s.c. 83 Am. Dec. 475.

² See: *Dudley v. Warde*, Amb. 113;

Lawton v. Lawton, 3 Atk. 13;

Lawton v. Salmon, 1 H. Bl. 260; s.c. 2 Rev. Rep. 764;

Elwes v. Maw, 3 East 38; s.c. 6 Rev. Rep. 523; 2 Smith's Lead. Cas. (9th Am. ed.) 1423.

³ *Herlakenden's Case*, 4 Co. 62; Shep. Touch. 469, 470.

⁴ See: *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382.

⁶ *Johnson's Ex'rs v. Wiseman's Ex'rs*, 4 Met. (Ky.) 360; s.c. 83 Am. Dec. 475.

See: *Pellenz v. Bullerdieck*, 13 La. An. 274; s.c. 18 La. An. 614;

Wall v. Hinds, 70 Mass. (4 Gray) 256; s.c. 64 Am. Dec. 64;

Winslow v. Merchants' Ins. Co., 45 Mass. (4 Met.) 306;

Muller v. Baker, 42 Mass. (11 Met.) 27;

Gaffield v. Hapgood, 34 Mass. (17 Pick.) 192; s.c. 28 Am. Dec. 290;

Finney v. Watkins, 13 Mo. 291.

⁶ *Miller v. Plumb*, 6 Cow. (N. Y.) 665; s.c. 16 Am. Dec. 456.

⁷ See: *Hayes v. N. Y. Mining Co.*, 2 Colo. 273;

Youngblood v. Eubank, 68 Ga. 630;

Thomas v. Crout, 5 Bush (Ky.) 37;

Davis v. Buffum, 51 Me. 160;

Winslow v. Merchants' Ins. Co., 45 Mass. (4 Met.) 306, 310;

extends much greater indulgence to them in this respect than is conceded to executors, remaindermen, or any other class of persons.¹ The ground for this is because tenants usually pay their landlords adequate rents, and for that reason it is equitable that they should have the right to remove fixtures which have been put up by them for their own convenience and use and at their own expense.² But a person occupying lands under a contract of purchase will not have a tenant's right to remove a fixture he has placed upon the land.³

The second of these well-settled rules is that fixtures which tenants are allowed to disannex and carry away are comprehended within two classes, or are of a mixed nature,⁴ falling partly within and partaking of the nature of each. These classes are : first, those articles which are put up for ornament, or the more convenient use of the premises, known as domestic fixtures ;⁵ and second, those articles which are put up for the purposes of trade.⁶ Fixtures which do not fall under either of these two classes, and which have manifestly been erected for the general improvement of the premises occupied, inure to the benefit of the freehold and cannot be removed.⁷ This

- Gaffield v. Hapgood, 34 Mass. (17 Pick.) 192 ; s.c. 28 Am. Dec. 290 ;
 Conrad v. Saginaw Mining Co., 54 Mich. 249 ; s.c. 20 N. W. Rep. 39 ;
 Deane v. Hutchinson, 40 N. J. Eq. (13 Stew.) 83 ;
 Western N. C. R. Co. v. Deal, 90 N. C. 110 ;
 Oregon, R. & N. Co. v. Mosier, 14 Oreg. 519 ; s.c. 58 Am. Rep. 821 ; 13 Pac. Rep. 300 ;
 Keogh v. Daniell, 12 Wis. 163 ;
 Lawton v. Lawton, 3 Atk. 13 ;
 Penton v. Robart, 2 East 88 ; s.c. 6 Rev. Rep. 376 ;
 Pugh v. Arton, L. R. 8 Eq. 626.
¹ Wall v. Hinds, 70 Mass. (4 Gray) 256 ; s.c. 64 Am. Dec. 64.
 See : Grymes v. Boweren, 6 Bing. 439 ; s.c. 19 Eng. C. L. 201 ;
 Elwes v. Maw, 3 East 38 ; s.c. 6 Rev. Rep. 523 ; 2 Smith's Lead. Cas. (9th Am. ed.) 1423 ;
 Elliott v. Bishop, 10 Exch. 507.
² Blethen v. Towle, 40 Me. 311 ;
 Bainway v. Cobb, 99 Mass. 457, 459 ;
 Bliss v. Whitney, 91 Mass. (9 Allen) 114 ;
 King v. Johnson, 73 Mass. (7 Gray) 239 ;
 Wall v. Hinds, 70 Mass. (4 Gray) 256 ; s.c. 64 Am. Dec. 64 ;
 Hays v. Doane, 11 N. J. Eq. (3 Stockt.) 84 ;
 Kutter v. Smith, 69 U. S. (2 Wall.) 491 ; bk. 17 L. ed. 830 ;
 Grymes v. Boweren, 6 Bing. 437 ; s.c. 4 Moore & P. 143 ; 19 Eng. C. L. 201.
³ King v. Johnson, 73 Mass. (7 Gray) 239 ;
 Murphy v. Marland, 62 Mass. (8 Cush.) 575 ;
 Hutchins v. Shaw, 60 Mass. (6 Cush.) 58 ;
 McLaughlin v. Nash, 96 Mass. (14 Allen) 136 ; s.c. 92 Am. Dec. 741.
⁴ See : *Ante*, § 128.
⁵ See : *Ante*, § 124.
⁶ See : Wall v. Hinds, 70 Mass. (4 Gray) 256 ; s.c. 64 Am. Dec. 64 ;
Ante, § 127.
⁷ See : Buckland v. Butterfield, 2 Brod. & B. 54.

right of the tenant to remove domestic and trade fixtures has been fully recognized since *Poole's Case*,¹ decided by Lord Holt in Queen Anne's time.²

SEC. 136. **Same—Same—Removal of fixtures by tenant.**—This removal of fixtures must be made by the tenant without serious injury to the freehold,³ during his term, because after the expiration of his term of lease he loses all control over them, they becoming part of the real estate, and cannot be claimed by the tenant or his assignee as against the owner of the land;⁴ and this is true whether the lease is terminated by expiration of time or by breach of contract and re-entry of the landlord.⁵ This rule, however, applies only where the tenant leases for a term certain, and the instrument creating the estate contains no special provisions in regard to fixtures.⁶ Where the term is uncertain, or depends upon a contingency—as where a party is in possession as tenant for life, or at will,—the fixtures may be removed within a reasonable time after the tenancy is determined.⁷

¹ Salk. 368.

See: *Elwes v. Maw*, 3 East 38; s.c. 6 Rev. Rep. 523; 2 Smith's Lead. Cas. (9th Am. ed.) 1423, 1434.

² See: *Penton v. Robart*, 2 East 88, 90; s.c. 6 Rev. Rep. 376; *Dean v. Allalley*, 3 Esp.* N. P. 11; *Lawton v. Salmon*, 1 H. Bl. 260; s.c. 2 Rev. Rep. 764; *Fitzherbert v. Shaw*, 1 H. Bl. 258.

³ See: *Allen v. Kennedy*, 40 Ind. 142;

Conrad v. Saginaw Mining Co., 54 Mich. 249; s.c. 20 N. W. Rep. 39;

Ambs v. Hill, 10 Mo. App. 108; *Cubbins v. Ayres*, 4 Lea (Tenn.) 329.

⁴ *Watriss v. First Nat. Bank of Cambridge*, 124 Mass. 571; s.c. 26 Am. Rep. 694, 696.

See: *Youngblood v. Eubank*, 68 Ga. 630;

Talbot v. Whipple, 96 Mass. (14 Allen) 177;

Bliss v. Whitney, 91 Mass. (9 Allen) 114, 115;

Wall v. Hinds, 70 Mass. (4 Gray) 256; s.c. 64 Am. Dec. 64;

Butler v. Page, 48 Mass. (7 Met.) 40; s.c. 39 Am. Dec. 757;

Shepard v. Spaulding, 45 Mass. (4 Met.) 416;

Winslow v. Merchants' Ins. Co., 45 Mass. (4 Met.) 306, 311;

Noble v. Bosworth, 36 Mass. (19 Pick.) 314;

Gaffield v. Hapgood, 34 Mass. (17 Pick.) 192; s.c. 28 Am. Dec. 290;

Goddard v. Chase, 7 Mass. 432;

Torrey v. Burnett, 38 N. J. L. (9 Vr.) 457; s.c. 20 Am. Rep. 421;

Hays v. Doane, 11 N. J. Eq. (3 Stockt.) 84;

Loughran v. Ross, 45 N. Y. 792;

Van Ness v. Pacard, 27 U. S. (2 Pet.) 137; bk. 7 L. ed. 374;

Lyde v. Russell, 1 Barn. & Ad. 394; s.c. 20 Eng. C. L. 532;

Elwes v. Maw, 3 East 38; s.c. 6 Rev. Rep. 523; 2 Smith's Lead. Cas. (9th Am. ed.) 1423;

Penton v. Robart, 2 East 88; s.c. 6 Rev. Rep. 376;

Minshall v. Lloyd, 2 Mees. & W. 450; *Poole's Case*, 1 Salk. 368.

⁵ *Pugh v. Arton*, L. R. 8 Eq. 626.

⁶ *Watriss v. First Nat. Bank of Cambridge*, 124 Mass. 571; s.c. 26 Am. Rep. 694.

⁷ *Watriss v. First Nat. Bank of Cambridge*, 124 Mass. 571; s.c. 26 Am. Rep. 694;

* See: *Post*, (*) footnote to § 292.

SEC. 137. Same—Same—Renewal of lease without removal of fixtures.—It has been said that where a tenant has added fixtures and then taken a new lease to commence on the termination of the first one, that he thereby loses his title in and his right to remove such fixtures.¹ Against this doctrine Judge COOLEY enters a vigorous protest,² saying, among other things: "The requirement that the tenant shall remove during his term whatever he proposes to claim a right to remove at all is based upon a corresponding rule of public policy for the protection of the landlord, and which is, that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord or of a succeeding tenant, to remove fixtures which he might and ought to have taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term; indeed, the law does not in strictness require of him that he shall remove them during the term, but only before he surrenders possession, and during the time he has a right to regard himself as occupying in the character of a tenant."³

SEC. 138. Same—7. Mortgagor and mortgagee.—The rules respecting fixtures that apply between mortgagor and mortgagee are the same as those between executor and heir at law, vendor and vendee.⁴ All improvements and

Loughran v. Ross, 45 N. Y. 792; s.c. 6 Am. Rep. 173.

See: Doty v. Gorham, 22 Mass. (5 Pick.) 487, 490; s.c. 16 Am. Dec. 417;

Whiting v. Brastow, 21 Mass. (4 Pick.) 310, 311;

Ellis v. Paige, 18 Mass. (1 Pick.) 43, 49;

Reynolds v. Shuler, 5 Cow. (N. Y.) 323;

Martin v. Roe, 7 El. & Bl. 237; s.c. 90 Eng. C. L. 236.

¹ Merritt v. Judd, 14 Cal. 59;

Loughran v. Ross, 45 N. Y. 792; s.c. 6 Am. Rep. 173.

² Kerr v. Kingsbury, 39 Mich. 150; s.c. 33 Am. Rep. 362, 364.

³ Penton v. Robart, 2 East 88; s.c. 6 Rev. Rep. 376;

Weeton v. Woodcock, 7 Mees. & W. 14.

⁴ See: Harkness v. Sears, 26 Ala.

493; s.c. 62 Am. Dec. 742;

Arnold v. Crowder, 81 Ill. 56; s.c. 25 Am. Rep. 260;

Johnson v. Wiseman, 4 Met. (Ky.) 357;

Butler v. Page, 48 Mass. (7 Met.) 40; s.c. 39 Am. Dec. 757;

Winslow v. Merchants' Ins. Co., 45 Mass. (4 Met.) 306; s.c. 38 Am. Dec. 368;

Weathersby v. Sleeper, 42 Miss. 732;

Thomas v. Davis, 76 Mo. 72;

Burnside v. Twitchell, 43 N. H. 390;

Wadleigh v. Janvrin, 41 N.H. 503; Despatch Line v. Bellamy Mfg.

annexations to the soil pass to the mortgagee, or to the purchaser at foreclosure sale, unless they are excepted from the lien of the mortgage in express terms.¹ This is true alike of fixtures upon the property at the time the mortgage was given and all annexations made after its execution.² Thus it has been held that trade fixtures,

- Co., 12 N. H. 205; s.c. 37 Am. Dec. 203;
 Davidson v. Westchester Gas-Light Co., 99 N. Y. 559; s.c. 2 N. E. Rep. 892;
 Voorhis v. Freeman, 2 Watts & S. (Pa.) 116; s.c. 37 Am. Dec. 490;
 Montague v. Dent, 10 Rich. (S. C.) L. 135; s.c. 67 Am. Dec. 572;
 Degraffenreid v. Scruggs, 4 Humph. (Tenn.) 451; s.c. 40 Am. Dec. 658.
¹ See: Merritt v. Judd, 14 Cal. 60;
 Maples v. Millon, 31 Conn. 568;
 Arnold v. Crowder, 81 Ill. 56; s.c. 25 Am. Rep. 260;
 Pea v. Pea, 35 Ind. 387;
 Winslow v. Merchants' Ins. Co., 45 Mass. (4 Met.) 306; s.c. 38 Am. Dec. 368;
 Union Bank v. Emerson, 15 Mass. 159;
 Wadleigh v. Janvrin, 41 N. H. 503, 514;
 Quimby v. Manhattan Cloth Co., 24 N. J. Eq. (9 C. E. Gr.) 260;
 McRea v. Central Nat. Bank of Troy, 66 N. Y. 489;
 Hoskin v. Woodward, 45 Pa. St. 42;
 Longstaff v. Meagoe, 2 Ad. & E. 167; s.c. 29 Eng. C. L. 94;
 Walmsley v. Milne, 7 C. B. N. S. 115; s.c. 6 Jur. N. S. 125; 29 L. J. C. P. 97; 1 L. T. N. S. 62; 97 Eng. C. L. 115;
 Ex parte Belcher, 4 Dea. & Ch. 703;
 Longbottom v. Berry, L. R. 5 Q. B. 123;
 Hitchman v. Walton, 4 Mees. & W. 409.
Mortgagor and mortgagee—As to what constitutes fixtures between, among other cases, see: *Rogers v. Prattville Mfg. Co.*, 81 Ala. 483; s.c. 60 Am. Rep. 171; 1 So. Rep. 643;
 Arnold v. Crowder, 81 Ill. 56; s.c. 25 Am. Rep. 260;
 Hamilton v. Huntley, 78 Ind. 521; s.c. 41 Am. Rep. 593;
 Adams v. Beadle, 47 Iowa 439; s.c. 29 Am. Rep. 487;
 Ottumwa Woolen Mills Co. v. Hawley, 44 Iowa 57; s.c. 24 Am. Rep. 719;
 Snowden v. Craig, 26 Iowa 156; s.c. 96 Am. Dec. 125;
 Daniels v. Bowe, 25 Iowa 403; s.c. 95 Am. Dec. 797;
 Eaves v. Estes, 10 Kan. 314; s.c. 15 Am. Rep. 345;
 Dudley v. Hurst, 67 Md. 44; s.c. 1 Am. St. Rep. 368; 8 Atl. Rep. 901;
 Hubbell v. East Cambridge Five Cent Savings Bank, 132 Mass. 447; s.c. 42 Am. Rep. 446;
 McConnell v. Blood, 123 Mass. 47; s.c. 25 Am. Rep. 12;
 Pierce v. George, 108 Mass. 78; s.c. 11 Am. Rep. 310;
 McLaughlin v. Nash, 96 Mass. (14 Allen) 136; s.c. 92 Am. Dec. 741;
 State Savings Bank v. Kircheval, 65 Mo. 682; s.c. 27 Am. Rep. 310;
 Jones v. Detroit Chair Co., 38 Mich. 92; s.c. 31 Am. Rep. 314;
 Wolford v. Baxter, 33 Minn. 12; s.c. 53 Am. Rep. 1;
 Thomas v. Davis, 76 Mo. 72; s.c. 43 Am. Rep. 756;
 Rogers v. Crow, 40 Mo. 91; s.c. 93 Am. Dec. 299;
 McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38; s.c. 37 Am. Rep. 471;
 Globe Marble Mills Co. v. Quinn, 76 N. Y. 23; s.c. 32 Am. Rep. 259;
 Tift v. Horton, 53 N. Y. 377; s.c. 13 Am. Rep. 537;
 Foote v. Gooch, 96 N. C. 265; s.c. 60 Am. Rep. 411; 1 S. E. Rep. 525;
 Green v. Phillips, 26 Gratt. (Va.) 752; s.c. 21 Am. Rep. 323.
² *McLaughlin v. Nash*, 96 Mass. (14 Allen) 136; s.c. 92 Am. Dec. 741.
 See: *Wood v. Whelen*, 93 Ill. 153;

which were upon the land at the time of the mortgage, pass with the land to the mortgagee,¹ or to the purchaser at a sale under the mortgage,² and that fixtures placed in a building, after the execution of a mortgage, intended to permanently increase the value of the building for occupation,³ become a part of the realty and pass under the mortgage.⁴ Such, however, is not the case

Hamilton v. Huntley, 78 Ind. 521 ;
Ottumwa Woolen Mill Co. v.

Hawley, 44 Iowa 57 ; s.c. 24
Am. Rep. 719 ;

Clore v. Lambert, 78 Ky. 224 ;

Wight v. Gray, 73 Me. 297 ;

Smith Paper Co. v. Servin, 130
Mass. 511 ;

Cole v. Stewart, 65 Mass. (11
Cush.) 181 ;

Butler v. Page, 48 Mass. (7 Met.)
40 ; s.c. 39 Am. Dec. 757 ;

Winslow v. Merchants' Ins. Co.,
45 Mass. (4 Met.) 306 ; s.c. 38
Am. Dec. 368 ;

Coleman v. Stearns Mfg. Co., 38
Mich. 30 ;

State Savings Bank v. Kercheval,
65 Mo. 682 ;

Campbell v. Roddy, 44 N. J. Eq.
(17 Stew.) 244 ; s.c. 6 Am. St.
Rep. 889 ;

Walmsley v. Milne, 7 C. B. N. S.
115 ; s.c. 97 Eng. C. L. 114 ;

Cullwick v. Swindell, L. R. 3 Eq.
Cas. 249.

See, also : *Tillman v. DeLacy*, 80
Ala. 103 ;

Corliss v. McLagin, 29 Me. 115 ;

McKim v. Mason, 3 Md. Ch. 186 ;

Lynde v. Rowe, 94 Mass. (12
Allen) 100 ;

Richardson v. Copeland, 72 Mass.
(6 Gray) 536 ;

Jones v. Detroit Chair Co., 38
Mich. 92 ; s.c. 31 Am. Rep. 314 ;

Coleman v. Stearns Mfg. Co., 38
Mich. 30 ;

Burnside v. Twitchell, 43 N. H.
390 ;

Snedeker v. Warring, 12 N. Y.
170 ;

Blake v. Respass, 77 N. C. 193 ;

Bond v. Coke, 71 N. C. 97 ;

Hill v. Sewald, 53 Pa. St. 271 ;
s.c. 91 Am. Dec. 209 ;

Roberts v. Dauphin Dep. Bank,
19 Pa. St. 71 ;

Sweetzer v. Jones, 35 Vt. 317 ;

Ex parte Belcher, 4 Dea. & Ch.
703 ;

Ex parte Cotton, 2 Mont. D. &
DeG. 725.

¹ See : *Ottumwa Woolen Mill Co. v.*
Hawley, 44 Iowa 57 ; s.c. 24

Am. Rep. 719 ;

Parsons v. Copeland, 38 Me. 537 ;
s.c. 54 Am. Dec. 628 ;

Corliss v. McLagin, 29 Me. 115 ;

Farrar v. Stackpole, 6 Me. 155 ;

Burnside v. Twitchell, 43 N. H.
390 ;

Harlan v. Harlan, 15 Pa. St. 507,
513 ;

Voorhis v. Freeman, 2 Watts &
S. (Pa.) 116 ; s.c. 37 Am. Dec.
490.

Compare : *Gale v. Ward*, 14 Mass.
352 ; s.c. 7 Am. Dec. 223 ;

Potter v. Cromwell, 40 N. Y. 287 ;

Murdock v. Gifford, 18 N. Y. 28 ;

Walker v. Sherman, 20 Wend.
(N. Y.) 656 ;

Corwin v. Cowan, 12 Ohio St.
629 ;

Teaff v. Hewitt, 1 Ohio St. 511 ;
s.c. 59 Am. Dec. 634 ;

Bartlett v. Wood, 32 Vt. 372 ;

Hill v. Wentworth, 28 Vt. 428.

² See : *Dudley v. Hurst*, 67 Md. 44 ;
s.c. 1 Am. St. Rep. 368 ; 8 Atl.

Rep. 901 ;

Mather v. Fraser, 2 Kay & J. 536 ;

Climie v. Wood, L. R. 3 Ex. 257 ;

Longbottom v. Berry, L. R. 5 Q.
B. 123.

³ See : *McConnell v. Blood*, 123
Mass. 47 ; s.c. 25 Am. Rep. 12.

⁴ *McConnell v. Blood*, 143 Mass. 47 ;
s.c. 25 Am. Rep. 12.

See : *Wood v. Whelen*, 93 Ill. 153 ;

Hamilton v. Huntley, 78 Ind. 52 ;

Clore v. Lambert, 78 Ky. 224 ;

Wight v. Gray, 73 Me. 297 ;

Smith Paper Co. v. Servin, 130
Mass. 511 ;

Lynde v. Rowe, 94 Mass. (12
Allen) 100 ;

Richardson v. Copeland, 72 Mass.
(6 Gray) 536 ;

Cole v. Stewart, 65 Mass. (11
Cush.) 181 ;

with machinery or fixtures merely incidental to a business carried on in the building at the date of the mortgage ;¹ or with gas chandeliers and pendant gas-burners and gas-jets on the side-walls, capable of being detached without injury to the pipes or the building.²

SEC. 139. **Same — 8. Personal representative and devisee.**—As between the personal representative and a devisee, such fixtures as are severable from the freehold, and which would go to the personal representative in exclusion of the heir, may be devised by the testator, where the estate upon which they are located is devisable ; but it is otherwise where the estate to which they are attached is not devisable by the testator.³ In such a case the rights of the devisee are the same as would be those of the heir, in whose place he stands.⁴

SEC. 140. **Same — 9. Tenants in common.**—The same general rules that apply as between an executor and the heir at law, and between a mortgagor and mortgagee, will be applied to fixtures erected upon land by tenants in common, on a division of the estate by partition.⁵

SEC. 141. **Same — 10. Vendor and vendee.**—As between the vendor and the vendee, the strict rule as to fixtures applies, and the purchaser is entitled to everything that has been annexed to the freehold with a view to increasing its value, or adapted to the purpose for which it is used, unless there has been an express provision to the contrary,⁶ in the contract of sale, or instrument of con-

Winslow v. Merchants' Ins. Co.,
45 Mass. (4 Met.) 306 ;

Jones v. Detroit Chair Co., 38
Mich. 92 ; s.c. 31 Am. Rep. 314.

¹ McConnell v. Blood, 123 Mass. 47 ;
s.c. 25 Am. Rep. 12.

See : Pierce v. George, 108 Mass.
78 ; s.c. 11 Am. Rep. 310 ;

Winslow v. Merchants' Ins. Co.,
45 Mass. (4 Met.) 306 ; s.c. 38
Am. Dec. 368 ;

Hellawell v. Eastwood, 6 Exch.
295 ; Queen v. Lee, L. R. 1 Q. B.
241.

² See : Chapman v. Union Mutual
Life Ins. Co., 4 Ill. App. 29 ;

Early v. Burtis, 40 N. J. Eq. (13
Stew.) 501 ; s.c. 4 Atl. Rep. 765 ;
Vaughen v. Halderman, 33 Pa.
St. 522 ;

Montague v. Dent, 10 Rich. (S.
C.) L. 185 ; s.c. 67 Am. Dec. 572.

³ See : Herlakenden's Case, 4 Co.
62 ;

Shep. Touch. 469, 470.

⁴ Stuart v. Bute, 3 Ves. 212.

⁵ Parsons v. Copeland, 38 Me. 537 ;
s.c. 54 Am. Dec. 628.

⁶ Rogers v. Crow, 40 Mo. 91 ; s.c.
93 Am. Dec. 299.

See : Harkness v. Sears, 26 Ala.
493 ; s.c. 62 Am. Dec. 742 ;

veyance.¹ Within this principle it has been held that various articles are fixtures, and pass with the land to

- Fratt v. Whittier*, 58 Cal. 126; s.c. 41 Am. Rep. 251;
Kennard v. Brough, 64 Ind. 23;
Pea v. Pea, 35 Ind. 387;
Clore v. Lambert, 78 Ky. 224;
Smith v. Commonwealth, 14 Bush (Ky.) 31;
Johnson v. Wiseman, 4 Met. (Ky.) 357;
Lapham v. Norton, 71 Me. 83;
Davis v. Buffum, 51 Me. 160;
Farrar v. Stackpole, 6 Me. (6 Greenl.) 154, 157;
Kirwan v. Latour, 1 Harr. & J. (Md.) 289;
Johnson's Ex'rs v. Wiseman's Ex'rs, 4 Met. (Ky.) 360; s.c. 87 Am. Dec. 475;
Rogers v. Crow, 40 Mo. 91; s.c. 93 Am. Dec. 299;
Schlemmer v. North, 32 Mo. 206;
Cohen v. Kyler, 27 Mo. 122;
Connor v. Coffin, 27 N. H. 538;
Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205; s.c. 37 Am. Dec. 203;
Kittredge v. Woods, 3 N. H. 503; s.c. 14 Am. Dec. 393;
Miller v. Plumb, 6 Cow. (N. Y.) 665;
Walker v. Sherman, 20 Wend. (N. Y.) 636;
Hutchins v. Masterson, 46 Tex. 551;
Connor v. Squiers, 50 Vt. 680;
Preston v. Briggs, 16 Vt. 124;
Stone v. Proctor, 2 D. Chip. (Vt.) 113;
Hitchman v. Walton, 4 Mees. & W. 409; s.c. 2 Smith's Lead. Cas. (9th Am. ed.) 1452;
2 Kent. Com. (13th ed.) 441.
As to what are fixtures between vendor and vendee among other cases, See: *Harkness v. Sears*, 26 Ala. 493; s.c. 62 Am. Dec. 742;
Fratt v. Whittier, 58 Cal. 126; s.c. 41 Am. Rep. 251;
McGreary v. Osborne, 9 Cal. 119;
Stockwell v. Campbell, 39 Conn. 362; s.c. 12 Am. Rep. 393;
Smith v. Price, 39 Ill. 28; s.c. 89 Am. Dec. 284;
Bull v. Griswald, 19 Ill. 631;
Leonard v. Stickney, 131 Mass. 541;
McLaughlin v. Nash, 96 Mass. (14 Allen) 136; s.c. 92 Am. Dec. 741;
Richardson v. Copeland, 72 Mass. (6 Gray) 536; s.c. 66 Am. Dec. 424;
Johnson's Ex'rs v. Wiseman's Ex'rs, 4 Met. (Ky.) 360; s.c. 83 Am. Dec. 475;
Richardson v. Borden, 42 Miss. 71; s.c. 2 Am. Rep. 595;
Rogers v. Crow, 40 Mo. 91; s.c. 93 Am. Dec. 299;
Cohen v. Kyler, 27 Mo. 122;
Hunt v. Mullanphy, 1 Mo. 508; s.c. 14 Am. Dec. 300;
Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205; s.c. 37 Am. Dec. 203;
Terhune v. Elbersson, 3 N. J. L. (2 Penn.) 297;
Potter v. Cromwell, 40 N. Y. 287; s.c. 100 Am. Dec. 485;
Shaw v. Lenke, 1 Daly (N. Y.) 487;
Teaff v. Hewitt, 1 Ohio St. 511; s.c. 59 Am. Dec. 634;
Heysham v. Dettre, 89 Pa. St. 506;
Jarechi v. Philharmonic Soc., 79 Pa. St. 403; s.c. 21 Am. Rep. 78, 80;
Meig's Appeal, 62 Pa. St. 28; s.c. 1 Am. Rep. 372;
Voorhis v. Freeman, 2 Watts & S. (Pa.) 116; s.c. 37 Am. Dec. 490;
Degraffenreid v. Scruggs, 4 Humph. (Tenn.) 451; s.c. 40 Am. Dec. 658;
Hitchins v. Masterson, 46 Tex. 551; s.c. 26 Am. Rep. 286;
Peck v. Batchelder, 40 Vt. 233; s.c. 94 Am. Dec. 392;
Cross v. Marston, 17 Vt. 533; s.c. 44 Am. Dec. 593;
Green v. Phillips, 26 Gratt. (Va.) 752; s.c. 21 Am. Rep. 323.
Smith v. Price, 39 Ill. 28; s.c. 89 Am. Dec. 284.
See: *Connor v. Clark*, 12 Cal. 168; s.c. 73 Am. Dec. 529;
Purinton v. Northern Illinois R. Co., 46 Ill. 297, 300;
Martin v. Pensacola & G. R. Co., 8 Fla. 370; s.c. 73 Am. Dec. 713;
Dicken v. Morgan, 54 Iowa 684, 686; s.c. 7 N. W. Rep. 145;
Rohrabacher v. Ware, 37 Iowa 85, 87;
Johnson v. Tatlinger, 31 Iowa 500, 502;

the vendee, such as a bath-tub ;¹ bell, where attached to the realty ;² boilers used in a flouring-mill ;³ chandeliers ;⁴ a cotton-gin on a plantation,⁵ fixed in place ;⁶ conduit pipes to conduct water to a house ;⁷ counters in a store ;⁸ crops growing on land ;⁹ double-windows in a dwelling,¹⁰ and the dwelling itself, unfinished, or set on blocks laid on the ground ;¹¹ dye-kettles, brick-set in a dye-house ;¹² fencing materials ;¹³ front piece to a fire grate,¹⁴ and the grate itself ;¹⁵ gas-fixtures ;¹⁶ hop-poles used in cultivating hops ;¹⁷ a hot-air furnace used in heating a dwelling,¹⁸ and the screens placed in front of steam-radiating pipes ;¹⁹ machinery annexed to realty

- Jack *v.* Naber, 15 Iowa 450, 452 ;
 Gelpcke *v.* Blake, 15 Iowa 387 ;
 s.c. 83 Am. Dec. 418, 422 ;
 Timms *v.* Shannon, 19 Md. 296 ;
 s.c. 81 Am. Dec. 632 ;
 Noble *v.* Bosworth, 36 Mass. (19
 Pick.) 314 ;
 Fulton *v.* Hood, 34 Pa. St. 365 ;
 s.c. 75 Am. Dec. 664 ;
 Kearly *v.* Duncan, 1 Head (Tenn.)
 397 ; s.c. 73 Am. Dec. 179 ;
 Downie *v.* White, 12 Wis. 176 ;
 s.c. 78 Am. Dec. 731.

¹ Cohen *v.* Kyler, 27 Mo. 122.

² Alvord Carriage Mfg. Co. *v.* Gleason, 36 Conn. 86.

³ Sands *v.* Pfeiffer, 10 Cal. 259.

⁴ Johnson's Ex'r *v.* Wiseman's Ex'r,
 4 Met. (Ky.) 360 ; s.c. 83 Am.
 Dec. 475.

⁵ Richardson *v.* Borden, 42 Miss. 71 ;
 s.c. 2 Am. Rep. 595.

See: Bratton *v.* Clawson, 2 Strobb.
 (S. C.) 478 ;

Farris *v.* Walker, 1 Bailey (S. C.)
 L. 540 ;

McKenna *v.* Hammond, 3 Hill
 (S. C.) L. 331 ;

Degraffenreid *v.* Scruggs, 4
 Humph. (Tenn.) 431, 451.

⁶ Bratton *v.* Clawson, 2 Strobb.
 (S. C.) L. 478.

⁷ Philbrick *v.* Ewing, 97 Mass. 133,
 134, and through the rooms of
 a dwelling ;

Cohen *v.* Kyler, 27 Mo. 122.

⁸ Rogers *v.* Crow, 40 Mo. 91 ; s.c.
 93 Am. Dec. 299, 302.

⁹ Planters' Bank *v.* Walker, 3 Smed.
 & M. (Miss.) 409 ;

Keisel *v.* Earnest, 21 Pa. St. 90 ;
 Smith *v.* Johnson, 1 Pen. & W.
 (Pa.) 471.

See: Pickens *v.* Reed, 1 Swan
 (Tenn.) 80.

¹⁰ Peck *v.* Batchelder, 40 Vt. 233 ;
 s.c. 94 Am. Dec. 392.

¹¹ Butler *v.* Page, 48 Mass. (7 Met.)
 43 ; s.c. 39 Am. Dec. 757.

¹² Noble *v.* Bosworth, 36 Mass. (19
 Pick.) 314.

¹³ Goodrich *v.* Jones, 2 Hill (N. Y.)
 142.

¹⁴ See: Leonard *v.* Stickney, 131
 Mass. 541.

¹⁵ Id.

¹⁶ Johnson's Ex'rs *v.* Wiseman's
 Ex'rs, 4 Met. (Ky.) 360 ; s.c. 83
 Am. Dec. 475.

See: Fratt *v.* Whittier, 58 Cal.
 126 ; s.c. 41 Am. Rep. 251 ;

Smith *v.* Commonwealth, 14
 Bush (Ky.) 31 ; s.c. 29 Am. Rep.
 402 ;

Post, § 142.

¹⁷ Bishop *v.* Bishop, 11 N. Y. 123 ;
 s.c. 62 Am. Dec. 68.

¹⁸ Stockwell *v.* Campbell, 39 Conn.
 362 ; s.c. 12 Am. Rep. 393.

¹⁹ Iron screens before radiating pipes.
 —Question for jury.—In the case
 of Leonard *v.* Stickney, 131
 Mass. 541, it is said that the
 question whether iron screens,
 placed in front of the steam-
 radiating pipes, resting on the
 floor and kept in position by
 their own weights, with marble
 slabs upon them, pass by deed,
 is a question of fact for the jury,
 if the evidence is conflicting on
 the points whether the screens
 and slabs formed part of the
 steam-heating apparatus and
 its connections ; whether the
 apparatus would be complete

by the owner;¹ manure made in the course of husbandry;² an organ fitted into a niche in a church;³ a portable grist-mill;⁴ potash kettles appertaining to a building used in the manufacture of ashes;⁵ salt-pans used in the manufacture of salt;⁶ statuettes erected for ornament, though kept in their place merely by their own weight;⁷ steam-engines and fixtures used in driving a bark-mill,⁸ or a brick-mill,⁹ or a flouring-mill,¹⁰ where attached or fastened to a frame of timber, or imbedded in a quartz ledge and used for the purpose of working the ledge;¹¹ a steam-heating apparatus;¹² stoves affixed to the brick of chimneys;¹³ tables fixed and dormant;¹⁴ trees cut down and lying at full length on the ground where they grew;¹⁵ vats, stills, and kettles of a brewery;¹⁶ wainscot work;¹⁷ the window-blinds of a building;¹⁸ and the like. Many things pass by deed of a house, being put therein by the owner and seller, which a tenant who has affixed might have removed. They are regarded as fixtures, and pass to the vendee, although annexed and used for purposes of trade, manu-

without them; whether they were fitted to their places having regard to the walls near which they stood and the apparatus itself; whether they could be arranged for any other place without disproportionate expense; and whether, if removed, they were worth more than their value as marble and old iron.

¹ *Harkness v. Sears*, 26 Ala. 493; s.c. 63 Am. Dec. 742;

McGreary v. Osborne, 9 Cal. 119;

Green v. Phillips, 26 Gratt. (Va.)

752; s.c. 21 Am. Rep. 353;

Walmsley v. Milne, 7 C. B. N. S.

115; s.c. 97 Eng. C. L. 114.

² See: *Ante*, § 126;

Rogers v. Crow, 40 Mo. 91; s.c.

93 Am. Dec. 299.

³ See: *Chapman v. Union Mutual*

Life Ins. Co., 4 Ill. App. 29;

Strickland v. Parker, 54 Me. 263;

Thomas v. Davis, 76 Mo. 72.

⁴ *Potter v. Cromwell*, 40 N. Y. 287;

s.c. 100 Am. Dec. 485.

⁵ *Miller v. Plumb*, 6 Cow. (N. Y.)

665; s.c. 16 Am. Dec. 456.

⁶ *Lawton v. Salmon*, 1 H. Bl. 260;

s.c. 2 Rev. Rep. 764.

⁷ *Snedeker v. Warring*, 12 N. Y. 170.

See: *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382; s.c. 36 L. J. Ch. 107; 15 W. R. 186.

⁸ *Oves v. Oglesby*, 7 Watts (Pa.) 106.

See: *Morgan v. Arthur*, 3 Watts (Pa.) 140.

⁹ *Oves v. Oglesby*, 7 Watts (Pa.) 106.

¹⁰ *Sands v. Pfeiffer*, 10 Cal. 259.

¹¹ *Sands v. Pfeiffer*, 10 Cal. 259.

¹² *Leonard v. Stickney*, 131 Mass. 541.

¹³ *Goddard v. Chase*, 7 Mass. 432.

¹⁴ *Sands v. Pfeiffer*, 10 Cal. 259.

¹⁵ *Brackett v. Goddard*, 54 Me. 309.

¹⁶ *Rogers v. Crow*, 40 Mo. 91; s.c. 93 Am. Dec. 299, 302.

See: *Tabor v. Robinson*, 36 Barb. (N. Y.) 483;

Bryan v. Lawrence, 5 Jones (S. C.) L. 337;

Main v. Schwarzwälder, 4 E. D. Smith (N. Y.) 273.

¹⁷ *Sands v. Pfeiffer*, 10 Cal. 259.

¹⁸ *Peck v. Batchelder*, 40 Vt. 233; s.c. 94 Am. Dec. 392.

facture, or for ornament or domestic use.¹ According to the weight of decision, an article may be a fixture constituting a part of the realty as between the vendor and vendee, which would not, under like circumstances, be such as between landlord and tenant;² and for this reason the right of the vendee to things of a personal character must be established by showing that they were, in the deed, treated as real estate.³

SEC. 142. **Same — Same — Gas-fixtures, chandeliers, etc.—** The general rule is that all real fixtures, placed on the premises and attached to the freehold, as a fixed establishment, become a part of the freehold and pass to the vendee.⁴ But the better doctrine is that lamps, chandeliers, candlesticks, candelabra, sconces, gas-fixtures, side-brackets, and the various contrivances for lighting houses, by means of candles, oil, other fluid, or gas, are not fixtures, form no part of the realty, and do not pass with a conveyance thereof,⁵ unless it is the manifest in-

¹ *Fratt v. Whittier*, 58 Cal. 126; s.c. 41 Am. Rep. 251, 255.

² *Teaff v. Hewitt*, 1 Ohio St. 511, 524; s.c. 59 Am. Dec. 634, 639.

³ *Hunt v. Mullanphy*, 1 Mo. 508; s.c. 14 Am. Dec. 300.

⁴ *Rice v. Adams*, 4 Harr. (Del.) 332; *Sparks v. State Bank*, 7 Blackf. (Ind.) 469;

Symonds v. Harris, 51 Me. 14; s.c. 81 Am. Dec. 553;

Parsons v. Copeland, 38 Me. 537; s.c. 5 Am. Dec. 628;

Corliss v. McLagin, 29 Me. 115; *Trull v. Fuller*, 28 Me. 545;

McKim v. Mason, 3 Md. Ch. 186; *Union Bank v. Emerson*, 15 Mass. 159;

Richardson v. Copeland, 72 Mass. (6 Gray) 536; s.c. 66 Am. Dec. 424;

Phillipson v. Mullanphy, 1 Mo. 620; s.c. 14 Am. Dec. 380;

Baker v. Davis, 19 N. H. 325; *Murdock v. Harris*, 20 Barb. (N. Y.) 407;

Buckley v. Buckley, 11 Barb. (N. Y.) 43;

Witmer's Appeal, 45 Pa. St. 455; s.c. 84 Am. Dec. 505;

Christian v. Dripps, 28 Pa. St. 271;

Roberts v. Dauphin Bank, 19 Pa. St. 71;

Harlan v. Harlan, 15 Pa. St. 507; *Oves v. Oglesby*, 7 Watts (Pa.) 106;

Pyle v. Pennock, 2 Watts & S. (Pa.) 390; s.c. 37 Am. Dec. 517;

Voorhis v. Freeman, 2 Watts & S. (Pa.) 116; s.c. 37 Am. Dec. 490;

Sweetzer v. Jones, 35 Vt. 317;

Harris v. Haynes, 34 Vt. 220. ⁵ *McConnell v. Blood*, 123 Mass.

47; s.c. 25 Am. Rep. 12; *Rogers v. Crow*, 40 Mo. 91; s.c.

93 Am. Dec. 299;

Montague v. Dent, 10 Rich. (S. C.) L. 135; s.c. 67 Am. Dec. 572.

See: *Fratt v. Whittier*, 58 Cal. 126; s.c. 41 Am. Rep. 251;

Towne v. Fiske, 127 Mass. 125; *Guthrie v. Jones*, 108 Mass. 191;

Heysham v. Dettre, 89 Pa. St. 506; *Jarechi v. Philharmonic Soc.*, 79

Pa. St. 403; s.c. 21 Am. Rep. 78;

Vaughen v. Halderman, 33 Pa. St. 522; s.c. 75 Am. Dec. 622;

Terhune v. Elberson, 3 N. J. L. (2 Penn.) 297;

tention to have them pass with the property, or the presence of these articles and the convenience arising from their use are held out as an inducement to the purchaser, and are the means of making the sale. Thus it has been said by the New York Supreme Court in *Funk v. Brigaldi*,¹ that when the owner of a house, in order to induce the vendee to purchase it, gave him to understand that the gas-fixtures were a part of the realty, such inducement was sufficient evidence that the owner intended to make them a permanent attachment to the house, and that they passed to the vendee.

SEC. 143 Same — Same—Fixtures annexed by one in possession under contract of purchase.—Fixtures annexed to the freehold by one in possession, under an executory contract of purchase from the owner, become a part of the realty,² and on breach of the conditions of purchase, the person thus annexing the fixtures will not have the

McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38; s.c. 37 Am. Rep. 47T;

Shaw v. Lenke, 1 Daly (N. Y.) 487;

Lawrence v. Kemp, 1 Duer (N. Y.) 363;

Cross v. Marston, 17 Vt. 533; s.c. 44 Am. Dec. 353.

Lamps, chandeliers, and gas fixtures, though often sold with the house, are not fixtures, and will not pass to the vendee, unless there be a special agreement in regard to them.

Towne v. Fiske, 127 Mass. 125;

Guthrie v. Jones, 108 Mass. 191;

Rogers v. Crow, 40 Mo. 91; s.c. 93 Am. Dec. 299;

McKeage v. Hanover Ins. Co., 81 N. Y. 38; s.c. 37 Am. Rep. 471;

Jarechi v. Philharmonic Soc., 79 Pa. St. 403;

Vaughen v. Halderman, 33 Pa. St. 522;

Montague v. Dent, 10 Rich. (S. C.) L. 135; s.c. 67 Am. Dec. 572.

¹ 4 Daly (N. Y.) 359.

² *Smith v. Moore*, 26 Ill. 292;

Central Branch R. Co. v. Fritz, 20 Kan. 430; s.c. 27 Am. Rep. 175;

Lapham v. Norton, 71 Me. 83;

Hinkley & E. Iron Co. v. Black, 70 Me. 473;

Westgate v. Wixon, 128 Mass. 304;

Oakman v. Dorchester Mut. F. Ins. Co., 98 Mass. 57;

Curtis v. Riddle, 89 Mass. (7 Allen) 185;

King v. Johnson, 73 Mass. (7 Gray) 239;

Murphy v. Marland, 62 Mass. (8 Cush.) 575;

Milton v. Colby, 46 Mass. (5 Met.) 78;

Perkins v. Swank, 43 Miss. 349;

Moore v. Vallentine, 77 N. C. 188.

Lease of articles—Affixing under contract of purchase.—In the case of *Hendy v. Dinkerhoff*, 57 Cal. 3; s.c. 40 Am. Rep. 107, A leased to B an engine and boiler, with a privilege of purchase, and B affixed them in a permanent manner to land of C in possession of B under a contract for purchase, which provided that if B failed to perform, all tools and machinery put on the land by him should belong to the defendant. A knew that the engine and boiler were to be affixed to the land, but did not

right to remove them.¹ Although a person occupying land under a contract of purchase may be said to be, in a certain sense, a tenant of the owner, still the analogy does not hold good in all respects. In one essential particular, at least, it fails. The occupier is not liable to pay rent to the owner. It would seem to follow naturally from this that he has no right to remove fixtures annexed by him to the freehold. The reason why a tenant is allowed to remove structures erected for the purposes of trade or convenience, affixed by him to the realty during his tenancy, is because, having paid as rent a full equivalent for the premises as demised, it would be inequitable to compel him to forfeit articles, at the end of his term, which he had procured for his own use and at his own expense.² That reason is wholly inapplicable to the case of a person occupying under a contract of purchase. In such a case the occupant has paid no equivalent for the use and enjoyment of the premises; nor is he compelled to surrender the estate at a fixed period of time, as upon the expiration of a term demised. He can, by fulfilling his contract of purchase, become the owner of the estate, and enjoy the full benefit of all the erections and improvements which he has made thereon. There is therefore no reason for applying to a case of this sort the very liberal rule in regard to fixtures, which prevails where the relation of lessor and lessee obtains between the parties.³

know of this agreement respecting fixtures. B failed to perform. The court held, that A could recover the engine and boiler or their value from C.

But see: *Morrison v. Berry*, 42 Mich. 389; s.c. 36 Am. Rep. 446; 4 N. W. Rep. 731, where a different doctrine is held.

¹ *Westgate v. Wixon*, 128 Mass. 304.

See: *Murphy v. Marland*, 62 Mass. (8 Cush.) 575;

Eastman v. Foster, 49 Mass. (8 Met.) 19;

Milton v. Colby, 46 Mass. (5 Met.) 78;

Ashmun v. Williams, 25 Mass. (8 Pick.) 402.

² *Wall v. Hinds*, 70 Mass. (4 Gray)

256, 270-271; s.c. 64 Am. Dec. 64.

³ *King v. Johnson*, 73 Mass. (7 Gray) 239, 241.

Erecting building upon lands by tenant in possession, with privilege of purchase.—In the recent case of *Westgate v. Wixon*, 128 Mass. 304, 306, one Abbott, in possession of a parcel of land under a bond for a deed, erected a barn upon the premises, the sills of which rested in part on large stones imbedded in the soil, and in part upon the soil itself. After a breach of the bond, but while Abbott was still in possession of the land, the barn was attached and removed by one of Abbott's

SEC. 144. **Agreement in relation to fixtures.**—It is a well-settled rule of law that the parties between whom the question as to fixtures arises, may, by express agreement, fix upon chattels annexed to realty whatever character they may have agreed upon. Property which the law regards as fixtures may be by them considered as personalty, and that which is considered in law as personalty they may regard as a fixture. Whatever may be their agreement in this respect the court will enforce, as between themselves.¹ Thus it has been held that if a

creditors. In an action of tort in the nature of trover, brought by the owner of the land against the officer, after demand, it was held that the barn was a part of the realty and not subject to attachment. The court say: "As a general rule, buildings are a part of the realty, and belong to the owner of the land on which they stand. Even if built by a person who has no interest in the land, they become a part of the realty, unless there is an agreement by the owner of the land, either express or implied from the relation of the parties, that they shall remain personal property."

Webster v. Potter, 105 Mass. 414, 416;

Poor v. Oakman, 104 Mass. 309; *Oakman v. Dorchester Ins. Co.*, 98 Mass. 57;

Howard v. Fessenden, 96 Mass. (14 Allen) 124.

"The facts in this case do not take it out of the general rule. There was no express agreement by the plaintiff that Abbott might remove the barn, and the relations of the parties were not such as that the law will imply such an agreement. Abbott was in the occupation of the land under a bond, by which the plaintiff agreed to convey the land to him upon the performance of certain conditions stipulated therein. While he thus occupied, Abbott built the barn in question. The legal title to the land was in the plaintiff, but Abbott had an equitable interest in it, a right to obtain a title to the

soil upon performance of the conditions of the bond. He was not, therefore, a mere stranger, who erected a building upon the land of another with the consent of the owner, in which case an agreement that he might remove it might more easily be implied. Nor can he be regarded as a tenant of the plaintiff, so that the liberal rules in regard to fixtures, which prevail between lessor and lessee, can be applied. The essential features of a tenancy upon which those rules rest are wanting; he was not under any liability to pay rent, and he was not compelled to surrender the estate at a fixed time, as upon the expiration of the term; but, upon performing the conditions of the bond, all the additions and improvements made by him would inure to his own benefit."

Westgate v. Wixon, 128 Mass. 304, 306.

Citing: *King v. Johnson*, 73 Mass. (7 Gray) 239.

¹ *Frat v. Whittier*, 58 Cal. 126; s.c. 41 Am. Rep. 251, 256;

Hunt v. Bay State Iron Co., 97 Mass. 279;

Sisson v. Hibbard, 75 N. Y. 542;

Tift v. Horton, 53 N. Y. 377; s.c. 13 Am. Rep. 537;

Menagh v. Whitwell, 53 N. Y. 146; s.c. 11 Am. Rep. 683;

Ford v. Williams, 24 N. Y. 359;

Ford v. Cobb, 20 N. Y. 344;

Smith v. Benson, 1 Hill (N. Y.) 176;

Smith v. Waggoner, 50 Wis. 155; s.c. 6 N. W. Rep. 568.

See: *Merrit v. Judd*, 14 Cal. 60;

Cromie v. Hoover, 40 Ind. 49, 61;

man builds a house on lands which are not his own, by consent of the owner, the house is personal property¹ and remains separate from the freehold by virtue of the agreement between the parties.² And rails when laid upon a railway track become a part of the realty, in the absence of any agreement to the contrary;³ but when they are delivered under an agreement that they shall be laid down on a specified part of the railroad-bed, and continue the property of the vendors until a specified price is paid therefor, they remain the personal property of the vendors, until payment is made, and are not, when laid, so inseparably annexed to or incorporated with the realty that they cannot be removed for the non-payment of the agreed price. The agreement of the parties supersedes the law, and is binding alike upon the original parties and subsequent mortgagees or purchasers with notice.⁴

Frederick v. Devol, 15 Ind. 357;

McCracken v. Hall, 7 Ind. 30;

Foster v. Prentiss, 75 Me. 279;

Curtis v. Riddle, 89 Mass. (7 Allen) 185;

Robertson v. Corsett, 39 Mich. 777;

Warner v. Kenning, 25 Minn. 173;

Torrey v. Burnett, 38 N. J. L. (9 Vr.) 457;

Brearley v. Cox, 24 N. J. L. (4 Zab.) 287;

Sampson v. Graham, 96 Pa. St. 405;

Sullivan v. Jones, 14 S. C. 362;

Josslyn v. McCabe, 46 Wis. 591; s.c. 1 N. W. Rep. 174;

Mansfield v. Blackburne, 6 Bing. N. C. 426; s.c. 37 Eng. C. L. 699;

Saint v. Pilley, L. R. 10 Ex. 137;

Perry v. Brown, 2 Stark. 403;

Naylor v. Collinge, 1 Taunt. 19; s.c. 9 Rev. Rep. 691.

¹ *Curtis v. Riddle*, 89 Mass. (7 Allen) 185, 187.

Citing: *Belding v. Cushing*, 67 Mass. (1 Gray) 578;

First Parish of Sudbury v. Jones, 62 Mass. (8 Cush.) 190;

Ashmun v. Williams, 25 Mass. (8 Pick.) 402;

Doty v. Gorham, 22 Mass. (5 Pick.) 489; s.c. 16 Am. Dec. 417;

Wells v. Bannister, 4 Mass. 514.

² *Hunt v. Bay State Iron Co.*, 97 Mass. 279, 283;

Curtis v. Riddle, 89 Mass. (7 Allen) 185, 187.

Agreement by parol.—As the agreement relates to personal property, it may be made by parol.

Curtis v. Riddle, 89 Mass. (7 Allen) 185.

³ *Hunt v. Bay State Iron Co.*, 97 Mass. 279, 283.

See: *Richardson v. Copeland*, 72 Mass. (6 Gray) 536; s.c. 66 Am. Dec. 424;

Butler v. Page, 48 Mass. (7 Met.) 40; s.c. 39 Am. Dec. 757;

Winslow v. Merchants' Ins. Co., 45 Mass. (4 Met.) 306;

Peirce v. Goddard, 39 Mass. (22 Pick.) 559.

Rails and ties for repairs.—It is said in *Covey v. Pittsburg, Ft. W. & C. R. Co.*, 3 Phila. (Pa.) 173, that old and new rails and ties lying along the track of a railroad, for use in making repairs, are a part of the realty.

⁴ *Hunt v. Bay State Iron Co.*, 97 Mass. 279, 283;

Haven v. Emery, 33 N. H. 66;

Pierce v. Emery, 32 N. H. 484.

See: *Strickland v. Parker*, 54 Me. 263.

SEC. 145. **Same—Limitations of doctrine.**—There are limitations and exceptions to this doctrine, however. In the first place, the property in question must be of such a character as to be capable of becoming personal property. If the subject itself, or the mode of annexation, is such that the attributes of personal property cannot be predicted of the thing in controversy, the agreement of the parties will not govern.¹ In the second place, such agreements are subject to the statute of frauds, where the fixtures are incorporated with the freehold,² although it is said not to apply where the fixture is merely annexed to the freehold.³ But such contracts are so far relieved from the statute that they may be proven by parol.⁴ In the third place, such agreements are invalid as against the rights of the third person,⁵ as *bona fide* purchasers of the land.⁶ Thus where a person who has hired the use of certain personal property converts it by annexing to and making it a part of his real estate, and then sells the real estate to a third person who has no notice of the facts, the wrong-

¹ See : Ford v. Cobb, 20 N. Y. 344 ;
Fortman v. Goepfer, 14 Ohio St.
558.

² See : Meyers v. Schemp, 67 Ill. 469 ;
Trull v. Fuller, 28 Me. 545.

³ Strong v. Doyle, 110 Mass. 92.
Citing : Bostwick v. Leach, 3 Day
(Conn.) 476 ;
Hallen v. Runder, 1 Crompt. M.
& R. 266.

⁴ See : Frederick v. Devol, 15 Ind. 357 ;
Walker v. Schindel, 58 Md. 360 ;
Mitchell v. Freedley, 10 Pa. St.
198.

⁵ Ott v. Specht (Del.), 12 Atl. 721 ;
s.c. 11 Cent. Rep. 244 ;
Badger v. Batavia Paper Mfg.
Co., 70 Ill. 302 ;
Eaves v. Estes, 10 Kan. 314 ;
Sisson v. Hibbard, 75 N. Y. 542.

⁶ Rowand v. Anderson, 33 Kan.
264 ; s.c. 6 Pac. Rep. 255 ;
Bartholomew v. Hamilton, 105
Mass. 239 ;
Lacustrine Fertilizer Co. v. Lake
Guano & Fertilizer Co., 82 N.
Y. 476 ;
Fryatt v. The Sullivan Co., 5 Hill
(N. Y.) 116 ;
Smith v. Waggoner, 50 Wis. 155 ;
s.c. 6 N. W. Rep. 568.

Severance—Notice of, necessary to bind purchaser.—It is said by the Supreme Court of Ohio, in the case of Brennan v. Whitaker, 15 Ohio St. 446, 453-4, that "it is true that in the case of Ford v. Cobb, 20 N. Y. 344, it was held that an agreement which was evidenced by a chattel mortgage was effectual against a subsequent purchaser of the land, without notice. But it seems to us to be the sounder rule, and more in accordance with principle, and the policy of our recording laws, to require actual severance, or notice of a binding agreement to sever, to deprive the purchaser of the right to fixtures or appurtenances to the freehold."

See : Richardson v. Copeland, 72
Mass. (6 Grav.) 536 ; s.c. 66 Am.
Dec. 424 ;

Fryatt v. Sullivan Co., 5 Hill (N.
Y.) 116 ;

Fortman v. Goepfer 14 Ohio St.
Rep. 565 ;

Frankland v. Moulton et al., 5
Wis. 1.

fully annexed property passes to the purchaser.¹ And the owner of the land cannot, by agreement between himself and another, make that which is in its nature land, personal property, as against a subsequent purchaser for value without notice, there having been no actual severance of the soil when the subsequent grant was made.² Thus it was held by the Supreme Court of Kansas in the case of *Rowand v. Anderson*³ that a fence built by one person upon the land of another, under a parol license or agreement that it might be removed at the will of the builder, becomes a fixture which will pass with a grant of the land to a *bona fide* purchaser without notice of the adverse title to such fence.⁴

SEC. 146. **Removal of fixtures.**—As between landlord and tenant, the right to remove fixtures depends upon the intention to annex.⁵ Where fixtures are annexed by the tenant for the purposes of trade, or some other immediate or temporary use, or for ornament or furniture,⁶ he may

¹ *Fryatt v. The Sullivan Co.*, 5 Hill (N. Y.) 116; *aff'd* 7 Hill (N. Y.) 529.

See: *Peirce v. Goddard*, 39 Mass. (22 Pick.) 559; s.c. 33 Am. Dec. 764;

Voorhees v. McGinnis, 48 N. Y. 278; s.c. 46 Barb. (N. Y.) 242; *Ford v. Cobb*, 20 N. Y. 344.

² *Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co.*, 82 N. Y. 476.

³ 33 Kan. 264; s.c. 6 Pac. Rep. 255.

⁴ See: *Prince v. Case*, 10 Conn. 375; s.c. 27 Am. Dec. 675;

Dostal v. McCaddon, 35 Iowa 318; *Smith v. Carroll*, 4 G. Greene (Ia.) 146;

Eaves v. Estes, 10 Kan. 314;

Houx v. Seat, 26 Mo. 178; s.c. 72 Am. Dec. 202;

Haven v. Emery, 33 N. H. 63;

Powers v. Dennison, 30 Vt. 752;

Wescott v. Delano, 20 Wis. 514.

⁵ *Teaff v. Hewitt*, 1 Ohio St. 511; s.c. 59 Am. Dec. 634;

Hill v. Sewald, 53 Pa. St. 271; s.c. 91 Am. Dec. 238;

Pyle v. Pennock, 2 Watts & S. (Pa.) 390; s.c. 37 Am. Dec. 517.

See: *Foster v. Maybe*, 4 Ala. 402; s.c. 37 Am. Dec. 749;

Hunt v. Mullanphy, 1 Mo. 508; s.c. 14 Am. Dec. 300;

Gray v. Holdship, 17 Serg. & R. (Pa.) 413; s.c. 17 Am. Dec. 680, 686.

Positive act necessary to change nature of chattel.—It is said in the case of *Fortman v. Goepper*, 14 Ohio St. 558, that *Teaff v. Hewitt*, 1 Ohio St. 511; s.c. 59 Am. Dec. 634, “is not in conflict with the case of *Hill v. Wentworth*, 28 Vt. 423, holding that to change the character of an article from a chattel to a fixture there should be some positive act and intent to that effect on the part of the person annexing it to the building, and if the intent is in doubt, upon an inspection of the property itself, taking into consideration its nature, the mode, extent, and purpose of its annexation, it should be held to be personal property.”

⁶ *Coombs v. Jordan*, 3 Bland. Ch. (Md.) 284; s.c. 22 Am. Dec. 236;

Holmes v. Tremper, 20 John. (N. Y.) 129; s.c. 11 Am. Dec. 238;

Gaffield v. Hapgood, 34 Mass. (17 Pick.) 192; s.c. 28 Am. Dec. 290;

remove them during the continuance of his original term,¹ or such further period of possession by him as he holds the premises under the right to still consider himself a tenant,² when he can do so without material injury to the freehold;³ but if he fails to do so and quits without any special agreement with his landlord respecting them, neither he nor his assignee can afterwards claim such fixtures as against the owner of the land or his grantee;⁴ and this is true whether the lease is ter-

- Hunt v. Mullanphy, 1 Mo. 508; s.c. 14 Am. Dec. 300.
- ¹ See Hayes v. N. Y. Mining Co., 2 Colo. 273;
- Beers v. St. John, 16 Conn. 322;
- Mason v. Fenn, 13 Ill. 525;
- Griffin v. Ransdell, 71 Ind. 440;
- Allen v. Kennedy, 40 Ind. 142;
- Dostal v. McCaddon, 35 Iowa 318;
- Thomas v. Crout, 5 Bush (Ky.) 37;
- Dingley v. Buffum, 57 Me. 381;
- Davis v. Buffum, 51 Me. 160;
- Bliss v. Whitney, 91 Mass. (9 Allen) 114; s.c. 85 Am. Dec. 745;
- Shepard v. Spaulding, 45 Mass. (4 Met.) 416;
- Gaffield v. Hapgood, 34 Mass. (17 Pick.) 192; s.c. 28 Am. Dec. 290;
- Powell v. McAsham, 28 Mo. 70;
- Kuhlmann v. Meier, 7 Mo. App. 260;
- State v. Elliot, 11 N. H. 540;
- Torrey v. Burnett, 38 N. J. L. (19 Vr.) 457; s.c. 20 Am. Rep. 421;
- Reynolds v. Shuler, 5 Cow. (N. Y.) 323;
- Haffick v. Stober, 11 Ohio St. 482;
- Davis v. Moss, 38 Pa. St. 346;
- White v. Arndt, 1 Whart. (Pa.) 91;
- Preston v. Briggs, 16 Vt. 124;
- Josslyn v. McCabe, 46 Wis. 591; s.c. 1 N. W. Rep. 174;
- Pitt v. Shew, 4 Barn. & Ald. 206; s.c. 6 Eng. C. L. 453;
- Davis v. Jones, 2 Barn. & Ald. 165;
- Colegrave v. Dias Santos, 2 Barn. & C. 76; s.c. 9 Eng. C. L. 42;
- Lyde v. Russell, 1 Barn. & Ald. 394; s.c. 20 Eng. C. L. 532;
- Wilde v. Waters, 16 C. B. 637; s.c. 81 Eng. C. L. 637;
- Heap v. Barton, 12 C. B. 274; s.c. 74 Eng. C. L. 273;
- Leader v. Homewood, 5 C. B. N. S. 546; s.c. 27 L. J. C. P. 316; 4 Jur. N. S. 1062; 94 Eng. C. L. 544;
- Hallen v. Runder, 1 Crompt. N. & R. 266;
- Penton v. Robart, 2 East 88; s.c. 6 Rev. Rep. 376;
- Pugh v. Arton, L. R. 8 Eq. Cas. 626;
- Weeton v. Woodcock, 7 Mees. & W. 14;
- Mackintosh v. Trotter, 3 Mees. & W. 184;
- Minshall v. Lloyd, 2 Mees. & W. 450;
- Roffey v. Henderson, 17 Q. B. 574; s.c. 79 Eng. C. L. 573;
- Lee v. Risdon, 7 Taunt. 188-191; s.c. 2 Marsh. 495; 2 Eng. C. L. 320.
- ² Carlin v. Ritter, 68 Md. 478; s.c. 6 Am. St. Rep. 467; 13 Atl. Rep. 370; 16 Id. 301.
- ³ Stockwell v. Marks, 17 Me. 455; s.c. 35 Am. Dec. 266.
- ⁴ Stockwell v. Marks, 17 Me. 455; s.c. 35 Am. Dec. 266;
- Gaffield v. Hapgood, 34 Mass. (17 Pick.) 192; s.c. 28 Am. Dec. 290;
- Colegrave v. Dias Santos, 2 Barn. & C. 76; s.c. 9 Eng. C. L. 42;
- Lee v. Risdon, 7 Taunt. 188; s.c. 2 Marsh. 495; 2 Eng. C. L. 320.
- See Merrit v. Judd, 14 Cal. 59;
- Moore v. Smith, 24 Ill. 512;
- Cromie v. Hoover, 40 Ind. 49;
- Dostal v. McCaddon, 35 Iowa 318;
- Sullivan v. Carberry, 67 Me. 531;
- Northern Cent. R. Co. v. Canton Co. of Baltimore, 30 Md. 347;
- Watriss v. First Nat. Bank of Cambridge, 124 Mass. 571; s.c. 26 Am. Rep. 694;
- Guthrie v. Jones, 108 Mass. 196;

minated by the lapse of time, or breach, or re-entry on forfeiture.¹ But the forfeiture must be judicially ascertained.² This rule finds its reason in the fact that the annexation of a chattel to a freehold by a tenant is regarded as a conditional gift to the landlord, which may be defeated by its subsequent removal during the term, but which becomes absolute if the premises are surrendered without its having been first severed and removed.³ The reason for this is because the interest, right, and title of a tenant, whatever they may be in and to the premises, terminate absolutely on his going out of possession at or after the expiration of his term, and any subsequent re-entry, even under another demise from the same landlord, will not relate back to or revive the right which was forfeited by a failure to exercise this right at the proper time.⁴

SEC. 147. **Same—Exceptions to the rule.**—This rule always applies when the term is of certain duration, as under a lease for a term of years, which contains no

Hanrahan v. O'Reilly, 102 Mass. 201;

Bainway v. Cobb, 99 Mass. 457, 459;

Talbot v. Whipple, 96 Mass. (14 Allen) 181;

Bliss v. Whitney, 91 Mass. (9 Allen) 114, 115;

Wall v. Hinds, 70 Mass. (4 Gray) 256; s.c. 64 Am. Dec. 64;

Butler v. Page, 48 Mass. (7 Met.) 40; s.c. 39 Am. Dec. 757;

Shepard v. Spaulding, 45 Mass. (4 Met.) 416;

Winslow v. Merchants' Ins. Co., 45 Mass. (4 Met.) 306, 311;

Noble v. Bosworth, 36 Mass. (19 Pick.) 314;

Goddard v. Chase, 7 Mass. 432;

Crippen v. Morrison, 13 Mich. 23, 31;

Torrey v. Burnett, 38 N. J. L. (9 Vr.) 457; s.c. 20 Am. Rep. 421;

Crane v. Brigham, 11 N. J. Eq. (3 Stockt.) 29;

Loughran v. Ross, 45 N. Y. 792; s.c. 6 Am. Rep. 173;

Reynolds v. Shuler, 5 Cow. (N. Y.) 323;

Davis v. Moss, 38 Pa. St. 346;

Preston v. Briggs, 16 Vt. 129;

Kutter v. Smith, 69 U. S. (2 Wall.) 491; bk. 17 L. ed. 830;

Ex parte Ames, 1 Low. C. C. 561; s.c. 6 Nat. Bank Reg. 235;

Lyde v. Russell, 1 B. & Ad. 394; s.c. 20 Eng. C. L. 532;

Penton v. Robart, 2 East 88; s.c. 6 Rev. Rep. 376;

Minshall v. Lloyd, 2 Mees. & W. 450;

Poole's Case, 1 Salk. 368.

¹ *Whipley v. Dewey*, 8 Cal. 36;

Pugh v. Arton, L. R. 8 Eq. Cas. 626;

Weeton v. Woodcock, 7 Mees. & W. 14.

² *Keough v. Daniell*, 12 Wis. 163.

³ *McCracken v. Hall*, 7 Ind. 30;

Gaffield v. Hapgood, 34 Mass. (17 Pick.) 192; s.c. 28 Am. Dec. 290;

Reynolds v. Shuler, 5 Cow. (N. Y.) 323;

Haffick v. Stober, 11 Ohio St. 482;

White v. Arndt, 1 Whart. (Pa.) 91.

⁴ See: *Shepard v. Spaulding*, 45 Mass. (4 Met.) 416;

Ante, § 137.

special provisions in regard to fixtures, but where the term is uncertain, or depends upon a contingency—as where a party is in as tenant for life or at will—the fixtures may be removed within a reasonable time after the tenancy is determined.¹ Where a lease has been given by an agent without sufficient authority, during the absence of the owner, and is terminated by the owner on his return, the lessee becomes a tenant at sufferance, and will be entitled to remove any fixtures he may have put upon the premises within a reasonable time after such termination.² And where a tenant has been restrained by an injunction from removing fixtures placed by him upon the estate during his tenancy, and such injunction is afterwards dissolved, the tenant will have a reasonable time within which to remove the fixtures after the dissolution.³

¹ *Watriss v. First Nat. Bank of Cambridge*, 124 Mass. 571, 575; s.c. 26 Am. Rep. 694, 697.

See: *Sullivan v. Carberry*, 67 Me. 531;

Cooper v. Johnson, 143 Mass. 108;

Antoni v. Belknap, 102 Mass. 193;

Doty v. Gorham, 22 Mass. (5 Pick.) 487, 490; s.c. 16 Am. Dec. 417;

Whiting v. Brastow, 21 Mass. (4 Pick.) 310, 311;

Ellis v. Paige, 18 Mass. (1 Pick.) 43, 49;

Loughran v. Ross, 45 N. Y. 792; s.c. 6 Am. Rep. 173;

Haflick v. Stober, 11 Ohio St. 482;

Martin v. Roe, 7 E. & B. 237; s.c. 90 Eng. C. L. 236.

² *Antoni v. Belknap*, 102 Mass. 193;

Watriss v. First Nat. Bank of Cambridge, 124 Mass. 571, 575; s.c. 26 Am. Rep. 694, 697.

³ See: *Mason v. Fenn*, 13 Ill. 525; *Bircher v. Parker*, 40 Mo. 118.

BOOK II.

TENURES.

CHAPTER I.

INTRODUCTION.

SEC. 148. English origin of our institutions.

SEC. 149. Same—English common and statute law.

SEC. 150. Teutonic origin and English institutions.

SEC. 151. Same—The feudal system.

SECTION 148. **English origin of our institutions.** —Our laws and institutions are not wholly of our own making, the foundations were brought over by our English ancestors from the parent country. The soil upon which the English colonies were planted in America was derived from the crown through royal grants,¹ and every form of political government set up in the colonies rested upon royal charters.² The earliest form of direct legislative control to which the colonies were subjected was in the form of ordinances or instructions, for their guidance, emanating, not from the law-making power of the king in parliament, but from the ordaining power of the king in council.³ In the internal organization of these colonies they were essentially the same as that of the mother country. The unit of the constitutional monarchy was the borough or township; upon the township was founded the county, composed of several townships similarly organized; and of several counties similarly

¹ See Narrative and Critical History of U. S., vol. VI. p. 3. ³ Taylor's Orig. & Gr. Eng. Const. pt. I., p. 25.

² 1 Story on Const., chs. II.—XVII.

organized states were formed ; and of these states, first a Federation and then a Union.¹ This process of state-building was the same as that pursued by the Teutonic conquerors of Britain in building up what afterwards became the English kingdom.²

SEC. 149. **Same—English common and statute law.**—Not only did our forefathers build up the original thirteen states and the colonial federation in the same manner in which the Teutonic conquerors of Britain had built up the English kingdom, but they either had forced upon them by royal charters, or adopted of their own choice, the principles of the common and statute law of the mother country as it existed at the time.³ In fact they regarded these as much a part of their heritage as the language they spoke or the religion they cherished.⁴ Particularly was this true in regard to the laws relating to and regulating real property.⁵ To the common law and the statutes brought over with them, the colonists added afterwards a few English statutes enacted subsequent to their emigration to this country.⁶

SEC. 150. **Teutonic origin of English institutions.**—It will thus be seen that the constitutional history of our institutions does not begin with the landing of our English forefathers in America in the seventeenth century, but with the landing of the English in Britain, in the

¹ De Tocqueville's "Democracy in America," vol. I., p. 49.

² Taylor's Orig. & Gr. Eng. Const., p. 27.

³ OLIVER, J., in *Baker v. Mattocks*, Quincy (Mass.) 72.

⁴ See: *Helms v. May*, 29 Ga. 121, 124 ; *Commonwealth v. Chapman*, 54 Mass. (13 Met.) 68, 69 ; *Marshall v. Fisk*, 6 Mass. 24, 31 ; s.c. 4 Am. Dec. 76, 79 ; *Commonwealth v. Knowlton*, 2 Mass. 530, 535 ; *Commonwealth v. Leach*, 1 Mass. 60, 61 ; *Baker v. Mattocks*, Quincy (Mass.) 72 ;

Wheaton v. Peters, 33 U. S. (8 Pet.) 521, 415-418 ; bk. 8 L. ed. 1055 ;

Doe ex d. Patterson v. Winn, 30 U. S. (5 Pet.) 233, 241 ; bk. 8 L. ed. 108, 111 ;

Town of Pawlet v. Clark, 13 U. S. (9 Cr.) 293 ; bk. 3 L. ed. 375.

⁵ *Sackett v. Sackett*, 25 Mass. (8 Pick.) 309, 315, 318 ;

Marshall v. Fisk, 6 Mass. 24, 31 ; s.c. 4 Am. Dec. 76, 79 ;

Commonwealth v. Knowlton, 2 Mass. 535 ;

Baker v. Mattocks, Quincy (Mass.) 72.

⁶ *Morris v. Vanderen*, 1 U. S. (1 Dall.) 64 ; bk. 1 L. ed. 38 ;

Boehm v. Engle, 1 U. S. (1 Dall.) 15 ; bk. 1 L. ed. 17.

See : *Blankard v. Galdy*, 4 Mod. 222.

fifth century,¹ when the conquerors of Britain, as M. Taine puts it, "created a Germany outside of Germany,"² bringing with them their language, their customs, their religion, and their laws. These customs and laws were incorporated into the civil polity of the new nation, and were the foundation of those principles and laws which our forefathers imported and copied after. The laws and the customs of the victorious Germans were what we now know as the "feudal system."

SEC. 151. **Same—The feudal system.**—Our theory regarding the rights of private property in land, and the foundation of many of the laws governing such property, have their origin in the feudal system, and for this reason a general survey of that system, and of the laws and institutions it gave rise to, becomes important in our study of the law relating to real property in this country, because, as Chief Justice TILGHMAN says in the case of *Lyle v. Richards*,³ "the principles of the feudal system are so interwoven with our jurisprudence that there is no moving them without destroying the whole texture." Both ancient English tenures and modern English tenures, upon which the doctrine of tenures as it exists in this country to-day is founded, are derived from and the outgrowths of the feudal system. For this reason it is thought best to here give a concise statement of the feudal system, as well as of ancient English tenures.⁴

¹ See : Freeman, "The English People in its Three Homes," p. 360 ;

Taylor's Orig. & Gr. Eng. Const., p. 15.

² M. Taine's Hist. Eng. Lit., vol. I., p. 50.

³ 9 Serg. & R. (Pa.) 333.

⁴ We cannot enter into a full discussion of this interesting and important subject in this place. Those who wish to pursue a study of the subject at length will find valuable assistance in the following works :

Freeman's "Comparative Politics ;"

Freeman's "Growth of the English Constitution ;"

Freeman's "Norman Conquest ;" Freeman's "The English People in its Three Homes ;"

Green's "History of the English People ;"

Hallam's "Constitutional History ;"

Hallam's "History of the Middle Ages ;"

Palgrave's "English Commonwealth ;"

Palgrave's "Normandy and England ;"

Pollock's "History of the Science of Politics ;"

Stubbs's "Constitutional History of England ;"

Taylor's "Origin and Growth of the English Constitution."

CHAPTER II.

THE FEUDAL LAW.

- SEC. 152. Sources of the English law.
- SEC. 153. Origin of feudal government.
- SEC. 154. France and Clovis.
- SEC. 155. Same—Riparian Franks.
- SEC. 156. Same—Theodosian Code.
- SEC. 157. Same—Introduction of feuds.
- SEC. 158. Same—Laws of Normandy.
- SEC. 159. Establishment of feudal tenures.
- SEC. 160. Same—Origin and growth of feudal customs.
- SEC. 161. Same—Military services.
- SEC. 162. Same—The German Comites.
- SEC. 163. Same—Allodial tenures.
- SEC. 164. Same—Consuetudines feudorem.
- SEC. 165. Definition of feuds.
- SEC. 166. Kinds of feuds—Proper and improper.
- SEC. 167. Same—Ligium and non-ligium.
- SEC. 168. Same—Feudum antiquum and feudum novum.
- SEC. 169. Same—Feudum nobile and feudum dignitatis.
- SEC. 170. Investiture of feuds.
- SEC. 171. Same—Improper or symbolical vestiture.
- SEC. 172. Same—Breve testatum.
- SEC. 173. Fealty—Oath of.
- SEC. 174. Homage—Ceremony of.
- SEC. 175. Duties of lord and vassal
- SEC. 176. Feudal aids.
- SEC. 177. Estate of vassal.
- SEC. 178. Alienation of feuds.
- SEC. 179. Same—Subinfeudation.
- SEC. 180. Estate of the lord.
- SEC. 181. The lord's obligation on vassal's eviction.
- SEC. 182. Descent of feuds.
- SEC. 183. Same—Feudum talliatum.
- SEC. 184. Same—Distinguished from succession under Roman law.
- SEC. 185. Investiture upon descent.
- SEC. 186. Same—Relevium.
- SEC. 187. Escheat of feuds.
- SEC. 188. Forfeiture of feuds.
- SEC. 189. Forfeiture of seigniory.
- SEC. 190. Feudal jurisdiction.

SECTION 152. **Sources of the English law.**—It has been established beyond all question that the laws of England are derived from those of northern nations, who, migrating from the forests of Germany, overturned the Roman Empire, and established themselves in the southern part of Europe. The Danes and the Saxons were beyond all question swarms from the northern hive. It may be presumed that the description which Tacitus has left us of the manners and customs of the Germans is applicable also to them. The Saxons, on their establishment in England, adopted but a small portion of the laws of the Britons, and exterminated, rather than subdued, the ancient inhabitants, introducing their own laws rather than adopting those which prevailed among the Britons.¹

SEC 153. **Origin of feudal government.**—Before the northern hordes sallied forth from their home to conquer the world, they were not subject to the government of kings;² even where monarchical government had been established, the prince possessed but little authority, and was a general rather than a king. His military command was extensive, but his civil jurisdiction almost nothing.³ The army which these men led was not composed of soldiers who could be compelled to serve, but of such men as voluntarily followed his standard.⁴ These soldiers conquered not for their leader, but for themselves; and being free in their own country, they renounced not their liberty when they acquired new territory and made new settlements. They did not exterminate the inhabitants of the countries which they subdued, but seized the greater part of the lands, and took the people under their protection. The difficulty of maintaining a new conquest, as well as the danger of being attacked by new invaders as barbarous and ferocious as themselves, rendered it necessary to be always

¹ Montesquieu says that it is impossible to have any tolerable notion of the French political law, unless we are thoroughly acquainted with the laws and manners of the German na-

tions. 2 Montesqu. *Spirit of L.* (10th ed., Edinburgh), bk. 30, c. xix, p. 337.

² Caesar, lib. VI., c. 23.

³ Tacitus, *De Mor. Germ.* c. 7, 11.

⁴ Caesar, lib. VI., c. 23.

in a posture of defense. The form of government which they established was altogether military, and resembled as nearly as possible that which they had been accustomed to in their northern home. Their general still continued to be the head of the people, and a part of the conquered lands were allotted to him; the remainder, under the name of *beneficia* or *fiefs*, were divided among his principal officers. As the common safety required that these officers should, upon all occasions, be ready to appear in arms, for the common defense, and should also continue obedient to the commands of their general, they bound themselves to take the field when called upon, and to serve him with a number of men, in proportion to the extent of their territory. These officers again parceled out their lands among their followers and annexed to their grant the same condition. Thus it was that a feudal kingdom was properly the encampment of a great army. Military ideas predominated every walk of life, military subordination was established, and the possession of the lands and the profit derived therefrom was the pay which soldiers received for their personal service.¹

SEC. 154. **France and Clovis.**—The French nation derived their origin from a tribe of Germans under Clovis, who crossed the Rhine about the year A. D. 481, and established themselves in the northern provinces of that country. The different German tribes were first governed by codes of laws formed by their respective chiefs. One of the most ancient of these is the Salic Law, which is generally supposed to have been written in the fifth century.²

¹ See: 1 Robertson's Hist. Scot. (17th ed.) 213, *et seq.*

² The Salic law is the name of a code of laws framed by the Salians, a tribe of Germans who settled in Gaul under Pharamond. This law is remarkable principally for its provisions in relation to succession, by which males alone inherited the lands or succeeded to the crown of France. De terra vero salica nulla portio hæreditatis transit in mulierem, sed hoc virilis

sextus acquirit; hoc est, filii in ipsa hæreditate seccundunt.

See: Hallam's Middle Ages (Murray's ed. of 1878), vol. I., pp. 47, 147–149, 278, 279, 280;

Hume's Hist. Eng. (Worthington's ed. 1880), vol 2, p. 151;

Maine's "Ancient Law," p. 152.

Same—The futile effort to introduce the Salic law into England by Henry IV. is fully set out by Hume. 2 Hume's Hist. Eng. (Worthington's ed. 1880).

SEC. 155. **Same — Riparian Franks.**—After the Franks had quitted their country they made a compilation of the Salic laws, with the assistance of the Sagas of their own nation, and having joined themselves under Clovis¹ to the Salians, preserved their original customs; which Theodoric, King of Austrasia, caused them to reduce into writing;² and also collected the last of those Bavarians and Germans who were dependent upon his kingdom. Charlemagne was the first who reduced the Saxons, and gave them the law still extant.³

SEC. 156. **Same—Theodosian Code.**—While Clovis and his descendants governed France, that country was ruled by the Theodosian Code and the laws of the different German tribes who had settled there. The Theodosian Code was in the course of time abrogated or forgotten by reason of the fact that greater advantages were allowed to those who lived under the Salic law. During the reign of the first French monarchs a general assembly of the nation took place each year, either in the month of March or in the month of May, at which time many ordinances were made which acquired the force of law, and were known as *Capitularii*.⁴

SEC. 157. **Same—Introduction of feuds.**—A variety of regulations inconsistent with the ancient code of laws was produced by the introduction of feuds; and France was at that time divided into an infinite number of small seigniories whose lords acknowledged a feudal dependency

¹ See : Gregory of Tours, *passim*.

² See : Prologue to the laws of the Bavarians and to the Salic law. Leibnitz says, in his "Origin of the Franks," that this law was made before the reign of Clovis; but it cannot have been before the Franks quitted their German home, because they did not at that time understand the Latin tongue. See : 2 Montesquieu, *Spirit of L.* (10th ed. Edinburgh), lib. XXVIII., c. 1 p. 206, *et seq.*

³ Montesquieu, *Spirit of L.* (10th Edinburgh ed.) 206, *et seq.*

The codes referred to by Montesquieu.

may be found in Ciaciani's collection entitled "Barbarorum Legis Antiquæ," 5 vols. fol. *Venetis*, 1781-5. The early customs and laws of the northern nations may be inferred with tolerable certainty from the "Jus Commune Norvegicum," a compilation made in the year 1274 by the order of the king, out of the then existing codes in the realm, and published at Copenhagen in 1817 in 1 vol. 4to.

⁴ 1 Cruise on Real Prop. (4th ed.) 2, §§ 6 and 7.

only on the monarchy, not a political one. By reason of this it became impossible that they should all be regulated by the same laws. The codes of the Germans and the *Capitularii* of the Salines were both superseded by the local customs, and each seigniory and province had its own rules and regulations; and there were scarce two seigniories in the whole kingdom whose customs agreed in every particular.¹ Several of these customs were collected and published in the course of the fifteenth century under the direction of the king of France, and authenticated by the most eminent lawyers and magistrates of the different provinces, but they had in general been put in writing by private individuals long before that period.²

SEC. 158. **Same—Laws of Normandy.**—Normandy, like other provinces of France, was governed by its own peculiar customs. When it was ceded to Rollo, the Norse leader, in the year 912, he caused an inquiry to be made into its ancient usages and added his sanction to their former authority. Normandy did not experience those troubles and revolutions which disturbed the other parts of France during the tenth and eleventh centuries, and as a consequence the original laws and customs of the Franks were preserved there with more purity, and suffered less from a mixture of the canon and civil law than in any other province of France.³ Upon the establishment of the Normans in England the customary law of Normandy, which had been already reduced to writing, was introduced and established there. The kings of England, at the time having great possessions in France, frequently visited that country for two centuries after the conquest, and borrowed from the French many of the improvements which were made in the French jurisprudence and established them in England. From this it will be seen that the primeval customs of the Germans and the codes of their different tribes,⁴ together with the laws of the

¹ 2 Montesquieu's *Spirit of L.* (10th Edinburgh ed.) 219.

² 1 Cruise on Real Prop. (4th ed.) 3, § 9.

³ See: Howard's *Lit. Pref.*

⁴ In legibus Henrici I. Regis Angliæ, multa reperio e Lege Salica deprompta; interdum nominatim interdum verbatim. Spelman's *Gloss*, voc. *Lex*.

Germans during the middle ages, the *Capitularii* of the French monarchs of the first two races, and the customs of the different provinces of Normandy, are the real sources from which the English ancient laws can with certainty be deduced.¹

SEC. 159. Establishment of feudal tenures.—In the ninth and tenth centuries there were only two tenures, or modes of holding land upon the continent of Europe, to wit: the allodial and the feudal. Allodial lands were those whereof the owner had the *dominium directum et verum*, the complete and absolute property, free from all service of any particular lord,² so that the owner could dispose of it at his pleasure or transmit it as an inheritance to his children.³ A feud was a tract of land acquired by the voluntary and gratuitous donation of a superior, and held on the condition of fidelity and certain services which were in general of a military nature.⁴ The tenure of the feudatory was of a precarious kind, depending entirely upon the will and pleasure of the person who granted it.⁵ With these ideas and under this policy of government, the Germans made conquests. When they acquired a province, the land became the property of the victorious tribe, and each individual laid claim to a certain share of it. A tract of ground was accordingly marked out for the leader

¹ See: 1 Cruise, Real Prop. (4th ed.), §§ 10–12.

² 2 Bl. Com. 105.

Quod est verè, simplicissimè, et absolutissimè Alaudium, nativa sua naturalis juris libertate, originaliter et perpetuò gaudens; nullis unquam hominis, servituti aut recognitioni subditum. Dumoulin (sive Molinæus), Consuet. Paris. tit. I., § 1. 1.

³ See: Dumoulin, In Consuet. Parisien. tit. 1, § 67; Id. Opera, tom. 1, p. 658.

⁴ 2 Bl. Com. 105.

See: Wallace v. Harmstead, 44 Pa. St. 499.

⁵ No private property in land among early Germans.—We learn from Cæsar and Tacitus that the individual German had no

private property in land; that it was his nation or tribe which allowed him annually a portion of ground for his support; that the ultimate property, or *dominium verum* of the lands, was vested in the tribe; and that the portions dealt out to individuals returned to the public, after they had reaped the fruits of them (Cæsar de Bello Gal., lib. 6, c. 21; Tacitus, De Mor. Germ., c. 26). Thus Tacitus says: *Agri pro numero cultorum ab universis per vices occupantur, quos mox inter se secundum dignationem partiantur. Facilitatem partiendi camporum spatia præstant; arva per annos mutant, et superest ager.* Tacitus, De Mor. Germ., c. 26.

of the expedition, and to his inferiors were given portions corresponding to their respective merits and importance. The lands thus given became the permanent property of the occupiers.¹

SEC. 160. **Same—Origin and growth of feudal customs.**—The situation of the German tribes in conquered provinces being at first extremely precarious, the necessity of defense induced the chiefs to annex to each grant or allotment of land a condition of military service, for the mutual protection of the tribe in the conquered province.² This allotment of land was originally made to individuals of the German tribe on their first establishment in a conquered country, as mere *beneficia* or feuds, and many have thence derived the origin of the feudal law. Whether this be correct or not we will not stop to inquire, but may remark that it is universally admitted that feuds were originally voluntary and gratuitous donations to be held at the mere will of the giver, who could resume them at pleasure.³ When the Germans first settled in the southern parts of Europe, they enjoyed a very great degree of liberty; and upon the distribution of the lands in a conquered province, each individual claimed that portion of them to which his rank and services entitled him, not as a favor, but as a right, being the just reward of his toils. Nor can it be supposed that a people who did not conquer for their

¹ See: 1 Cruise on Real Prop. (4th ed.) 4, §§ 16, 17.

² See: 1 Robertson's Hist. Scot. (17th ed.) 215, 254.

³ **Spence on benefices.**—Although this declaration is found in the Book of Feuds, Mr. Spence, in his "Equable Jurisdiction of Courts of Chancery," vol. I., pp. 44 to 46, maintains that it is contradicted by Anglo-Saxon history, as far as any authentic records extend, and is not confirmed by the early documents or history of any other nations. He admits that the Anglo-Saxon lords, like those on the continent of Europe, did in some cases grant benefices revocable at pleasure, or for a

term short of the life of the beneficiary, or only for his life; but he declares that nothing is found in any early documents to show that they did not, from the very first, make grants of transmissible or hereditary benefices. He cites documentary instances of such grants, in the times of the Saxon princes, in England, Scotland, and France, which he declares did not countenance the opinion of the Master of Rolls in *Burgess v. Wheate*, 1 Eden 192, where it is said that the introduction of the power of alienation was an era in the history of benefices.

chiefs only, but also for themselves, should submit to hold their acquisitions as the voluntary and gratuitous donations of their leader, and on so precarious a tenure as his will and pleasure.¹

SEC. 161. **Same—Military-services.**—The feudal system was not generally established till some centuries after the settlement of the German tribes in Italy and France; nor did the circumstances of annexing a condition of military service to a grant of lands imply that they were held by a feudal tenure, for the possessors of allodial property, who were in France called *Liberi Homines*, were bound to the performance of military service.² The original idea of feuds appears to have

¹ See: 1 Robertson's Hist. Char. V. (11th ed., 8vo) 254.

Conquests and booty of German tribes common property.—Robertson says that the German tribes considered their conquests as a common property, in which all had a title to share, as all had contributed to acquire them. 1 Hist. Char. V. (11th ed.) 14. He gives as an illustration a remarkable instance in the history of the Franks, which shows that the king himself had no part of the booty gained by the army, except that which he acquired by lot. The army of Clovis, the founder of the French monarchy, having plundered a church, carried off, among other sacred utensils, a vase of extraordinary size and beauty. The bishop sent deputies to Clovis, beseeching him to restore the vase, that it might be again employed in the sacred services to which it had been consecrated. Clovis desired the deputies to follow him to Soissons, as the booty was to be divided in that place, and promised, that if the lot should give him the disposal of the vase, he would grant what the bishop desired. When he came to Soissons, and all the booty was placed in one great heap in the middle of the army, Clovis entreated, that before making the division, they

would give him that vase over and above his share. All appeared willing to gratify the king, and to comply with his request, when a fierce and haughty soldier lifted up his battle-ax, and striking the vase with the utmost violence, cried out with a loud voice, "You shall receive nothing here but that to which the lot gives you a right."

See: Greg. Turon. Hist. Francorum, lib. 11, c. 27, p. 70, par. 1610.

² Deriving "allodium" from "los."—Some of the French writers, and among them M. Bouquet the historian, derive the word *allodium* from *los*, which signifies *lot*, and from this etymology conclude that allodial property was that which was acquired by lot upon the distribution of lands among the Franks.

See: Bouquet, Droit Pub.; Sismondi, Hist. des Francais, tom 3, 219.

Division of conquered land.—Robertson says in his History of Charles V. (17th ed.), pp. 256–258, that "upon settling in the countries which they had subdued, the victorious troops divided the conquered lands. Whatever portion of them fell to a soldier, he seized as the recompense due to his valor, as a settlement acquired by his own sword. He took possession of it as a

grown up from the necessity of concerted action in defending themselves and the allotment of lands in conquered provinces,¹ as heretofore set out.²

freeman in full property. He enjoyed it during his own life, and could dispose of it at pleasure, or transmit it as an inheritance to his children. Thus property in land became fixed. It was at the same time allodial, *i. e.*, the possessor had the entire right of property and dominion; he held of no sovereign or superior lord, to whom he was bound to do homage and perform service. But as these new proprietors were in some danger of being disturbed by the remainder of the ancient inhabitants, and in still greater danger of being attacked by successive colonies of barbarians as fierce and rapacious as themselves, they saw the necessity of coming under obligations to defend the community, more explicit than those to which they had been subject in their original habitations. On this account, immediately upon their fixing in their new settlements, every freeman became bound to take arms in defense of the community, and, if he refused or neglected to do so, he was liable to a considerable penalty. I do not mean that any contract of this kind was formally concluded, or mutually by any legal solemnity. It was established by tacit consent, like the other compacts which hold society together. Their mutual security and preservation made it the interest of all to recognize its authority, and to

enforce the observation of it. We can trace back this new obligation on the proprietors of land to a very early period in the history of the Franks. Chilperic, who began his reign A. D. 562, exacted a fine *bannos jussit exigi*, from certain persons who had refused to accompany him in an expedition. Greg. Turon., lib. V., c. 26, p. 211. Childebert, who began his reign A. D. 576, proceeded in the same manner against others who had been guilty of a like crime. *Id.*, lib. VII., c. 42, p. 342. Such a fine could not have been exacted while property continued in its first state, and the military service was entirely voluntary. Charlemagne ordained, that every freeman who possessed five *mans*, *i. e.*, acres of land, in property, sixty should march in person against the enemy. *Capitul.*, A. D. 807. Louis le Debonnaire, A. D. 815, granted lands to certain Spaniards who fled from the Saracens, and allowed them to settle in his territories, on the condition that they should serve in the army like other freemen. *Capitul.*, vol. I., p. 500. By land possessed in property, which is mentioned in the law of Charlemagne, we are to understand, according to the style of that age, allodial land; *alodes* and *proprietas*, *alodum* and *proprium*, being words perfectly synonymous. *Du Cange voce Alodis*. The clearest

¹ Tacitus on the Comites.—Tacitus tells us that the chief men among the Germans endeavored to attach to their persons and interests certain adherents whom they called Comites, *Insignis nobilitas, aut magna patrum merita, principis dignationem etiam adolescentibus adsignant. Cæteri robustioribus ac jampridem probatis aggregantur; nec rubor inter*

comites aspici. Gradus quintem et ipse comitus habet, judicio ejus, quem sectantur; magnæque et comitum æmulationis, quibus primus apud principem suum locus; et principum cui plurimi et acerrimi comites. Hæc dignitas, hæc vires, magno semper electorum juvenum globo circumdari; in pace decus, in bello præsidium.

² See: *Ante*, § 153.

SEC. 162. **Same—The German Comites.**—The custom that grew up among the northern hordes of attaching adherents to their persons and interests, was continued by the German princes in their new settlements made in France and elsewhere. These *comites* or attendants were called *Vassi*, *Antrustiones*, *Lendes*, *Homines in truste regis*. These persons were all of much more exalted position than the ordinary freemen, so that we find that the composition paid for the murder of a person of this description was triple that paid for the murder of a common freeman.¹ While the German tribes re-

proof of the distinction between allodial and beneficiary possession is contained in two charters published by Muratori, by which it appears that a person might possess one part of his estate as allodial, which he could dispose of at pleasure, the other as *beneficium*, of which he had only the usufruct, the property returning to the superior lord on his demise. *Antiq. Ital. Medii Ævi*, vol. I., pp. 559, 565. The same distinction is pointed out in a *Capitularia* of Charlemagne, A. D. 812, edit. Baluz. vol. I., p. 491. Count Everard, who married a daughter of Louis le Debonnaire, in the curious testament by which he disposes of his vast estate among his children, distinguishes between what he possessed *proprietary*, and what he held *beneficio*; and it appears that the greater part was allodial. A. D. 837. Aub. Miræri Opera Diplomatica, Lovan. 1723. Vol. I., p. 19.

Liber homo and Vassus — Obligation to serve superior.—In the same manner *Liber homo* is commonly opposed to *Vassus* or *Vassalus*; the former denotes an allodial proprietor, the latter one who held of a superior. These freemen were under an obligation to serve the state; and this duty was considered as so sacred, that freemen were prohibited from entering into holy orders, unless they had obtained the consent of the sovereign. The reason given

for this in the statute is remarkable, "For we are informed that some do so not so much out of devotion, as in order to avoid that military service which they are bound to perform." Capit. lib. I., § 114. If, upon being summoned into the field, any man refused to obey, a full *hercbannum*, i.e., a fine of sixty crowns, was to be exacted from him according to the law of the Franks. Capit. Car. Magn. ap. Leg. Longob., lib. I., tit. 14, § 13, p. 539. This expression, according to the law of the Franks, seems to imply that both the obligation to serve, and the penalty on those who disregarded it, were coeval with the laws made by the Franks at their first settlement in Gaul. This fine was levied with such rigor, "that if any person convicted of this crime was insolvent, he was reduced to servitude, and continued in that state until such time as his labor should amount to the value of the herebannum." Ibid. The Emperor Lotharius rendered the penalty still more severe; and if any person, possessing such an extent of property as made it incumbent on him to take the field in person, refused to obey the summons, all his goods were declared to be forfeited, and he himself might be punished with banishment. Murat. Script. Ital., vol. I., pars. ii., p. 153.

¹ 2 Baluzius, capit. Reg. Francor. 898, 926, 928.

mained in their northern home, the leaders or generals courted and preserved the favor of their *comites* by presents of arms and horses, and by hospitality.¹ When they settled in other countries which they had conquered, portions of lands known by the name of *Fiscus Regis*, or *Domanium Regis*, were allotted to the *comites* as a reward for their fidelity. These donations were originally called *beneficia*, because they were gratuitous. In course of time they acquired the name of *feuda*. The persons to whom this kind of property was given were thereby subject to fidelity, and the performance of military services, to those from whom they had received the lands.²

Montesquieu, *Spirit L.* (10th ed., Edinburgh), lib. 30. c. 19, p. 337.

¹ Tacitus says: "Exigunt (comites) principis sui liberalitate illum bellatorum equum, illam cruentam victricemque Traameam; nam epulæ, et quamquam incompti, largi tamen apparatus pro stipendio cedunt." Tacitus, *De Mor. Germ.*, c. 14.

See: Du Cange, *Gloss. voc. Fiscus*;

1 Baluz. Capit. Reg. Francor. 453; 2 Id. 875.

² See: 1 Cruise, *Real Prop.* 6, § 23. M. Bignon says in his notes on the "Formulæ of Marculphus," that the "Proprietate et Fisco duæ notantur bonorum species et velut maxima rerum divisio quæ eo seculo recepta erat, omnia namque prædia aut propria erant, aut fiscalia. Propria seu proprietates dicebantur quæ nullius juri obnoxia erant, sed optimo maximo jure possidebantur; ideoque ad hæredes transibant. Fiscalia vero, beneficia sive fisci vocabantur, quæ a rege ut plurimum, posteaque ab aliis, ita concedebantur, ut certis legibus servitiisque obnoxia, cum vitâ accipientis finirentur."

See: 2 Baluz. Capit. Reg. Francor. 875.

Muratori, the learned author of "*Antiquitates Italica Medii Ævi*," gives us a dissertation on "Allodial and Feudal Tenures." He says that feuds

derived their origin from the Germans, and were originally called *beneficia*; that the ancient *Vassi et Vassali* were persons who attached themselves to kings and princes in order to acquire the privileges which those who formed a part of their families were entitled to, and also in the hope of obtaining, from the liberality of their lords, *beneficia*; that is, the usufruct of a portion of their royal demesnes, during the lives of their lords. That whenever a person of noble birth attached himself in this manner to a prince, he then took an oath of fidelity to him and was afterwards called *Vassus* or *Vassalus*, which words occur in a *Capitularium* of Louis the Pious, enacted in the year 823 (See: Capit. Regum. Francor., lib. II., cc. IV., IX., XXIV., in *Leges Barbaror. antiquæ*, vol. 3, pp. 174, 175, 178). That to constitute a *vassus* it was not necessary that he should have a *beneficium*; that an *allodium* was an inheritance which might be alienated at the pleasure of the possessor, and that the words by which it was granted usually were, "ut proprietario jure teneat atque possideat; seu faciat inde quicquid voluerit, tam ipse quamque hæredes ipsius. See: Muratori, *Antiq. Ital. Medii*, lib. I., p. 345, *Dissert. XI.*

SEC. 163. **Same—Allodial tenures.**—Feuds were originally granted by kings and princes only, yet in a short time the great lords to whom the kings had allotted extensive tracts of land, partly from a disposition to imitate their superiors, and partly for the purpose of attaching persons to their particular fortunes, bestowed a portion of their demesnes as benefices or feuds. The greater part of the lands in Italy and France were, however, held by an allodial tenure, till the beginning of the tenth century, when the feudal system appears to have been generally adopted in those countries. Allodial property being much more desirable than feudal, such a change appears surprising; especially when we know that allodial property was frequently converted into feudal by the voluntary deed of the possessor.

The reason which induced the proprietors of allodial lands to convert them into feuds has been thus explained: Those who held feuds were entitled to great privileges. The composition or fine for the commission of a crime against a feudatory was much greater than where against a person who held his lands by an allodial tenure. But the chief motive for this alteration was, to acquire the protection of some powerful lord, without which, in those times of anarchy and confusion, it was scarce possible for an individual to preserve either his liberty or his property. These, and probably other reasons with which we are unacquainted, produced an extension of the feudal tenure over the whole western world.¹

SEC. 164. **Same—Consuetudines feudorem.**—These tenures gave way to feuds, which, upon their first introduction were regulated by unwritten customs. About the year 1170 Emperor Frederick Barbarossa directed the code of the feudal law to be compiled, which was accordingly done and subsequently published at Milan. This compilation was called “*Consuetudines Feudorem*,” and was divided into five books, of which the first two and some fragments of the last two are still in existence, and to be found at the end of the modern editions of the

¹ Hervé, lib. I., p. 102.

See: 2 Montesqu. Spirit of L.

(10th ed., Edinburgh), lib. XXXI., c. 8, p. 330, *et seq.*

“Corpus Juris Civilis.” This work is thought to be no more than a collection of the customs which prevailed most generally among the German tribes, and which were generally adhered to in feudal matters, together with the constitutions of the Emperors Lotharius, Conrad, and Frederick, respecting feuds.¹

SEC. 165. **Definition of feuds.**—A feud has been defined to be a tract of land held by a voluntary and gratuitous donation, on condition of fidelity, and certain services being rendered to a superior, from whom it was received.² It was a benevolent or liberal concession or gift, supposed to have been originally granted from motives of mere benevolence, and not for any sum of money or other valuable consideration.³

SEC. 166. **Kinds of feuds—Proper and improper.**—The most general division of feuds is into proper and improper ones. A proper feud was such an one as was purely military, given *militiæ gratia*, without price, to persons duly qualified for military service. An improper feud was one which did not, in point of acquisition or service, strictly conform to the nature of a mere military feud; such as those that were sold or bartered for any equivalent, or granted free of all service, or any consideration of any certain returns of service. A feud, was, however, always considered as a proper one unless the contrary appeared. That a feud was an improper one could only be shown by a reference to the original investiture. From this arose the maxim of the feudal law, *tenor investituræ*

¹ See : Giannone, dell' Istor. Regn. Nap., lib. XIII., c. 3, § 3.

² 2 Bl. Com. 105.

See : Wallace v. Harmstead, 44 Pa. St. 499.

Craig defines a feud as follows : “Est feudum beneficium, seu benevola et libera rei immobilis, aut æquipollentis, concessio, cum utilis dominii translatione; retenta proprietate, seu dominio directo; sub fidelitate, et exhibitione servitiorum honestorum. See : Jus. Feudale, lib. I., Dieg. 9, 5. This definition is copied by Zasius, in Usus Feud. Epit.,

part I., 3, who derives it from earlier feudists. See Zasii, Opera, tom. IV., p. 77.

³ Feudum enim non sub prætextu pecuniæ, sed amore et honore Domini acquirendum est. Consuet. Feud. lib. I., tit. 27. Nothing but immovable property could be granted as a feud. Sciendum est autem Feudum, sive Beneficium, nonnisi in rebus soli, aut solo cohærentibus, aut in iis qui inter immobilia connumerantur—posse consistere. Zasii, Opera, lib. II., tit. 1.

inspiciendus. Improper feuds were distinguished from proper ones, however, by those qualities only in which they varied; in all other respects they were considered proper feuds.¹

SEC. 167. **Same—Ligium and non-ligium.**—Feuds were also divided into *feudum ligium* and *feudum non-ligium*. A *feudum ligium* was one for which the vassal owed fealty to his lord, against all persons whomsoever, without any exception or distinction. A *feudum non-ligium* was one for which the vassal owed fealty to his immediate lord, but with an exception in favor of some superior lord.²

SEC. 168. **Same—Feudum antiquum and feudum novum.**—The third division of feuds was into *feudum antiquum* and *feudum novum*. A *feudum antiquum* was that which had descended to the vassal from his father, or some more remote ancestor. A *feudum novum* was one which the vassal had originally acquired for himself. The service in each was the same; the distinction was merely the method by which the vassal came into possession of the feud.³

SEC. 169. **Same—Feudum nobile and feudum dignitatis.**—The fourth division of feuds was into *feudum nobile* and *feudum dignitatis*. The feud granted by a sovereign-prince, to be holden immediately of himself, with a jurisdiction, was called *feudum nobile*, and conferred nobility on the grantee; where a title of honor was annexed to the lands so granted, it was called a *feudum dignitatis*.⁴

¹ 1 Cruise, Real Prop. (4th ed.) 9, §§ 32, 33.

² 1 Bl. Com. 367; Spelman's Gloss.

³ 2 Bl. Com. 212; Spelman's Gloss.

⁴ Craig, lib. I., tit. 10, §§ 11, 12; Spelman's Gloss.

In Bouvier's Law Dict. (15th ed.) 655, the following additional feuds are mentioned:

Feudum apertum, or a fee which the lord might enter upon and resume either through failure of issue of the tenant, or any crime or legal cause on his

part. 2 Bl. Com. 245; Spelman, Gloss.

Feudum francum, or a free feud. One which was noble and free from talliage, and other subsidies, to which the *plebeia feuda*, or vulgar feuds, were subject. See: Spelman, Gloss.

Feudum hauberticum, or a fee held on the military service of appearing fully armed at the *ban* and *arriere ban*. Spelman, Gloss.

Feudum improprium, or a derivative fee.

Feudum individuum, or a fee which

SEC. 170. Investiture of feuds.—Feuds were originally granted by a solemn and public delivery of the very land itself by the lord to the vassal, in the presence of the other vassals of the lord, which ceremony was called *investiture*.¹ This ceremony was so essentially necessary to the creation of a feud, that one could not be constituted without it.² The only persons who could be witnesses to the investiture were the other vassals of the lord, *convassalli* or *pares*, and their presence was required as much for the advantage of the lord as of the tenant. Of the lord, so that if the tenant was a secret enemy, or in any other manner unqualified, the lord might be apprised of it; and that they might also bear testimony of the obligations which the tenant contracted. Of the tenant, that they might testify the grant of the lord, and for what services it was made. And lastly for their own advantage, that they might know who was the tenant, and what land he held.³

SEC. 171. Same—Improper or symbolical vestiture.—It was frequently inconvenient for the lord to go to the lands which he intended to grant, and for his convenience, what is known as improper vestiture was introduced, which was a symbolical transfer of the lands, by the delivery of a staff, a sword, or a robe; the last being the most common method among the immediate vassals of kings and princes, gave rise to the designation inves-

could descend to the eldest son alone. 2 Bl. Com. 215.

Feudum maternum, or a fee descending from the mother's side. 2 Bl. Com. 212.

Feudum novum ut antiquum, or a new fee held with the qualities and incidents of an ancient one. 2 Bl. Com. 212.

Feudum paternum, or a fee which the paternal ancestors had held for four generations. Calvinus, Lex.; Spelman, Gloss. This was a fee which was descendable to heirs on the paternal side only (2 Bl. Com. 223), and which might be held by males only. See: Du Cange.

Feudum proprium, or a genuine original feud or fee, of a military nature, in the hands of a

military person. 2 Bl. Com. 57.

Feudum talliatum, or a restricted fee; that is, one limited to descend to certain classes of heirs. 2 Bl. Com. 112, n.; Spelman, Gloss. See: Le Grand Coutumier; Dalrymple, Feuds; Du Cange; Calvinus, Lex.; Merlin, Répert. Feodalité; Pothier, des Fiefs; Spelman, Feuds.

¹ This ceremony is thus described by Corvinus: "Investitura ab investiendo dicta, quod per eam vassalus possessione quasi veste induatur."

² Sciendum est feudum sine investitura nullo modo constitui posse. Consuet. Feud., lib. I., tit. 25.

³ Consuet. Feud., lib. II., tit. 32.

titure.¹ A proper investiture and possession were synonymous terms. Whenever investiture was distinguished from possession, it was an improper one.²

SEC. 172. **Same—Breve testatum.**—The services which the vassal was bound to perform were declared by the lord at the time of the investiture, in the presence of the other vassals or *convassalli*. At first this declaration was merely made verbally, but as the terms on which the feud was to be held might be forgotten or mistaken, it ultimately became usual for the tenant to procure a writing from the lord containing the terms upon which the donation was made, witnessed by the other vassals, which writing was called a *breve testatum*. In those cases where the lord could not conveniently go to the land, he delivered to the vassal a *breve testatum*, as an improper investiture, with a direction to some person to give him actual possession of the land.³ A *breve testatum* being a much better security than a verbal declaration, those who acquired feuds preferred the improper investiture, with a subsequent delivery of the possession, to the proper investiture.⁴

SEC. 173. **Fealty—Oath of.**—Upon the creation of a feud, a connection and union arose between the lord and his vassal which has been declared by feudal writers to have been stronger than any natural tie whatever, and which the tenant was obliged to acknowledge by taking the oath of fidelity to the lord.⁵ The idea of this oath appears to have been taken from the obligation which existed between the German princes and their *comites*.⁶

¹ Investitura quidem proprie dicitur possessio; abusivo autem modo dicitur investitura, quando hasta aut aliud corporum quidlibet porrigitur a domino, se investituram facere dicente. Quæ si quidem ab illo fiat, qui alios habet vassallos, saltem coram duobus, ex illis solemniter fieri debet; alioqui, licet alii intersint testes, investitura minime valeat.

² Craig, lib. II., tit. 2, § 4; Consuet. Feud., lib. II., tit. 2.

³ Craig, lib. II., tit. 2, 17.

⁴ The feudal writers divide an improper investiture into three parts,—a *breve testatum*, a *preceptum seisinæ*, and a *possessionis tradition*.

⁵ The oath was as follows: "Ego Titius (vassallus) juro super hæc sancta Dei Evangelia, quod ab hac hora in antea usque ad ultimum diem vitæ meæ, ero fidelis tibi Caio Domino meo contra omnem hominem, excepto Imperatore, vel Rege." Consuet. Feud., lib. II., tit. 7.

⁶ Tacitus says: "Illum defendere,

Fealty was so essentially requisite to the nature of a feud, whether it was a proper or an improper one, that such feud could not exist without fealty; for if lands were given without a reservation of fealty, the tenure was considered as allodial. The oath of fealty, however, was frequently dispensed with.¹

SEC. 174. **Homage—Ceremony of.**—When feuds became military, another ceremony was added called *homagium* or *hominium*, which was performed by the vassal kneeling before his lord, uncovered and ungirt, and putting his hands in those of his lord, and saying: "I become your man from this day forth for life, for member, and for worldly honor, and will owe you faith for the lands that I hold of you, saving the faith that I owe unto our lord the king."² The lord then embraced the tenant, and this completed the ceremony of homage.³ Fealty and homage are frequently confounded by the feudal writers. A fealty was a solemn oath made by the vassal of fidelity and attachment to his lord; but homage was merely an acknowledgment of tenure.⁴

SEC. 175. **Duties of lord and vassal.**—In consequence of the feudal relation of lord and vassal several duties arose, both on the part of the lord and on the part of the vassal. The vassal took the oath of fealty and did homage to his lord, but the lord, on account of his dignity, did nothing; yet he was as firmly bound as though he had taken a feudal oath to do and forbear everything with respect to the vassal, which the vassal was bound to do and forbear toward the lord. Their obligations and duties were in most respects reciprocal.⁵ The duties which the vassal owed to the lord⁶ were to counsel and aid. Under counsel

tueri, sua quoque fortia gloriæ ejus assignare, præcipuum sacramentum est."

¹ 1 Cruise on Real Prop. (4th ed.) 11, § 41.

² 2 Reeves' Hist. Eng. L. (2d ed.) 311. "Devenio homo vester, de tenemento quod de vobis teneo, et tenere debeo, et fidem vobis portabo contra omnes gentes."

³ 1 Cruise, Real Prop. (4th ed.) 11, § 42.

⁴ Craig, lib. I., tit. 11, § 11; Id. lib. II., tit. 12, § 20.

⁵ Wright, Ten. 43, 44.

⁶ These duties are described in the *Consuetudines Feudorum* as follows: "Qui domino suo fidelitatem jurat, ista sex in memoria semper habere debet, incolume, tutum, honestum, utile, facile, possibile."

was included not only giving faithful advice to the lord, but also keeping his secrets, and attending his courts, to enable him to distribute justice to the rest of his attendants.¹ To aid the lord might be either in supporting his reputation and dignity, or in defending his person or property. By aid to his person, the vassal was not only obliged to defend his lord against his private enemies, but also to assist him on his wars; and feuds were in general originally granted on condition of military service, to be done in the vassal's proper person and at his own expense.²

SEC. 176. **Feudal aids.**—Under the feudal law the vassal was not originally required to contribute to the lord's private necessities. The first feudal aids were purely military. In course of time, however, the lords claimed and established a right to several other aids, the principal of which were : 1. To make the lord's eldest son a knight. 2. To marry the lord's eldest daughter. 3. To ransom the lord's person when taken prisoner.³

SEC. 177. **Estate of vassal.**—The estate of the vassal was originally a donation made by the king or lords to their followers or *fideles* and *feuds*, and was of a temporary nature, nothing more than the usufruct being given. The *proprietas* remained in the lord, and the vassal had only the *usufructus* or *dominium utile*; that is, a right to take and enjoy the profits of the land, as long as he performed the services due to the lord. The duration of feuds was originally precarious; they might be resumed at the lord's pleasure. They were afterward granted for a year, then for years, and finally for life. In the course of time it became usual to retain the heir of the last tenant, if he was able to perform the services, and thus feuds became hereditary, and descended to the posterity of the vassal.⁴

¹ See : Craig, lib. II., tit. 6.

² 1 Cruise, Real Prop. (4th ed.) 12, § 46.

³ See : Du Cange, Gloss. voc. Auxilium.

⁴ See : Consuet. Feud. I., tit. 1.

This notion of the original character of feudal property and the gradual evolution of an hereditary estate by slow degrees, after a long lapse of time, is vigorously combated by Mr.

SEC. 178. **Alienation of feuds.**—In the first ages of the feudal law the vassal could not alien the feud without the consent of the lord ; neither could he subject it to the payment of his debts.¹ The consent of the lord was seldom given without receiving a present. From this practice of giving a present on alienating arose the custom of paying the lord a sum of money for permission to alien the feud.²

SEC. 179. **Same—Subinfeudation.**—A practice arose, however, of disposing of a part of the feud by a grant from the vassal to a stranger, to be held of himself by the same services as those which he owed to his lord, which was called subinfeudation.³ Subinfeudation became extremely common in France during the eleventh and twelfth centuries, but was prevented by an ordinance of Philip Augustus in 1210, which directed that where any estate was dismembered from a feud, it should be held of the chief lord.⁴

SEC. 180. **Estate of the lord.**—The estate or interest of the lord in the lands granted as a feud consisted in the *proprietas* together with a feudal *dominium* or seignior, and a right to fealty and homage, and all the other services reserved upon the grant. In case of failure in any of these the lord might enter upon and take possession of the feud. The feudatory was not able to alien the feud without the consent of the lord, and neither could the lord alien or transfer his seignior to another without the consent of his feudatory, because the obligations of the lord and vassal being mutual, the vassal was

Spence in his work on the Equitable Jurisdiction of the Court of Chancery, vol. I., pp. 44-46.

¹ It appears, however, from the *Consuetudines Feudorum*, to which constant reference is made in this chapter, that feuds were frequently aliened. By a constitution of the Emperor Lotharius, reciting that the alienation of feuds had proved extremely detrimental to the

military services which were due from the vassals, the tenants were absolutely prohibited from alienating their feuds without the consent of their lords ; which was confirmed by a law of the Emperor Frederic II. See : *Consuet. Feud. lib. II., tit. 55.*

² 1 Cruise, Real Prop. (4th ed.), 13, § 51.

³ *Consuet. Feud., lib. II., tit. 34, § 2.*

⁴ Hervé, lib. I., p. 101.

as much interested in the personal qualities of his lord, as the lord was in those of the vassal.¹

SEC. 181. **The lord's obligation on vassal's eviction.**—The vassal was bound to give aid and counsel to his lord, and defend his person and possessions; and in return for this duty and obligation on the part of the vassal the lord, among other things, was under obligation to defend the vassal in the possession of his feud. In case the vassal was evicted out of the feud granted him by his lord, the lord was obliged to give him another feud of equal extent, or else to pay him the value of that which he had lost.² This doctrine of the feudal law is the foundation of the wide diversity of opinion at the present day in regard to the proper rule of damages in actions for breach of covenant of warranty.³

SEC. 182. **Descent of feuds.**—According to the feudal law, after feuds became inheritable, the descendants only of the person to whom the feud was originally granted, were entitled to inherit. The reason for this was because the personal ability of the first acquirer to perform the military duties and services reserved was the motive of the donation, and for that reason it could only be transmitted by him to his lineal descendants.⁴ In consequence of this rule the ascending line was in all cases excluded.⁵ At first the sons all succeeded equally, even respecting the succession to the crown; but the frequent wars occasioned by these partitions caused a regulation that kingdoms should be considered as impartible inheritances, and descend to the eldest son.⁶ The rule, that

¹ Consuet. Feudorum, lib. II., tit. 34, § 1:

Wright, Ten. 30.

² Consuet. Feud. II., tit. 25;

Craig, lib. II., tit. 4, §§ 1 and 2.

Compare: Wright, Ten. 38.

³ See: *Post* (Damages on failure of warranty of title).

⁴ Craig, lib. I., tit. 10, § 11; Id. lib. II., tit. 13, §§ 46, 47; Id. tit. 15, § 10.

⁵ Hence it is laid down in the Consuetudines Feudorum, that: "Successionis feudi talis est natura, quod ascendentes non

succedunt." And a modern feudist has said: "Justamen feudale, ascendentium ordine neglecto, solos descendentes et collaterales admittit. Quoniam qui feudum accipit, sibi et liberis suis, non parentibus prospicit." In allodial property the ascending line was capable of inheriting. Craig, lib. II., tit. 13, §§ 46, 47; Id. lib. II., tit. 18; Id. lib. II., tit. 50.

⁶ 1 Cruise, Real Prop. (4th ed.) 14, § 62.

Honorary feud indivisible.—By a

none but the descendants of the first feudatory could inherit, was so strictly adhered to, that in the case of a *feudum novum*, the brother of the first acquirer could not succeed to his brother because he was not descended from the person who first acquired the feud. In the case of a *feudum antiquum*, however, a brother or other collateral relation who was descended from the first acquirer might inherit the estate.¹ Afterwards collateral relations of the first acquirer of the feud were admitted by granting a *feudum novum* to be held *ut antiquum*, that is, with all the qualities of an ancient feud derived from a remote ancestor, in which case the collateral relations were admitted, however distinct from the person who last possessed the feud.²

SEC. 183. Same — *Feudum talliatum*. — To restrain the general right of inheritance in all the collateral relations of the last possessor of the feud, a new kind of feud was invented, called a *feudum talliatum*, or restricted feud, which was limited to descend to certain classes of heirs.³

SEC. 184. Same — Distinguished from succession under Roman law. — The descent of a feud under the feudal law differed entirely from the succession established by the

constitution of the Emperor Frederic, honorary feuds became indivisible, and they, with the military feuds, began to descend to the eldest son, because he was sooner capable of performing the military service required of his ancestor. Consuet. Feud., lib. I., tit. 55.

Females were excluded from inheriting feuds, originally, because of their inability to perform the military services required, and also because of their liability to carry the feud by marriage to strangers or enemies. Consuet. Feud., lib. I., tit. 8; Struvius, Syntag. Jur. Feud., c. IV., § 8.

¹ Consuet. Feud., lib. I., tit. 1, § 2.

² See : Craig, lib. I., tit. 10, §§ 11, 13, 14, 15.

³ 2 Bl. Com. 112, note; Spelman, Gloss.

See : Calvinus Lex. ;

Darlymple, Feuds ;

Du Cange ;

Le Grand Coutumier ;

Merlin, Répert. Foédalite ;

Pothier, *des Fiefs* ;

Spelman, Feuds.

Du Cange's description. — This species of feud is thus described by Du Cange :—*Feudum talliatum dicitur, verbis forensibus, hæreditas in quamdam certitudinem limitata ; seu feudum certis conditionibus concessum, verbi gratiâ, alicui et liberis ex legitimo matrimonio nascituris. Unde si is cui feudum datum est moriatur absque liberis, feudum ad donatorem redit. Talliare enim est in quamdam certitudinem ponere, vel ad quoddam certum hæreditamentum limitare. See : Craig, lib. I., tit. 10, §§ 17, 25. Talliare, Dividere, Partiri, Disponere. Vide Carpentier, Gloss. voc. Talliare, 2.*

Roman law. In the former, the heir was a person instituted by the ancestor, or appointed by the law, to represent the ancestor in all his civil rights and obligations ; but in the feudal law the heir succeeded not under any supposed representation to the ancestor, but as related to him in blood, and designated, in consequence of that relation, by the terms of the investiture to succeed to the feud.¹

SEC. 185. **Investiture upon descent.**—After feuds became inheritable, the lord, upon the death of the tenant, claimed the right of granting a new investiture to the successor, without which he could not enter into legal possession of the feud. This right on the part of the lord showed that the right of inheriting was originally derived from the bounty and acquiescence of the lord ; and the investiture was evidence of the tenure, as well as of the services that were to be rendered for the feud.²

SEC. 186. **Same—Relevium.**—It was customary for the lord on such occasion to demand some present from the heir, upon granting him investiture ; and this custom of receiving presents from the heir who succeeded to the feud in time became a part of the profits of the feud, and was technically known as a *relevium*.³

SEC. 187. **Escheat of feuds.**—Feuds being originally granted on condition of military or other services, when there was no person capable of performing such services, it was deemed but just that the feud should return to the lord ; consequently, where a vassal died without heirs, the lord became entitled to the feud by escheat.⁴

SEC. 188. **Forfeiture of feuds.**—Feuds being originally considered as voluntary donations, it soon became the

¹ 1 Cruise, Real Prop. (4th ed.) 17, § 68.

² 1 Cruise, Real Prop. (4th ed.) 15, § 69.

³ Relevium est præstatio hæredum, qui cum veteri jure feudali non poterant succedere in feudis, ca-

ducam et incertam hæreditatem relevabant ; solutâ summâ vel pecuniæ, vel aliarum rerum, pro diversitate feudorum. Schilt. Cod., § 52.

⁴ 1 Cruise, Real Prop. (4th ed.) 16, § 71.

established rule that every act of the vassal which was contrary to the connection that subsisted between him and his lord, and to the fidelity which the former owed the latter, or by which the vassal disabled himself from performing the services due to the lord, should operate as a forfeiture of the feud.¹ Should the vassal omit to require an investiture from the heir of his lord, on the latter's decease, for a year and a day, and to take the oath of fealty to him, he thereby lost the feud; and in case of the vassal's death, if his heir neglected to require investiture from the lord within a year and a day, he forfeited his feud.² If the vassal refused to perform the services reserved upon such reinvestiture, he forfeited the feud.³ And if the vassal aliened the feud, or by any act of his considerably diminished the value thereof, he forfeited it.⁴ Where the vassal denied that he held his feud of the lord, declaring that he held it of some other person, or denied that the land was held by a feudal tenure, he forfeited the feud.⁵ And every species of felony operated as a forfeiture of the feud, being regarded as the highest breach of the vassal's oath of fealty.⁶

SEC. 189. **Forfeiture of seignior.**—The lord being equally bound to observe the terms of relation on his part to the vassal that the vassal was bound to observe to his feudal lord, if he neglected to protect and defend his tenant, or do anything that was prejudicial to him, or injurious to the feudal connection, he forfeited his seignior.⁷

SEC. 190. **Feudal jurisdiction.**—The feudal lord had a right to the services of his vassals to defend his person and his property in time of war; and the privilege also of adjusting their differences and determining their disputes in time of peace.⁸ The origin of the feudal juris-

¹ 1 Cruise, Real. Prop. (4th ed.) 16, § 72.

² Consuet. Feud., lib. II., tits. 23, 24.

³ Non est alia justior causa beneficii auferendi, quæ si id, propter quod beneficium datum fuerit, hoc servitium facere recusaverit; quia beneficium amittit. Consuet. Feud. lib. II., tit. 24, § 2.

⁴ Si vassallus feudum dissiparet, aut insigni detrimento deterius faceret, privabitur. Consuet. Feud., lib. I., tit. 2; Zasius, In Usus Feud., pars. 10, § 54.

⁵ Craig, lib. III., tit. 5, § 2.

⁶ 1 Cruise on Real Prop. (4th ed.) 17, § 77.

⁷ Consuet. Feud., lib. II., tits. 26, 47

⁸ Si inter duos vassallos de feudo

diction is accounted for thus :—By the laws of all northern nations every crime, including murder, was punished by a pecuniary fine, called *fredum*.¹ In the infancy of the northern governments, the chief occupation of the judge consisted in ascertaining and levying those fines which constituted a considerable part of the public revenue. When extensive tracts of lands were granted as feuds, the privilege of levying those fines was always included in the reservation in the grant, with a right to hold a court for the purpose of ascertaining them; and from this followed the jurisdiction over vassals, both in civil and criminal matters.² In all those nations descended from the Germans, justice was originally administered in their general assemblies. The king or chieftain did not pronounce sentence till he had consulted those persons who were of the same rank with the accused, and without their consent no judgment could be given. Out of this custom grew the feudal jurisdiction by which each lord held a court in which he distributed justice to his vassals; every freeman who held lands from the lord was bound, under pain of forfeiting his feud, to attend his court, there to assist his lord in determining all disputes arising between his vassals. These tenants, being all of the same rank and holding of the same lord, were called *pares curiæ*.³

sit controversia, domini sit cognito, et per eum controversia terminetur. Si vero inter dominum et vassallum lis oriatur, per pares curiæ, a domino sub fidelitatis debito conjuratos terminetur. Consuet. Feud., lib. I., tit. 18; Id., lib. II., tit. 55.

¹ When it was not determined by law, it was generally the third of what was given for the composition, as appears in the law of the Riparians, c. 89, which is explained by the third *capitulary* of the year 813, edition of Balufius, tom. I., p. 512.

² See :2 Montesque, Spirit L. (10th ed., Edinburgh), bk. 30, c. 20, p. 342.

³ 2 Montesque, Spirit L. (10th ed., Edinburgh), p. 342.

³ 2 Bl. Com. 54;

Craig, lib. II., tit. 2, § 4; Id. lib. II., tit. 11, § 18;

Hervé, vol. I., § 263.

This practice is said to have been established as early as the reign of Emperor Conrad, 920, who left the following law : Statuimus, ut nullus miles episcoporum, abbatum, etc., vel hominum, qui beneficium de nostris publicis bonis, aut de ecclesiarum prædiis, etc., tenent, etc., sine certa et convicta culpa, suum beneficium perdat, nisi secundum consuetudinem antecessorum nostrorum, et judicium parium suorum. Consuet. Feud., lib. V., tit. 1.

CHAPTER III.

ANCIENT ENGLISH TENURES.

- SEC. 191. Introduction of feuds.
- SEC. 192. Doctrine that lands held of king.
- SEC. 193. Consequences of establishment of feudal tenures.
- SEC. 194. Same—Effect on Bocland and Folcland.
- SEC. 195. Nature of the tenures.
- SEC. 196. Same—Escheat and forfeiture.
- SEC. 197. Kinds of tenures.
- SEC. 198. Same—Regarding free tenures.
- SEC. 199. Villeinage and copyholds.
- SEC. 200. Tenure in capite.
- SEC. 201. Tenure de honore.
- SEC. 202. Tenure by knight-service.
- SEC. 203. Same—Duties imposed.
- SEC. 204. Same—Scutagium.
- SEC. 205. Same—Fruits of tenure by knight-service.
- SEC. 206. Tenure by escuage.
- SEC. 207. Tenures by grand serjeanty.
- SEC. 208. Consequences of tenure.
- SEC. 209. Statute Quia Emptores.
- SEC. 210. Homage—Ceremony and importance of.
- SEC. 211. Fealty—An incident of feudal tenure.
- SEC. 212. Aids of the ancient English tenures.
- SEC. 213. Reliefs—Sums paid on investiture.
- SEC. 214. Primer seisin—Definition.
- SEC. 215. Wardship—Distinction between male and female wards.
- SEC. 216. Marriage—Male and female wards.
- SEC. 217. Abolition of military tenures.

SECTION 191. **Introduction of feuds.**—Our institutions being derived from the English, and the English finding their root and foundation in the old feudal institutions, in the study of our institutions, and particularly our laws relating to and regulating real property, it becomes important to know something regarding the ancient English tenures. It is now universally admitted that the feudal system, as established in Normandy, with all its

fruits and services, was first introduced into England by William the Conqueror, and established in those possessions of the Saxon Thanes which were granted by him to his followers. About the twentieth year of his reign the feudal system was formally and generally adopted throughout the entire kingdom.¹ All owners of land were required to engage and swear, that they became vassals or tenants, and as such would be faithful to William, as lord, in respect to the *dominium* residing in a feudal lord ;² that they would swear, everywhere faithfully to maintain and defend their lord's territories and titles as well as his person ; and give him all possible

¹ See : Spelman, Feuds, *per tot* ; Wright Ten. 63.

The most remarkable of the laws of William the Conqueror establishing the feudal system in England were chapters 52 and 58. The tenor of the 52d was as follows : " Statuimus, ut omnes liberi homines fœdere et sacramento affirmant, quod intra et extra universum regnum Angliæ (quod olim vocabatur regnum Britanniæ), Wilhelmo suo domino fideles esse velint ; terras et honores illius fidelitate ubique fervare cum eo, et contra inimicos et alienigenas defendere."

Same—The terms of this law are very general ; and probably it was purposely so conceived, in order to conceal the consequences that were intended to be founded thereon. The people of the country received with content a law which they looked upon in no other light than as compelling them to swear allegiance to William. The nation in general, by complying with it, probably meant no more than the terms apparently imported ; namely, that they obliged themselves to submit, and be faithful to William, as their lord, or king ; to maintain his title and defend his territory (Wright, Ten. 79). But the persons who penned that law, and William who promoted it, had deeper views, which were a little more explained in his 58th law. This enactment was in these words :

Same — 58th Law.—" Statuimus etiam, et firmiter præcipimus, ut omnes comites et barones, et milites, et servientes, et universi liberi homines totius regni nostri predicti habeant et teneant se semper bene in armis et in equis, ut decet, et oportet ; et quod sint semper prompti, et bene parati ad servitium fuum integrum nobis explendum, et peragendum, cum semper opus fuerit, secundum quod nobis de feodis debent et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri predicti, et illis dedimus et concessimus in fædo, jure hæreditario."

Kind of service required.—By this law the nature of the service to be performed is expressly mentioned, namely, knight-service on horseback ; and the term of each feudal grant was declared to be jure hæreditario. This latter circumstance must have had a very considerable effect in quieting the minds of men, respecting the nature of this new establishment. The Saxon feuds, being perhaps beneficiary, and only for life, were at once converted into inheritances ; and the Normans obtained a more permanent interest in their new property, than probably they had before enjoyed in their ancient feuds. 1 Reeves' Hist. Eng. L. (2d ed.) 35, 36.

² Wright, Ten. 68.

assistance against his enemies, whether foreign or domestic.¹ These engagements and obligations being the fundamental principles of the feudal state, when such were required from every freeman to the king, that policy was in effect established.²

SEC. 192. Doctrine that lands held of king.—As a consequence of this establishment of the feudal system it became a fiction of the English law, which finally ripened into a maxim, that all the lands in the kingdom were originally granted and held of the king, either mediately or immediately, in consideration of certain services rendered or to be rendered by the tenant. The thing held was called a tenement, the possessor thereof was called a tenant, and the manner of his possession a tenure. Whether the feuds thus held by the tenants were originally hereditary or not, in those countries where the feudal law was first established, it is not of importance here to discuss ; but we find that feuds were from the beginning hereditary where lands were held by an allodial tenure, and voluntarily converted into feuds.³ And when William the Conqueror established himself in England, he granted to his followers an inheritance of all the estates which he distributed among them ; and when he persuaded the Anglo-Saxon proprietors to hold their lands by a feudal tenure, he allowed them to retain the inheritance.⁴

SEC. 193. Consequences of establishment of feudal tenures.—From the statutes of William the Conqueror, referred to above, are to be derived the consequences of the ancient English tenure. From them a new system of law sprung up, by which the landed property of England was entirely

¹ Wright, Ten. 68.

² 1 Reeves' Hist. Eng. L. (2d ed.) 35, 36.

³ Basnage, in his commentary on the customs of Normandy, tom. 1 (ed. 1778), p. 153, says that when Rollo became master of that province, he granted a considerable portion of it to his companions, and to the gentlemen of Brittany, as hereditary

feuds. That he also recalled a number of the ancient inhabitants who had held their estates by hereditary right, and restored them to their possessions in as full and ample a manner as they had held them under the kings of France.

⁴ 1 Cruise, Real Prop. (4th ed.) 20, § 4.

governed to the middle of the last century, and is, in a greater or less degree, influenced even at this day. The Normandy lawyers, who were versed in this kind of learning, exercised their talents in explaining its doctrines, its rules, and its maxims; and at length established, upon artificial reasoning, most of the refinements of feudal jurisprudence.¹

SEC. 194. **Same—Effect on Bocland and Folcland.**—By the operation of the statutes above referred to, the Saxon distinction between Bocland and Folcland, charter-land and allodial, with the *trinoda necessitas*, and other incidents, was abolished; and all the *liberi homines* of the kingdom, on a sudden, became possessed of their lands under a tenure which bound them, in a feudal light, mediately or immediately to the king. Thus, if A had received his land of the king, and B had received his of A; B now held his land of A on the same terms, and under the same obligations, that A held his of the king; each considering himself under the reciprocal obligations of lord and tenant. In this manner it became a maxim of our law, that all land was held mediately or immediately of the king, in whom resided *dominium directum*; while the subject enjoyed only the *dominium utile*, or the present cultivation and fruits of it.²

SEC. 195. **Nature of the tenures.**—The position of affairs above described led to consequences of the greatest importance. Military service being required by an express statute, the other effects of tenure were deductions from the effect of that establishment. The king's tenants being supposed to have received their lands by the gift of the king, it seemed not unreasonable, that upon the death of the ancestor, the heir should purchase a continuance of the king's favor by the payment of a sum of money called a relief,³ for entering into the estate. Such heir being bound to the same service for which his ancestor was liable, which was the only return that

¹ 1 Reeves' Hist. Eng. L. (2d ed.) 36. ² 1 Reeves' Hist. Eng. L. (2d ed.) 36, 37.

³ See: *Ante*, § 186.

could be made in consideration of his enjoying the property, it was thought reasonable that the king should judge, whether the heir was capable, by his years, of performing the services required; if not, that he, as lord, should have the custody of the land during the infancy of the heir; that by the produce of it he might provide himself with a sufficient substitute, and in the mean time have the care or wardship of the infant's person, in order that he might educate him in a manner becoming the character he was to support as his tenant. If the heir was a female, it was equally material to the lord that she should connect herself in marriage with a proper person, and hence the disposal of her in marriage was thought naturally to belong to the lord.¹

SEC. 196. **Same—Escheat and forfeiture.**—On the first introduction of feuds into England, the obligations subsisting between lord and tenant were similar to the feudal ties that bound lord and vassal in Normandy, and their mutual duties and obligations were the same.² The obligations between the lord and his tenant so united their interests that the tenant was bound to afford aid and counsel to his lord, by payment of money on certain emergent calls respecting himself or his family; such as when he married his daughter, or when he made his son a knight, or when he was taken prisoner.³ Besides these incidents, it was held the land fell back into the hands of the lord for want of heirs of the tenant, or for commission of certain crimes; and in case of treason or felony it came into the hands of the king by the way of forfeiture.⁴

SEC. 197. **Kinds of tenures.**—Ancient English tenures were, according to the nature of the services, either free or base; and, in respect to their quantity and time of execution, were either certain or uncertain. Free services were such as were not unbecoming the character of a soldier or a freeman to perform; such as to serve under

¹ See: 1 Reeves' Hist. Eng. L. (2d ed.) 37; 3 Id. 297. ³ See: *Ante*, §§ 148, 149.

⁴ See: *Ante*, § 161;

² See: *Ante*, §§ 148, 150–154.

1 Reeves' Hist. Eng. L. (2d ed.) 38.

the lord in wars, to pay a sum of money, and the like. Base services were such as were fit only for peasants and persons of servile rank ; such as to plow the lord's land, to make his hedges, to carry out his dung, or other mean employments. The certain services, either free or base, were such as were stinted in quantity and could not be exceeded on any pretense ; such as to pay a stated annual rent or to plow such a field for three days. The uncertain services depended on unknown contingencies, such as to do military service in person, or pay an assessment in lieu of it, when called upon, which were free services ; or to do whatever the lord should command, which was a base or villein service.¹ From the various combinations of these services arose the four kinds of *lāy* tenures which subsisted in England up to the middle of the sixteenth century, and three of which have been continued to the present day. First, where the services were free, but uncertain, as military services ; which tenure was called chivalry, *servitium militare*, or knight-service. Secondly, where the service was not only free but also certain, as by fealty only, by rent and fealty and the like ; which tenure was called *liberum socagium*, or free socage. These were the only free holdings or tenements ; the others were *villeinous*, or servile. The third was where the services were base in their nature, and uncertain as to both time and quantity, and the tenure being *purum villenagium*, absolute or pure villeinage. And lastly, where the service was base in its nature, but reduced to a certainty, which, though still villeinage, was distinguished from the other by the name of privileged villeinage ;² or it might be still called socage, from the certainty of its service, but degraded by the baseness of such services into the inferior title of villein socage.³

SEC. 198. Same—Regarding free tenures.—Free tenures were of two kinds : tenure by the knight-service,⁴ and

¹ See : 2 Bl. Com. 60 ;

1 Cruise on Real Prop. (4th ed.) 20, § 5.

• *Villenagium privilegiatum*. 1
Cruise, Real Prop. (4th ed.) 20,
§ 6.

² 2 Bl. Com. 60.

⁴ In knight-service, where the tenant died leaving a male heir under twenty-one years, the lord held the land until the heir arrived at full age ; and if he was not

tenure in socage.¹ The tenure by a knight-service was in its institution purely military, and the legitimate outgrowth of the feudal establishment in England.² The services of this tenure were occasional, though not altogether uncertain, each service being confined to forty days. This tenure was subject to relief, aid, escheat, wardship, and marriage. Socage was a tenure by any conventional service not military. Knight-service contained two species of military tenure: grand³ and petit serjeanty.⁴ Under a socage may be ranked two

married, the lord also had the marriage. If it was an heir female, and she was of the age of fourteen or more, the lord had neither the land nor body in ward, because she might marry one who was sufficient to do the service. If she was under fourteen years and unmarried, then he might have the wardship of the land till she was sixteen years old. Concerning this, provisions were made by the statute of Westminster I. and the statute Merton.

See: 1 Reeves' Hist. Eng. L. (2d ed.) 283; 2 Id. 103; 3 Id. 297.

¹ See: 3 Reeves' Hist. Eng. L. (3d ed.) 296.

² Wright, Ten. 140.

³ See: *Post*, § 207.

Grand serjeanty was a holding of the king, and of him only, by such services as ought to be done in proper person to the king: as to carry the king's banner or lance; to lead his army, to be his marshal, carry his sword before him at the coronation, to be his carver, his butler, one of his chamberlains of the receipt of the exchequer, or other service; to find a man for the war was also a grand serjeanty. The same service made the tenure different, accordingly as the land was held of a private person, or of the king. Thus land held by the service of cornage, to wind a horn when the Scots came into the country, was grand serjeanty, if held of the king; yet if held of a private person, it was not grand serjeanty, but knight-service, and drew to it

ward and marriage; for none could hold by grand serjeanty but of the king. 3 Reeves' Hist. Eng. L. (2d ed.) 302.

Grand serjeanty again differed from escuage, inasmuch as those who held by escuage ought to do their service out of the realm; but those who held by grand serjeanty were to perform their service within the realm, as appears by most of the above instances. One who held by grand serjeanty was considered as a tenant by knight-service; for he was liable to ward, marriage, and relief; but no escuage could be demanded of him, unless it was also a tenure in escuage. 3 Reeves' Hist. Eng. L. (2d ed.) 302.

⁴ Tenure by petit serjeanty was now, like grand serjeanty, always a holding of the king, and him only; to yield to him a bow, a sword, a dagger, knife, lance, a pair of gloves, an arrow, or other small things belonging to the war. This service was considered in effect but as socage; for the tenant was not obliged to go, or do anything in person touching the war, but merely to pay yearly certain things to the king. Such were the natures of grand and petit serjeanty at the period of which we are now writing: there are several marks of difference between this description and that given by Bracton; the principal of which is, that both were now required to be held of the king. 3 Reeves' Hist. Eng. L. (2d ed.) 302, 303.

species of tenure : burgage and even gavelkind, though the latter had many qualities different from common socage. Besides these there was a tenure called *frankalmoigne*. This was the tenure by which religious houses and religious persons held their lands, and was so called because lands became thereby exempt from all service except that of prayer and religious duties. Persons holding by this tenure were said to hold in *libera elemosyna*, or in free alms.

SEC. 199. *Villeinage and copyholds*.—It was by these tenures that the *liberi homines* of the kingdom became either tenants by knight-service or in common socage. It is thought that the condition of the lower order of *ceorls*, who among the Saxons were in a state of bondage, received an improvement under this new polity, by being enfranchised and permitted to do fealty for the scanty subsidies which they were allowed to raise on their precarious possessions.¹ They were permitted to retain their possessions on performing the ancient services ; but, by doing fealty, the nature of their possession was, in construction of the feudal law, altered for the better. They were by that advanced in the character of tenants ; and the improved state in which they were placed was called the tenure of villeinage.² Elevated to

¹ Wright, Ten. 216.

² From the time of Henry III. little was said of villeinage, considered either as a condition of society or as a tenure. 1 Reeves' Hist. Eng. L. (2d ed.) 268, 269, 270 ; 3 Id. 308.

For an interesting account of the character and history of "Villein Tenure," see Annals American Academy of Political and Social Science, vol. I., pp. 412-425.

The proper and primary notion of villeinage was, when a person, being villein to a lord, held also of that lord certain lands or tenements at the will of the lord, to do villein services ; as to carry the lord's dung out of the city, or off the manor, to put it upon the land, and similar predial labors. But such have been the revolutions in so-

ciety, and the changes in property, it now very commonly happened that some persons who were free had become possessed of lands burdened with such services ; and such tenure was still called villeinage, though the persons themselves were no villeins. Others, on the contrary, who were villeins, had yet no land at all to hold in lieu of such services, which they were, nevertheless, still bound to perform. Another change that had taken place was, that the villein-services were no longer indeterminate, and wholly at the will of the lord, as in the time of Bracton, but were universally limited (as even in his time they were in the case of one sort of villeins, called villein-sockmen) by the custom that had imme-

this condition and consideration, they were treated with less wantonness by their lords, who, after receiving their fealty, could not in honor and conscience deprive them of their possessions while they performed their services. But the conscience and honor of their lord was their only support. However, the acquiescence of the lord, in suffering the descendants of such persons to possess the land, in the course of years, advanced the pretensions of the tenant in opposition to the absolute right of the lord; till at length this forbearance grew into a permanent and legal interest, which in after-times was called copyhold tenure.¹

morally prevailed in the manor. Thus the universal character of tenure in villeinage was a holding according to the custom of a manor, or otherwise at the will of the lord. With this qualification, the law of villeinage stood mostly on the footing it was on in the age of Bracton. 3 Reeves' Hist. Eng. L. (2d ed.) 308, 309.

As to the persons of villeins, they were either such by prescription, so that a villein and his ancestors had been villeins time out of mind of man, or by acknowledgment and confession in a court of record. Again, villeins were said to be regardant, or in gross. The former were in the nature of the original and proper villeins, namely, such as had belonged, they and their ancestors, to a manor, time out of the memory of man. The latter were such as had been granted by deed from one to another, in consequence of which they became villeins in gross, and not regardant. A man and his ancestors might perhaps have been fiefed of a villein and his ancestors, who were such in gross, beyond the memory of man. A man who confessed himself a villein in a court of record was a villein in gross. A female villein was called a niece. 3 Reeves' Hist. Eng. L. (2d ed.) 309.

Consequences of villeinage.—These were the divisions and species of villeins. Some points of

law, as now understood, concerning this sort of persons, were as follow. If a villein took a free woman to wife, and had issue, the children were considered by the law as villeins; on the other hand, if a niece married a freeman, the issue were free. In this an analogy seems to have been preserved towards our law of descents, which gave a preference to the male line, in direct contradiction to the civil law, which in a similar case pronounced, that *partus sequitur ventrem*. 3 Reeves' Hist. Eng. L. 308-310.

¹ Wright, Ten. 220; 1 Reeves' Hist. Eng. L. (2d ed.) 39.

Villeins could not hold property.—

According to the ancient law of England, a villein being himself a subject of property, whatever property he himself acquired might be taken and held by his owner as an incident or perquisite of his right of property in such villein. Consequently, if an executor had a villein for years, and the villein purchased lands in fee, upon which the executor entered, he should have the whole fee-simple; but because he had the villein in *autre droit*, that is, an executor, it was regarded as assets in his hands (1 Co. Litt. 117, 124). Chancellor BLAND says in *Coombs v. Jordan*, 3 Bland Ch. (Md.) 284; s.c. 23 Am. Dec. 236, 250, that "this is a singular instance in which

SEC. 200. *Tenure in capite*.—In the first instance all lands in England are supposed to have been held immediately of the king, but in consequence of the practice of subinfeudation, which soon grew up and prevailed throughout the kingdom, the king's chief tenants granted out a considerable part of their estates to inferior persons to hold of themselves, by which mesne or middle tenures were created. From this source arose several distinctions as to the manner in which lands were held. Estates might be held of the king or of a subject in two ways, either as of his person or as of the honor or manor of which he was seized. Every holding of the person was, strictly speaking, a *tenure in capite*. Still, that expression was always confined to a holding of the king in right of his crown and dignity, for where lands were held of the person of the subject they were called tenure in gross.¹ This class of tenure was in general so inseparable from a holding of the person of the king, that if lands were granted by the king, without reserving any tenure, the lands, by operation of law, were held of the king *in capite*, because that tenure was the most advantageous to the crown.²

SEC. 201. *Tenure de honore*.—Where an honor or barony, originally created by the crown, returned to the king by forfeiture or *escheat*, the persons who held their lands of such honor or barony became tenants to the crown, and were said to hold of the king *ut de honore*. This distinction of tenure was important to those who held of such owners or baronies. By an article of the *Magna Charta*

lands held in fee-simple might become assets in the hands of an executor; and as such liable by the common law to be taken and sold for the payment of the debts of the deceased to whose estate the perquisite had accrued. But as the villeinage has long since ceased in England, this law has certainly become obsolete there; yet, I can see no reason why the same law might not be applied in Maryland as to any real estate which might be conveyed to a slave with the consent of his

master, who held him as an executor or administrator."

Citing: Hall v. Mullin, 5 Har. & J. Md. 190;

Cunningham v. Cunningham, Cam. & N. (N. C.) 353;

Bynum v. Bostick, 4 Desau. 266.

¹ 1 Co. Inst. 108a;

Estvick's Case, 12 Co. 135;

, Fitz. N. B. 5.

² Lowe's Case, 9 Co., 122;

1 Co. Inst. 108a;

1 Cruise, Real Prop. (4th ed.) 21, §§ 7-9;

Statutes 1 Edw. VI., c. 4.

of King Henry III. it was declared that persons holding of honors escheated, and in the king's hands, should pay no more relief nor perform any more services to the king, than they should to the baron if it were in his hands.¹ It follows that where lands which were held of the king as of the honor or manor, and escheated to the crown, the tenure was not *in capite*; and where lands were granted by the king to hold of him, as of his manor, this was not a tenure *in capite*.²

SEC. 202. **Tenure by knight-service.**—The first and most honorable kind of tenure was by knight-service, or *servitium militare*. To constitute this class of tenure, a determined quantity of land was necessary, which was called knight's fee, or *feudum militare*, the measure of which has been estimated at eight hundred acres of land by some, and by others at six hundred and eighty acres.³

SEC. 203 **Same—Duties imposed.**—Every person holding by knight-service was obliged to attend his lord to the wars, if called upon, on horseback, armed as a knight, for forty days in every year, at his own expense. This attendance was his *redditus*, or return for the land he held. If he had only half a knight's fee, he was only bound to attend for twenty days, and so on, in proportion.⁴

SEC. 204. **Same—Scutagium.**—The personal attendance in knight's service growing troublesome and inconvenient, the tenants found means of compounding for it; first by sending others in their stead, and afterwards by making a pecuniary satisfaction to their lords in lieu of it. At last this pecuniary satisfaction was levied by assessments, at so much for every knight's fee; from whence it acquired the name of *scutagium*, or *servitum*

¹ See : 2 Co. Inst. 64.

² 1 Cruise, Real Prop. (4th ed.) 22, § 11.

³ Lord Coke was of the opinion that a knight's fee was estimated according to the quality and

not the quantity of the land; that but twenty pounds a year was the qualification of a knight. 1 Co. Inst. 69a.

⁴ 1 Cruise, Real Prop. (4th ed.) 23, § 14.

scuti; *scutum* being then a well-known name for money, and in Norman French it was called *escuage*.¹

SEC. 205. **Same—Fruits of tenure by knight-service.**—The tenure by knight service, being the most honorable, was also the most favorable to the lord, for it drew after it these five fruits or consequences, as inseparably incident to it; namely, aids, relief, primer seisin, wardship, and marriage.²

SEC. 206. **Tenure by escuage.**—Military service due from tenants underwent an alteration in the reign of Henry II. The attendance of the knight for only forty days was inadequate to the purposes of war, and the short service was highly inconvenient to the tenant, who perhaps came from the northern parts of the kingdom to perform his service in a province of France. Sensible of these inconveniences, in the fourth year of his reign, Henry II. devised a commutation for these services, to which was given the name of *escuage* or *scutage*. He published an order, that such of his tenants as would pay a certain sum, should be exempted from service, either in person or by deputy, in the expedition he then meditated against Tholouse. This sort of compromise was afterwards continued; and tenure by escuage became a new species of military tenure, springing from the advantage some tenants by knight-service had taken of this proposition made by the king.³

SEC. 207. **Tenures by grand serjeanty.**—The species of tenure called grand serjeanty, heretofore referred to,⁴ was considered superior to knight-service; whereby the tenant was bound, instead of serving the king generally in his wars, to do him some special honorary service in person. Thus where the king gave lands to a man to hold of him by the service of being marshal of his host, or marshal of England, or high steward of England, or

¹ Mad. Exch. 652;

1 Cruise, Real Prop. (4th ed.) 23,
§ 15.

* 1 Cruise, Real Prop. (4th ed.) 24,
§ 22.

³ 1 Reeves' Hist. Eng. L. (4th ed.)
40;

Spelm. Cod. in Wilk. Leg., p. 321.

⁴ See: *Ante*, § 198.

the like, these were grand serjeanties. So if the lands were given to a man to hold by the service of carrying the king's sword at his coronation, or being his carver or butler, these were called services of honor, held by grand serjeanty.¹

SEC. 208. **Consequences of tenure.**—The polity of tenures tended to restrict men in the use of that which, to all outward appearance, was their own. When the land of the Saxons was converted from allodial to feudal, as above described, it could no longer be aliened without the consent of the lord, nor could it be disposed of by will. These, with other shackles, sat heavy upon the possessors of land; nor were at last removed, except by frequent and gradual alterations, during a course of several centuries. The history of these alterations in the descent, alienation, and other properties of feuds, is wrapped in obscurity during this early period.²

SEC. 209. **Statute Quia Emptores.**—In the first years of the feudal law a private individual might, by grant of land, have created a tenure as of his person, or as of any honor or manor whereof he was seized; and if no tenure was reserved, the feoffee would hold of the feoffor by the same services by which the feoffor held over. From this doctrine there sprang several attendant inconveniences, to remedy which, in the reign of King Edward I., the statute *Quia Emptores terrarum* was passed, which directs that upon all sales or feoffments of lands, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee of whom such feoffor himself held. These provisions did not extend to the king's tenants *in capite*, and the law respecting them was regulated by the statute of *Prærogativa Regis*,³ by which all subinfeudations previous to the reign of Edward I. were confirmed, and all subsequent to that date left open to the king's prerogative.⁴

¹ Fleta, lib. I., c. 10;
1 Co. Inst. 106a, 107a;
Dyer, 285b;

1 Cruise, Real Prop. (4th ed.) 27,
§ 34.

² 1 Reeves' Hist. Eng. L. (2d ed.) 40.
³ 17 Edw. II., c. 6, and 34 Edw. III.,
c. 13.

⁴ 1 Co. Inst. 98b; 2 Co. Inst. 501;
1 Cruise, Real Prop. 22, § 12.

SEC. 210. **Homage—Ceremony and importance of.**—Tenure by knight-service had all the marks of a strict and regular feud, as heretofore set out, including words of pure donation,¹ transfer by investiture,² or delivering of corporeal possession of the land, and was perfected by homage³ and fealty.⁴ Secondly, every person holding a feud by this tenure was bound to do homage to his lord, which consisted in his kneeling before him and saying: "I become your man from this day forward, of life and limb, and of earthly worship; and unto you shall be true and faithful, and bear you faith for the tenements that I claim to hold of you; saving the faith that I owe unto our sovereign lord the king." And the lord being seated, kissed him.⁵ Homage was incident to knight-service because it concerned service in war. It had to be done in person and not by proxy or substitute; and the performance of it, where it was due, materially concerned the welfare both of the lord and the tenant. To the lord it was of great consequence because until he had received homage of the heir, he was not entitled to the wardship of his person or estate. To the tenant homage was equally important, because, when received, it bound the lord to acquittal and warranty; that is, to keep the tenant free from distress, entry, or other molestation for services due to the lord paramount, and to defend his title to the land against all strangers.⁶

SEC. 211. **Fealty—An incident of feudal tenure.**—Another incident of feudal tenure was fealty, which has been heretofore adverted to.⁷ All tenants by knight service

¹ See: *Ante*, § 165.

² See: *Ante*, § 185.

³ See: *Ante*, § 174.

⁴ See: *Ante*, § 173.

⁵ 1 Cruise, Real Prop. (4th ed.) 23, § 17;

Litt. § 85;

1 Reeves' Hist. Eng. L. (2d ed.) 277; 3 Id. 306.

See: *Ante*, § 174.

⁶ 1 Cruise, Real Prop. (4th ed.) 24, § 18.

The words *homagium* and *dominium* are directly opposed to each other, as expressing the respect-

ive situations and duties of the lord and vassal; which, in conformity to the principle of the feudal law, were reciprocal. Thus Glanville says. *Mutua quidem debet esse domini et homagii fidelitatis connexio, ita quod quantum homo debet domino, ex homagio; tantum illi debet dominus, præter solam reverentiam.* Glanv., lib. IX., c. 4.

⁷ See: *Ante*, § 200.

1 Reeves' Hist. Eng. L. (2d ed.) 277; 3 Id. 306.

were subject to fealty, which is described by Littleton as follows : “ When a freeholder doth fealty, he shall hold his right hand upon a book and shall say thus :—Kncw you this, my lord, that I shall be faithful and true unto you, and faith to you shall bear for the lands which I claim to hold of you, and that I shall lawfully do to you the customs and services which I ought to do at the time assigned. So help me God and his saints.” He thereupon kissed the book.¹ Fealty and homage were perfectly distinct from each other. Although fealty was an incident of homage, and usually accompanied it, yet it might exist by itself, being something done when homage would have been improper. Homage was inseparable from fealty, but fealty was separable from homage.² Homage and fealty were the great bonds between lord and tenant in feudal times, and when once established, were too sacred to be altered in substance.³

SEC. 212. **Aids of the ancient English tenure.**—The aids of the ancient English tenure were the same as those established on the continent heretofore alluded to ;⁴ namely, to make the lord’s eldest son a knight, to marry the lord’s eldest daughter, and to ransom the lord’s person when taken prisoner. Aids of this kind were originally uncertain ; but by the statute of Westminster I. the aids of inferior lords were fixed at twenty shillings for every knight’s fee, for making the eldest son a knight, or marrying his eldest daughter. The same thing was done in regard to the king’s tenants *in capite* by a subsequent statute.⁵ The aid for the ransom of the lord’s person always remained uncertain from the very nature of the ransom.⁶

SEC. 213. **Reliefs—Sums paid on investiture.**—The practice of paying a sum of money by the heir of the deceased tenant to the lord of his father on investiture upon

¹ Litt. § 91.

² 1 Co. Inst. 68a;

Wright, Ten. 55n.

³ 3 Reeves’ Hist. Eng. L. (2d ed.) 306.

⁴ See : *Ante*, § 176.

⁵ Stat. 25 Edw. III., c. 11.

⁶ 2 Inst. 231.

See : Aids to the King, 13 Co. 26;
1 Cruise, Real Prop. 24, §§ 23, 24.

descent, heretofore alluded to,¹ was adopted into the early English tenures from the laws of Normandy, where reliefs were reduced to a certainty at the time when the customs of that province were collected, before they were transplanted on to English soil by William the Conqueror.²

SEC. 214. **Primer seisin—Definition.**—Under the ancient English tenures, where the king's tenant died seized, the crown was entitled to receive of the heir, if he were of full age, an additional sum of money, called *primer seisin*. When this right was first established is not known; but we find it mentioned in the statute of Marlbridge,³ and also in the statute *De Prerogativa Regis*,⁴ and it was finally settled that the king should receive on this account one whole year's profit of the lands.⁵ This was incident only to the king's tenant *in capite*, and was not levied against those who held of inferior or mesne lords. Blackstone says that it seems to have been little more than an additional relief, founded on the principle of the ancient law of feuds, by which, immediately upon the death of a vassal, the lord was entitled to enter, and take seisin or possession of the land, by way of protection against intruders, till the heir appeared to claim it, and receive investiture; during which interval the lord was entitled to the profits.⁶

SEC. 215. **Wardship—Distinction between male and female wards.**—These payments were to be made only when the heir of the tenant was of full age. Being male, if under the age of twenty-one, or being a female under the age of fourteen, the lord was entitled to have in custody the body and lands of the heir, without being accountable for the profits, till the male attained the age of twenty-

¹ See: *Ante*, §§ 158, 159.

² 1 Cruise, Real Prop. (4th ed.) 25, § 25;

Grand Const., c. 24, fol. 56b.

³ 52 Hen. III., c. 16. A portion of this statute reads as follows: De hæredibus autem qui de domino rege tenent in capite, sic observandum est; quod dominus primam inde habeat seisin-

am, sicut prisus inde habere consuevit.

⁴ 17 Edw. II., c. 6, and 34 Edw. III., c. 13.

⁵ 1 Cruise, Real Prop. (4th ed.) 25, § 26;

2 Inst. 9, 134;

Stat. 17 Edw. II., c. 3.

⁶ 2 Bl. Com. 66.

one and the female that of sixteen. This custody was known as wardship.¹ The doctrine of wardship was taken

¹ The writ of right of ward was abolished by statutes 3 & 4 Will. IV., c. 27, § 36.

Heirs were considered in different lights according as they were of full age, or not. An heir of full age might hold himself in possession of the inheritance immediately upon the death of the ancestor; and the lord, though he might take the fee together with the heir into his hands, was to do it with such moderation as not to cause any disseisin to the heir; for the heir might resist any violence, provided he was ready to pay his relief and do the other services. Where the heir to a tenant holding by military service was under age, he was to be in custody of his lord till he attained his full age, which, in such tenure, was when he had completed the twenty-first year. The son and heir of a sokeman was considered as of age when he had completed his fifteenth year: the son of a burgess, or one holding in burgage tenure, was esteemed of age, says Glanville, when he could count money and measure cloth, and do all his father's business with skill and readiness. The lord, when he had custody of the son and his heir, and of his fee, had thereby, to a certain degree, the full disposal thereof; that is, he might, during the custody, present to churches, have the marriage of women, and take all other profits and incidents which belonged to the minor and his estate, the same as he might in his own; only he could make no alienation which would affect the inheritance. The heir was, in the mean time, to be maintained with a provision suitable to his estate; the debts of the deceased were to be paid in proportion to the estate and time it was in custody of the lord, who was not by such liens to be entirely deprived of his benefit by the custody: with that qualification, however, lords were

bound *de jure* to answer for debts of the ancestor. 1 Reeves' Hist. Eng. L. (2d ed.) 113, 114.

The age of female wards was contended by some to be at fifteen years complete, both in military and socage tenure; for, as the former, they said, that she might have a husband who was equal to perform the military service; and therefore she might, with propriety, be reckoned of age before she was twenty-one years of age. But this opinion is combated by Bracton, who says that the same principle might make her of age at an earlier period; and he therefore lays it down, that there is no distinction between male and female wards, in the respective tenures; and that it was only in the latter that females (as we have before seen of males) were to be considered as of age at fifteen years; at which time, says Bracton, p. 86b, a woman is able to manage her domestic concerns, which is a similar description as that given by Glanville, and adopted by Bracton, of the qualifications of an heir in burgage tenure; and the latter author mentions fifteen as the proper age for the infancy of a tenant in socage to cease, because he was then able to attend to affairs of agriculture. 1 Reeves' Hist. Eng. L. (2d ed.) 284.

It is laid down positively by Glanville, that if a person married his daughter and heiress without the assent of his lord, he should forfeit his inheritance; and that a widow who married without her lord's assent should in like manner forfeit her dower. These two points were recognized by Bracton as remnants of the old law, which had gone out of use. We have before seen what notice was taken of this cruel piece of law by *Magna Charta*; and it was now laid down by Bracton, that in both cases the lord was only entitled to a penalty; the measure of which, however,

from the customs of Normandy, in which it was known as *garde noble*.¹ Among the hardships which arose from the transplanting of the feudal law from Normandy into England, wardship was greatest. The first chapters of *Magna Charta* regulated the conduct of the lords in the exercise of their privilege of wardship, and restrained them from wasting and destroying the estates of their wards.²

SEC. 216. **Marriage—Male and female wards.**—Where the heir of the deceased tenant was a female under the age of fourteen, under the ancient English tenures such heir was directed to be married with the advice and consent of the lord and her relations, and to secure the consent of the lord a sum of money was usually required.³ Soon after the setting up of the feudal customs the king and great lords established a right to consent to the marriage of their male wards as well as of the female; and afterwards the right of selling the ward in marriage, or else of receiving the price of such sale, was expressly declared by the statute of Merton.⁴

he does not mention. Bract. 88; 1 Reeves' Hist. Eng. L. (2d ed.) 284, 285.

¹ See: Basnage, vol. I., p. 326; Grand Coust., c. 33, fol. 53.

² 1 Cruise, *Real Prop.* (4th ed.) 26, §29;

1 Reeves' Hist. Eng. L. (2d ed.) 235; 2 Id. 110.

³ *Magna Charta* on marriage. — In the charter of King Henry I. that monarch engages to waive that prerogative; this being disregarded, it was provided by the first draught of the *Magna Charta* of King John, that heirs should be married without disparagement, by the advice of their relations. But in the Charter of King Henry III. the clause is merely that heirs shall be married without disparagement. Grand Coust., c. 33, fol. 55, c.

⁴ 20 Hen. III., c. 6.

The statute of Merton contains eleven chapters, which are arranged with as little order as those of *Magna Charta*. To

secure lords in this valuable casualty, it was now further ordained, that when the heirs were forcibly led away, or detained by their parents or others, in order to marry them, every layman who should so marry an heir should restore to the lord who was a loser thereby the value of the marriage; that his body should be taken and imprisoned till he had made such amends; and further, till he had satisfied the king for the trespass. This provision related to heirs within the age of fourteen: as to those of fourteen, or above, and under full age, if such an heir married of his own accord without his lord's license, to defraud him of his marriage, and his lord offered him reasonable and convenient marriage without disparagement; it was ordained that the lord should hold the land beyond the term of his age of twenty-one years, till he had received the double value of the

SEC. 217. **Abolition of military tenures.**—Military tenures, and the consequences dependent upon them, were discontinued during the Civil Wars in the reign of King Charles I., and during the time of the Commonwealth, and were entirely removed at the Restoration, but a statute of Charles II.,¹ which provided that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values of forfeitures of marriages, by reason of any tenure of the king, or others, be totally taken away; that all fines for alienations, tenures by homage, knight-service, and escuage, and also aids for marrying the daughter, or knighting the son, and all tenures of the king *in capite*, be likewise taken away; that all sorts of tenures held of the king or others be turned into free and common socage, save only tenures in frankalmoigne, copyholds, and the honorary services of grand serjeanty; and that all tenures which should be created by the king, his heirs or successors in future, should be in free and common socage.²

marriage, according to the estimation of lawful men, or according to the value of any marriage that might have been *bonâ fide* offered, and proved of a certain value in the king's court. 1 Reeves' Hist. Eng. L. (2d ed.) 260, 261.

Same—Protection of infants against lords.—Thus far the interest of lords was secured. The following provision was to protect infants against abuse of this authority in their lords. If any lord married his ward to a villein or burgess where she would be disparaged, the ward being within the age of fourteen, and so not able to consent, then, upon the complaint of friends, the lord was to lose the wardship till the heir came of age; and the profit thereof was to be converted to the use of the heir, under the direction of her

friends. But if the heir was fourteen years old and above, so as to be by law of capacity to consent to the marriage, then no penalty was to ensue. Again, if an heir, of whatever age, would not consent to marry at the request of his lord, he was not to be compelled; but when he came of age, and before he received his land, he was to pay his lord as much as any would have given for the marriage and that, whether he would marry or not; for as the marriage of an heir within age was a lawful profit to the lord, he was not to be wholly deprived of it, but was to be recompensed in one way or another. *Magna Charta*, c. 6; 1 Reeves' Hist. Eng. L. (2d ed.) 261.

¹ 12 Charles II., c. 24.

² 1 Cruise, Real Prop. (4th ed.) p. 28, § 35.

CHAPTER IV.

TENURE IN THE UNITED STATES.

- SEC. 218. Allodial tenures.
SEC. 219. Doctrine of tenure in the United States—Socage tenures.
SEC. 220. Same—Discovery foundation of title.
SEC. 221. Same—Indian titles.
SEC. 222. Right of eminent domain.
SEC. 223. Restriction as to use.
SEC. 224. Same—Foundation of the doctrine.
SEC. 225. Same—Application of maxim.

SECTION 218. Allodial tenures. — Although lands in the United States are held unencumbered by any feudal burden,¹ yet the idea of tenure pervades, to a considerable degree, the law of real property in this country. Although land is essentially allodial, and every tenant in fee-simple has an absolute and unqualified title and dominion over it, yet in technical language his estate is said to be in fee-simple, and the tenure free and common socage,—words which imply a feudal relation, although such a relation has ceased to exist in any form in this country, and in several of the states the lands have been

¹ See : *Matthews v. Ward*, 10 Gill. & J. (Md.) 448 ;

Lorman v. Benson, 8 Mich. 18 ;
s.c. 77 Am. Dec. 435 ;

Van Rensselaer v. Hays, 19 N. Y. 68, 81 ; s.c. 75 Am. Dec. 278 ;

Morgan v. King, 30 Barb. (N. Y.) 9, reversed on another point in 35 N. Y. 454 ;

Cornell v. Lamb, 2 Cow. (N. Y.) 652 ;

Bradley v. Dwight, 62 How. (N. Y.) Pr. 300 ;

Cook v. Hammond, 4 Mas. C. C. 478 ;

4 Kent Com. (13th ed.) 24 ;

1 Story, Const. (4th ed.) 160.

"Fealty is not, in fact, due upon

any tenure in New York. It is altogether fictitious. It is retained by statute as to lands holden in socage, and abolished as to all grants made directly from the state, but the right to distrain is not impaired by the statute. It remains as at common law, by which fealty was incident to every tenure, and the right of distress incident to fealty ; and even if the latter be taken away, yet, where it would have existed at common law, distress may be made."

Cornell v. Lamb, 2 Cow. (N. Y.) 652.

declared by statute to be allodial.¹ In England there is no allodial tenure, because all the land is held mediately or immediately of the king. The words tenancy in fee-simple are there very properly used to express the most absolute dominion which a man can have over his real property.² In this country, in theory at least, all valid individual title to land is to be traced to a grant from the crown ;³ because, prior to the Revolution, every acre of land in this country was held mediately or immediately by the grants from the crown.⁴ Since the Revolution, lands in this country are held either from a state government or from the government of the United States.⁵

SEC. 219. **Doctrine of tenure in the United States—Socage tenures.**—In the United States the tenure of lands has always been free socage tenure, in which the lands were held by a fixed and determined service, which was neither military nor in the power of the lord to vary at his pleasure. It was the certainty and pacific nature of the service or duty which made this species of tenure such a safeguard against the wanton exactions of the feudal lords, and rendered it of such inestimable value to the ancient English. They regarded it as of the utmost importance that their tenures be changed by a knight-service into tenure by socage. Socage tenures were, as we have heretofore seen,⁶ of feudal origin ; and they retain some of the leading properties of feuds. But most of the feudal incidents and consequences of socage

¹ *Matthews v. Ward*, 10 Gill. & J. (Md.) 443 ;
Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 92 ;
Wallace v. Harmstad, 44 Pa. St. 492 ;
Arrison v. Harmstad, 2 Pa. St. 191 ;
Barker v. Dayton, 28 Wis. 367.

² 2 Bl. Com. 45 ;
 3 Kent Com. (13th ed.) 390.

³ *Chisholm v. Georgia*, 2 U. S. (2 Dall.) 419, 470 ; bk. 1 L. ed. 440, 462.

⁴ *Chisholm v. Georgia*, 2 U. S. (2 Dall.) 419, 470 ; bk. 1 L. ed. 440, 462.

See : *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 68 ;

Commonwealth v. Charleston, 18 Mass. (1 Pick.) 180 ; s.c. 11 Am. Dec. 161.

⁵ *De Armas v. Mayor of New Orleans*, 5 La. 132 ;
Johnson v. Hart, 12 John. (N. Y.) 77 ; s.c. 7 Am. Dec. 280 ;
Jackson v. Ingraham, 4 John. (N. Y.) 163 ;
Chisholm v. Georgia, 2 U. S. (2 Dall.) 419, 470 ; bk. 1 L. ed. 440, 462.

See : *Barlow v. Lambert*, 28 Ala. 704 ; s.c. 65 Am. Dec. 374 ;

People v. Van Rensselaer, 8 Barb. (N. Y.) 180, 189 ; s.c. 9 N. Y. 291.

⁶ See : *Ante*, § 201.

tenure have been expressly abolished by statute in this country.¹ The only feudal fictions and services which are retained in any part of the United States system is the feudal principle that the lands are held of some superior or lord to whom the obligation of fealty and to pay a determined rent are due. Where this doctrine prevails, the lord paramount of all socage land is none other than the people of the state, to whom, and them only, the duty of fealty was or is to be rendered.²

SEC. 220. **Same—Discovery foundation of title.**—We have already seen,³ that the title to all the lands in America was originally held by England and the other nations of Europe by what was denominated title by discovery.⁴ The European nations, making conquests on the American continent, asserted the exclusive right of granting the soil to individuals, subject only to the Indian right of occupancy ;⁵ and this principle was adopted by the people of the United States after attaining their sovereign independence.⁶

SEC. 221. **Same—Indian titles.**—From this theory of the foundation of the title to the lands in the United States, it follows that the Indian title, being simply that of occupation, is subordinate to the absolute ultimate title of the government.⁷ The Indian inhabitants of this

¹ In Connecticut they were abolished by statute in 1793, and the statutes as late as 1833, p. 389, declare that "Every proprietor in fee-simple of lands" shall have an absolute and direct dominion and property in the same ; and they are declared to be "vested with an allodial title."

In New York they were abolished by the act of 1787, and were entirely annihilated by the New York Revised Statutes.

See : 3 Kent Com. (14th ed.) 378.

² 3 Kent Com. (14th ed.) 510.

³ See : *Ante*, § 12.

⁴ See : *People v. Folsom*, 5 Cal. 373 ;

Jackson v. Ingraham, 4 John. (N. Y.) 163 ;

Rogers v. Jones, 1 Wend. (N. Y.) 237 ; s.c. 19 Am. Dec. 493 ;

United States v. Cambuston, 61 U. S. (20 How.) 59 ; bk. 15 L. ed. 828 ;

Martin v. Waddell's Lessee, 41 U. S. (16 Pet.) 367 ; bk. 10 L. ed. 997 ;

Johnson v. McIntosh, 21 U. S. (8 Wheat.) 543 ; bk. 5 L. ed. 681.

⁵ 4 *Johnson v. McIntosh*, 21 U. S. (8 Wheat.) 543 ; bk. 5 L. ed. 681.

4 *Johnson v. McIntosh*, 21 U. S. (8 Wheat.) 543 ; bk. 5 L. ed. 681.

⁶ See : *Brashear v. Williams*, 10 Ala. 630 ;

Brown v. Wenham, 51 Mass. (10 Met.) 495.

Strong v. Waterman, 11 Paige Ch. (N. Y.) 607 ;

country, not having an absolute title in their possessions, are of course incapable of transferring a fee-simple title in land to another.¹

SEC. 222. **Right of eminent domain.**—Although the title to lands in this country is absolute, and the owners thereof possess the whole title, yet every person who holds land in this country holds it subject to the right and power of the sovereign state in which it is located, or of the federal government, to appropriate it to particular uses, for the purpose of promoting the general welfare;² that is, the land must be surrendered to the government, either in whole or in part, when public necessities, evinced according to the established forms of law, shall demand such surrender.³ This right upon the part of the government, to require a surrender of individual property for the common welfare, is founded upon the principle that individual interests must be subservient to those of the public, and must yield when the public exigency requires;⁴ and all grants of land made by a state or by an individual are subject to the right of eminent domain, unless that right is specially relinquished.⁵ The question of the right of the state to the exercise of the power of eminent domain will be hereafter fully discussed.

Johnson v. McIntosh, 21 U. S. (8 Wheat.) 543; bk. 5 L. ed. 681.

See: *Stephens v. Westwood*, 20 Ala. 275;

Fellows v. Lee, 5 Den. (N. Y.) 628.

¹ See: *Clark v. Williams*, 36 Mass. (19 Pick.) 500;

Goodell v. Jackson, 20 John. (N. Y.) 693; s.c. 11 Am. Dec. 351;

Johnson v. McIntosh, 21 U. S. (8 Wheat.) 543; bk. 5 L. ed. 681.

² See: *Gilmer v. Limepoint*, 18 Cal. 229;

Crosby v. Hanover, 36 N. H. 404;

People v. Smith, 21 N. Y. 595;

Taylor v. Porter, 4 Hill. (N. Y.) 140; s.c. 40 Am. Dec. 274;

Bailey v. Miltenberger, 31 Pa. St. 37;

Kohl v. United States, 91 U. S.

(1 Otto) 367; bk. 23 L. ed. 449.

³ *People v. Mayor of New York*, 32 Barb. (N. Y.) 102.

⁴ See: *Enfield Toll Bridge Co. v. Hartford R. Co.*, 17 Conn. 454; s.c. 44 Am. Dec. 556;

Walker v. Gatlin, 12 Fla. 15;

Weir v. St. Paul, S. & T. F. R. Co., 18 Min. 155, 163;

Ash v. Cummings, 50 N. H. 591;

Heyward v. New York, 7 N. Y. 314, 325;

Varick v. Smith, 5 Paige Ch. (N. Y.) 137; s.c. 28 Am. Dec. 417;

Beekman v. Saratoga & S. R. Co., 3 Paige Ch. (N. Y.) 45; s.c. 22 Am. Dec. 679.

⁵ See: *Illinois & Mich. Canal Co. v. Chicago*, 14 Ill. 314, 334;

California Tel. Co. v. Alta Tel. Co., 22 Cal. 398;

Matter of N. Y. & H. R. R. Co., 77 N. Y. 248.

SEC. 223. **Restriction as to use.**—Although the owner of land is supposed to have the whole title, yet it is held subject, not only to the power of eminent domain, but also on the condition, and occupied with the tacit understanding, that the owner shall so deal with it as not to cause injury to the person or property of another, or to the rights or interests of the community.¹ This is on the well-known maxim of the common law, *sic utere tuo ut alienum non lædas*, so use your own as not to injure another's property.²

¹ *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55;

Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 86.

² Kerr's "Adjudicated Words, Phrases, and Applied Maxims."

See: *Rouse v. Martin*, 75 Ala. 515; s.c. 51 Am. Rep. 463;

Bannon v. State, 49 Ark. 167; s.c. 4 S. W. Rep. 655;

Martin v. Ogden, 41 Ark. 193;

St. Louis, I. M. & G. R. Co. v. Hecht, 38 Ark. 367;

Ex parte Koser, 60 Cal. 214;

Union Pac. Co. v. De Busk, 12 Colo. 294; s.c. 20 Pac. Rep. 752;

3 L. R. A. 350;

Fallon v. Schilling, 29 Kan. 292, 295; s.c. 4 Am. Rep. 642;

Branson v. Labrot, 81 Ky. 641;

Mayor of Baltimore v. Warren Mfg. Co., 59 Md. 106;

Boyd v. Conklin, 54 Mich. 583; s.c. 52 Am. Rep. 831; 20 N. W. Rep. 595;

Paterson v. Wabash, St. L. & Pac. R. Co., 54 Mich. 91; s.c. 19 N. W. Rep. 761;

People's Ice Co. v. Steamer Excelsior, 44 Mich. 229; s.c. 6 N. W. Rep. 636;

Krueger v. Farrant, 29 Minn. 385, 388; s.c. 43 Am. Rep. 223; 13 N. W. Rep. 158;

Keefe v. Milwaukee & St. P. R. Co., 21 Minn. 207; s.c. 18 Am. Rep. 393; 2 Cent L. J. 170;

Morgan v. Cox, 22 Mo. 373; s.c. 66 Am. Dec. 623; 1 Thomp. on Neg. 238;

Boynton v. Longley, 19 Nev. 69; s.c. 6 Pac. Rep. 437;

Garland v. Towne, 55 N. H. 55; s.c. 20 Am. Rep. 164; 1 Thomp. on Neg. 333, 336;

Lord v. Carbon Iron Co., 38 N. J. Eq. (11 Stew.) 452, 458;

Demarest v. Hardham, 34 N. J. Eq. (7 Stew.) 469, 474;

Gawtry v. Leland, 31 N. J. Eq. (4 Stew.) 385, 390;

Thomas Iron Co. v. Allenton Mining Co., 28 N. J. Eq. (1 Stew.) 77, 85;

Ross v. Butler, 19 N. J. Eq. (4 C. E. Gr.) 294, 298; s.c. 97 Am. Dec. 654;

Davidson v. Isham, 9 N. J. Eq. (1 Stock.) 186, 189;

State v. Wheeler, 44 N. J. L. (15 Vr.) 88, 91;

Weller v. Snover, 42 N. J. L. (13 Vr.) 341, 344;

McGuire v. Grant, 25 N. J. L. (1 Dutch.) 356, 361; s.c. 62 Am. Dec. 49;

Delaware & R. Canal Co. v. Lee, 23 N. J. L. (2 Zab.) 243, 247;

Sinnickson v. Johnson, 17 N. J. L. (2 Harr.) 129, 144; s.c. 34 Am. Dec. 184;

Buffalo East Side R. Co. v. Buffalo St. R. Co., 111 N. Y. 132, 141; s.c. 19 N. Y. S. R. 574;

Edwards v. N. Y. & H. R. Co., 98 N. Y. 245; s.c. 50 Am. Rep. 659;

Losee v. Buchanan, 51 N. Y. 476; s.c. 10 Am. Rep. 623; 1 Thomp. on Neg. 47, 51, aff'g 42 How. Prac. (N. Y.) 385; rev'g 61 Barb. (N. Y.) 86;

Hay v. Cohoes Co., 2 N. Y. 159; s.c. 51 Am. Dec. 279; 1 Thomp. on Neg. 72;

Tillinghast v. Troy & Boston R. Co., 48 Hun (N. Y.) 420, 425;

Panton v. Holland, 17 John. (N. Y.) 92; s.c. 8 Am. Dec. 369; 1 Thomp. on Neg. 249;

Worthington v. Parker, 11 Daly (N. Y.) 545, 551;

SEC. 224. **Same—Foundation of doctrine.**—This condition grows out of the nature of well-ordered civil society. All property, no matter how absolute and unqualified may be the title, is held under the implied condition that its use is to be so regulated that it shall not be injurious to an equal enjoyment of others, having an equal right to the enjoyment of their property, nor injurious to the rights of the community. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.¹ This is very different from the right of eminent domain,—the right of a government to take and appropriate private property to public use, whenever

Bell v. Norfolk S. R. Co., 101 N. C. 21; s.c. 7 S. E. Rep. 467;
 State v. Yopp, 97 N. C. 477; s.c. 2 Am. St. Rep. 305; 2 S. E. Rep. 458;
 Lawton v. Giles, 90 N. C. 381;
 Fulmer v. Williams, 123 Pa. St. 191; s.c. 15 Atl. Rep. 726; 1 L. R. A. 603; 22 W. N. C. 269; 46 Leg. Int. 37;
 Pennsylvania Coal Co. v. Saunders, 113 Pa. St. 126; s.c. 57 Am. Rep. 445; 6 Atl. Rep. 453; 4 Cent. Rep. 481;
 Pennsylvania Lead Co.'s Appeal, 96 Pa. St. 127; s.c. 42 Am. Rep. 534;
 Hydraulic Works Co. v. Orr, 83 Pa. St. 332;
 Stephens v. Martins (Pa.), 17 Atl. Rep. 242; s.c. 23 W. N. C. 475; 46 Leg. Int. 311;
 Hudson v. Dismukes, 77 Va. 242;
 Davis v. Central Vt. R. Co., 55 Vt. 93; s.c. 45 Am. Rep. 590;
 Brunswick-Balke Collender Co. v. Rees, 69 Wis. 442; s.c. 34 N. W. Rep. 732;
 Donnelly v. Decker, 58 Wis. 461, 469; s.c. 46 Am. Rep. 637; 17 N. W. Rep. 389;
 Woodruff v. North Bloomfield Gravel Mining Co., 18 Fed. Rep. 753, 809;
 Dean v. McCarthy, 2 Upp. Can.

Q. B. 448; s.c. 1 Thomp. on Neg. 116;
 Grocers' Co. v. Donne, 3 Bing. N. C. 34, 41; s.c. 32 Eng. C. L. 25, 29;
 Humphries v. Brogden, 12 Q. B. 739; s.c. 64 Eng. C. L. 738; 1 Thomp. on Neg. 263, 266;
 Nichols v. Marshland, L. R. 10 Exch. 255; s.c. 44 L. J. (Exch.) 134; 23 W. R. 693; 33 L. T. N. S. 265; 14 Moak's Eng. Rep. 538; 2 Cent. L. J. 523; 1 Thomp. on Neg. 186, § 4; s.c. on App. 2 Exch. Div. 1; 46 L. J. 174; 19 Moak's Eng. Rep. 335; 4 Cent. L. J. 319;
 Crowhurst v. Amersham Burial Board, 4 Ex. D. 5; s.c. 48 L. J. C. L. 109; 39 L. T. N. S. 355; 27 W. R. 95;
 Fletcher v. Rylands, 3 Hurl. & Colt. 774; s.c. L. R. 1 Exch. 265; 1 Thomp. on Neg. 2; *sub nom.* Rylands v. Fletcher, L. R. 3 H. L. 330;
 Cooley, Const. Lim. (5th ed.), § 708;
 Pollock on Torts, 93, 109;
 Pom. Mun. L. (2d ed.), § 915;
 1 Smith's Lead. Cas. (9th Am. ed., 499, n.
¹ Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 85.

the public exigency requires it ; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the public power, the power vested in the Legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be good for the welfare of the commonwealth, and of the subjects of the same.¹

SEC. 225. **Same—Application of maxim.**—This maxim restrains a man from using his own property to the prejudice of his neighbor, and is not usually applicable to a mere omission to act, but rather to some affirmative act or course of conduct which amounts to, or results in, an invasion of another's rights.² Where this maxim is applied to landed property, it is subject to a certain modification, it being necessary for the plaintiff to show, not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land.³

¹ *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85.

² *Krueger v. Farrant*, 29 Minn. 385; s.c. 13 N. W. Rep. 158.

³ *West Cumberland Iron Co. v. Kenyon*, 11 L. R. 6 Ch. Div. 773; s.c. 32 Moak's Eng. Rep. 821.

Cited in *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126; s.c. 57 Am. Rep. 445; 6 Atl. Rep. 453; 4 Cent. Rep. 481; 102 Pa. St. 307; 94 Pa. St. 302; 86 Pa. St. 401.

This maxim was once uncereemoniously discarded by Justice ERLE. He said: "The maxim is mere verbiage. A party may damage property where the law permits, and may not where the law prohibits, so that the maxim can never be applied till the law is ascertained, and when it has been, the maxim is superfluous."

Bonomi v. Backhouse, 36 L. J. Q. B. 388.

BOOK III.

CORPOREAL HEREDITAMENTS.

CHAPTER I.

ESTATES IN GENERAL.

- SEC. 226. Definition of estate.
- SEC. 227. The origin of estates.
- SEC. 228. Estate in land—Definition.
- SEC. 229. Same—Division of.
- SEC. 230. Freehold estates in land—Definition.
- SEC. 231. Same—Qualities of freehold estate.
- SEC. 232. Same—Seisin.
- SEC. 233. Same—Entry.
- SEC. 234. Same—Livery of seisin.
- SEC. 235. Same—Disseisin.
- SEC. 236. Same—Same—Kinds of disseisin.
- SEC. 237. Same—Same—What constitutes disseisin.
- SEC. 238. Abatement—Effect of.
- SEC. 239. Abeyance of freehold.
- SEC. 240. Who may be freeholders.
- SEC. 241. Same—Aliens.
- SEC. 242. Same—Same—Federal and state statutes.
- SEC. 243. Same—Corporations.
- SEC. 244. Division of estates.

SECTION 226. Definition of estate.—In its popular and most comprehensive meaning, the word “estate” is *genus generalissimum*, and includes, not only real and personal property,¹ but also the interest a person may have in

¹ Thornton v. Mulquinne, 12 Iowa 549; s.c. 79 Am. Dec. 548, 551; Mably v. Stainback, 1 Mart. (N. C.) 75; s.c. 1 Am. Dec. 545; Turbett v. Turbett's Ex'rs, 3 Yeates (Pa.) 187; s.c. 2 Am. Dec. 369, 371;

Weatherhead's Lessee v. Baskerville, 52 U. S. (11 How.) 329; bk. 13 L. ed. 717; Archer v. Deneale, 26 U. S. (1 Pet.) 585; bk. 7 L. ed. 272; Lambert v. Paine, 7 U. S. (3 Cr.) 97, 130; bk. 2 L. ed. 377.

such property,¹ as owner or otherwise,² from absolute ownership down to a naked possession.³ The term not only comprehends property of every description,⁴ but includes a person's condition in respect to property,⁵ and the very thing itself of which a person is the owner, whether personal or real,⁶ are so construed by courts in interpreting wills.⁷ In its more restricted

¹ *Lamar v. Sheffield*, 66 Ga. 711 ;
Kutler v. Smith, 69 U. S. (2 Wall.)
491 ; bk. 17 L. ed. 830 ;

2 Bl. Com. 103.

² He need not have the fee or even a freehold.

See : *Inhabitants of Sudbury v. Inhabitants of Stow*, 13 Mass. 462, 264.

³ See : *Moody v. Farr*, 33 Miss. 192, 195 ;

Jackson v. Parker, 9 Cow. (N. Y.) 73, 81.

It includes every possible estate in land except a mere chattel interest.

Jackson v. Parker, 9 Cow. (N. Y.) 73, 81.

The possession of land is an interest which may be sold on an execution against the person having the possession.

See : *Jackson v. Graham*, 3 Cai. (N. Y.) 188, 189 ;

Jackson v. Garnsey, 16 John. (N. Y.) 189, 192.

⁴ See : *Archer v. Deneal*, 26 U. S. (1 Pet.) 535 ; bk. 7 L. ed. 272.

⁵ Indebtedness as well as ownership.—Thus we speak of the "estate" of a deceased or an insolvent person. In these cases indebtedness as well as ownership is a part of the idea, the debts and assets together constituting the estate.

Davis v. Elkins, 9 La. 142.

⁶ See : *Sellers v. Sellers*, 35 Ala. 235, 241.

⁷ See : *Thornton v. Mulquinne*, 12 Iowa 549 ; s.c. 79 Am. Dec. 548, 551 ;

Laing v. Barbour, 119 Mass. 523, 525 ;

Kellog v. Blair, 47 Mass. (6 Met.) 322, 325 ;

Bullard v. Goffe, 37 Mass. 252, 256-257 ;

Godfrey v. Humphrey, 35 Mass. (18 Pick.) 537 ; s.c. 29 Am. Dec. 621.

Jackson v. Delancy, 13 John. (N. Y.) 536 ; s.c. 7 Am. Dec. 403 ;

Mably v. Stainback, 1 Mart. (N. C.) 75 ; s.c. 1 Am. Dec. 545 ;

Turbett v. Turbett's Ex'rs, 3 Yeates (Pa.) 187 ; s.c. 2 Am. Dec. 369, 371 ;

Lambert's Lessee v. Paine, 7 U.S. (3 Cr.) 97-130 ; bk. 2 L. ed. 377, 390 ;

Busby v. Busby, 1 U. S. (1 Dall.) 226 ; bk. 1 L. ed. 111 ;

Blagge v. Miles, 1 Story C.C. 436, 438 ;

Lloyd v. Lloyd, L. R. 7 Eq. Cas. 458 ;

Doe ex d. Evans v. Evans, 9 Ad. & E. 719 ; s.c. 36 Eng. C. L. 378 ;

Rideaut v. Paine, 3 Atk. 486 ;

Hawksworth v. Hawksworth, 27 Beav. 1 ;

Doe v. Chapman, 1 H. Bl. 223 ; s.c. 2 Rev. Rep. 755 ;

Rae v. Harvey, 5 Burr. 2638 ;

Sanderson v. Dobson, 7 C. B. 81 ; s.c. 62 Eng. C. L. 80 ;

Hogan v. Jackson, 1 Cowp. 306 ; *Jongsma v. Jongsma*, 1 Cox Eq. 362 ;

O'Toole v. Browne, 3 El. & Bl. 572 ; s.c. 77 Eng. C. L. 571 ;

Bridgewater v. Bolton, 6 Mod. 106 ;

Mayor of Hamilton v. Hodson, 6 Moore P. C. C. 76 ;

Popham v. Banfield, 1 Salk. 236 ; *Tilley v. Simpson*, 2 T. R. 659

note (b).

Holdfast v. Morten, 1 T. R. 411 ; s.c. 1 Rev. Rep. 243 ;

Barry v. Edgenorth, 2 Pr. Wms. 524 ;

Walker v. Denne, 2 Ves. 179 ; s.c. 2 Rev. Rep. 185 ;

Calcraft v. Roebuck, 1 Ves. 226.

Land held without color of title.—It is held in *Austin v. Rutland R. Co.*, 45 Vt. 215, that a bequest of a testator's "estate,"

sense the word estate is used to denote land.¹ The current use of the word is to denote the end, extent, degree,

real or personal," does not apply to land of which he is in possession without color of title. Under the North Carolina Revised Code this term does not embrace land.

Smithdeal v. Smith, 64 N. C. 52.

The word "estate" is the most general, significant, and operative that can be used in a will, and, according to all the cases, may embrace every degree and species of interest. If the word "estate" stand by itself, as if a man devise "all his estate to A," it carries a fee from its established and legal import and operation. Standing thus *per se*, it marks the intention of the testator, passes the inheritance to the devisee, and controls the rule in favor of the heir at law. It is true that this word, when coupled with things that are personal only, shall be restrained to the personality: *Noscitur a sociis*. The word "estate" may also, from the particular phraseology connected with the apparent intent of the testator, assume a local form and habitation, so as to limit its sense to the land itself. Here uncommon particularity of description is requisite, so as to leave the mind perfectly satisfied that the thing only was in contemplation, and nothing more. A description merely local cannot be extended beyond locality, without departing from the obvious import of the words, and thus making, instead of construing, the will of the testator. But when no words are made use of to manifest the intention of the testator that the term "estate" should be taken, not in a general, but in a limited signification, then it will pass a fee; because, the law declares that it designates and comprehends both the subject

and the interest. Nay, such is the legal import and operation of the word "estate," that it carries a fee, even when expressions of locality are annexed. To illustrate this position by apposite and adjudged cases: If a man in his will, says, "I give all my estate to A," it has been held that the whole of the testator's interest in such particular lands passed to the devisee, though no words of limitation are added. 2 Pr. Wms. 524. So the word "estate" was held to carry a fee, though it denoted locality, "as my estate at Kirby Hall."

Tuffnel v. Page, 2 Atk. 37; s.c. Barn. Cha. Rep. 9.

On which Lord Hardwicke observed, that though this is a locality, yet the question is, whether it is such a locality as is sufficient to show the testator's intention merely to be to convey the lands to themselves, and not the interest in them. He was of opinion that the words were descriptive both of the local situation, and the quantity of interest.

Same — Lord Talbot observed, in Ibbetson v. Beckwith, that the word "estate," in its proper, legal sense, means the inheritance, and carries a fee. Why, indeed, may not locality and interest be connected, and the same words express and convey both? To exclude interest in the subject, the expressions coupled with the word "estate" must be so restrictive and local in their nature, as to convey solely the idea of locality, and not to comprehend the *quantum* of interest, without doing violence to the words and intentions of the testator. Besides, it is a just remark, repeatedly made by Lord Hardwicke and Lord Mansfield, that where a general devise of land

¹ See: Sellers v. Sellers, 35 Ala. 235, 241;
Van Rensselaer v. Poucher, 5

Den. (N. Y.) 40;
Lambert v. Paine, 7 U. S. (3 Cr.) 97; bk. 2 L. ed. 377.

and quality of interest which a person has in real property.¹

SEC. 227. *The origin of estates.*—The distinction between absolute dominion, or absolute ownership, such as the law permits to be had in chattels, and an estate, to which the English law restricts the ownership of land, is no doubt referable to the universal existence in England of tenure. But the existence of estates of inheritance was suggested, and made possible, by the indestructibility of their commonest and earliest known subject. There are three ancient sources of lawful rights of property in England—(1) the common law ; (2) the statute law ; and (3) customs allowed by the law.² To these must, for many practical purposes, be added—(4) the course of equity, as devised and consolidated by the Court of Chancery. This last is the origin of equitable estates, which seem now to have a good claim to be also styled lawful. But the circumstances of their origin have impressed upon them some important characteristics, which they still in a great measure retain, by which they are distinguished from legal estates, commonly so called, and which make it improper to apply to them the epithet “legal.” All lawful estates must be traced to one or another of these sources. The first is the source of common-law estates ; the second is the source of entails ; the third is the source of copyhold and customary estates ; and the fourth is the source of equitable estates.

is narrowed down to an estate for life, the intention of the testator is commonly defeated, because people do not distinguish between real and personal property ; and, indeed, “common sense would never teach a man the difference ;” and, therefore, judges have endeavored to make the word “estate,” in a will, amount to a devise of the whole interest, unless unequivocal and strong expressions are added to restrict its general signification. It would be a laborious and useless task to enter into a minute and critical investigation of the great variety of cases which

bear on this subject. They are collected in a note by the editor of Willes’s Rep. 296.

See : *Lambert’s Lessee v. Paine*, 7 U. S. (3 Cr.) 97, 134 ; bk. 2 L. ed. 377, 390.

¹ See : *Estate of Coleman*, 21 N. Y. Daily Reg. 505, No. 63 ; *Walsingham’s Case*, 2 Plowd. 555 ;

2 Co. Litt. (19th ed.) 435 ;

1 Prest. Est. 7, 20.

² “*Consuetudo* is one of the main triangles of the laws of England, those laws being divided into common law, statute law, and custom.”

1 Co. Litt. (19th ed.) 110b.

SEC. 228. **Estate in land—Definition.**—An estate in land is such an interest as the owner¹ or tenant has therein. It is called in Latin *status*, because it signifies the condition or circumstance in which the owner stands with regard to his property.²

SEC. 229. **Same—Division of.**—To ascertain the ownership of property with precision and accuracy, estates in land may be regarded in a threefold view, to wit: (1) with regard to the quantity and quality of interest which the tenant has in the tenement;³ (2) with regard to the time at which the quantity of interest is to be enjoyed; and (3) with regard to the number and connection of the tenants.⁴ The quantity of interest or estate signifies the time of continuance, or degree of interest, which the tenant has in the tenement;⁵ and the quality of the estate has reference to the manner of its enjoyment, as whether it be absolute, solely common, in coparceny, or in joint tenancy.⁶ The quantity of interest which a tenant has in the tenement is measured by its duration and extent, and this occasions the primary division of estates into such as are a freehold and such as are less than a freehold.⁷

SEC. 230. **Freehold estate in lands—Definition.**—An estate of freehold is an interest in lands, or other real property, held by a free tenure, for the life of the tenant,⁸ or that of some other person, or for some uncertain period. It is called *liberum tenementum*, frank tenement, or freehold; and was formerly described to be such an estate as could only be created by livery of seisin,⁹ a ceremony similar to the investiture of the feudal law, and one which a freeman

¹ Van Rensselaer v. Poucher, 5 Den. (N. Y.) 40.

See: 2 Bl. Com. 103;

2 Co. Litt. (19th ed.) 345.

² 1 Co. Litt. (19th ed.) 1b;

1 Prest. Est. 420.

³ See: 2 Bl. Com. 103;

2 Co. Litt. (19th ed.) 345;

1 Prest. Est. 20.

⁴ Walsingham's Case, 2 Plowd. 555;

2 Bl. Com. 103;

1 Inst. 345a.

⁵ 1 Prest. Est. 21.

⁶ Prest. Est. 21.

See: Post, "Joint Estates."

⁷ See: Van Rensselaer v. Poucher, 5 Den. (N. Y.) 35, 40;

2 Bl. Com. 103;

2 Crab. R. Prop. 2.

⁸ See: Roseboom v. Vechten, 5 Den. (N. Y.) 414;

2 Bl. Com. 104;

4 Kent. Com. (13th ed.) 23.

⁹ 2 Bl. Com. 104;

1 Prest. Est. 209.

might constitutionally hold in reference to its tenure, and of course excluded all lands held in villeinage, even though held for the term of a life.¹ This term is used in two senses ; first as indicating the quantity of interest, and second as indicating the quality of the tenure.² But since the introduction of certain modern conveyances, by which an estate of freehold may be created without livery of seisin, this description is not sufficient.³

SEC. 231. **Same—Qualities of freehold estate.**—There are two qualities essentially requisite to the existence of every freehold estate. First, immobility,—that is, the subject-matter must either be land, or some interest issuing out of or annexed to land ; second, a sufficient legal indeterminate duration, for if the utmost period of time to which an estate can last is fixed and determined, it is not an estate of freehold.⁴ Thus if lands are conveyed to a man and his heirs forever, or for the term of his natural life, or for the term of the life of another, or until he is married, or goes to Rome, or the like, the estate created will be a freehold estate ; but if lands are limited to a man for five hundred years, or for ninety-nine years, if he shall live so long, he has not an estate of freehold.⁵

SEC. 232. **Same—Seisin.**—The term “seisin” is applied to the possession of an estate of freehold,⁶ and the possessor of such an estate is said to be “seized” thereto.⁷

¹ 1 Prest. Est. 209, 213.

² 2 Wood Lect. 5.

³ Britt., c. 32 ;

1 Inst. 48a.

⁴ 2 Bl. Com. 386.

⁵ The law is precisely the same now as when Bracton wrote : “ Et sciendum quod liberum tenementum est id quod quis tenet sibi et hæredibus suis, in feodo, et hæreditate, vel in feodo tantum, sibi et hæredibus suis. Item ut liberum tenementum, sicut ad vitam tantum, vel eodem modo ad tempus indeterminatum, absque aliqua certa temporis præfinitione ; sc. Donec quid fiat vel non fiat ; ut si dicatur. Do tali donec ei providero. Liberum autem tenementum non potest

dici alicujus quod quis tenet ad certum numerum annorum, mensium, vel diorum ; licet ad terminum centum annorum, quæ excedit vitas hominum. Bract. 207a ; 1 Inst. 42a.

⁶ *Bearce v. Jackson*, 4 Mass. 408 ; *Durando v. Durando*, 32 Barb. (N. Y.) 529 ;

1 Co. Litt. (19th ed.) 153a.

See : *Fitzhugh v. Croghan*, 2 J. J. Marsh (Ky.) 429 ; s.c. 19 Am.

Dec. 139 ;

Slater v. Rawson, 47 Mass. (6 Met.) 439 ;

Towle v. Ayer, 8 N. H. 57, 58 ;

Van Rensselaer v. Poucher, 5 Den. (N. Y.) 35.

⁷ *Barr v. Gratz*, 7 U. S. (4 Wheat.) 213 ; bk. 4 L. ed. 553 ;

Fitzhugh v. Croghan, 2 J.J. Marsh.

Anciently the possession of a feud was called seisin, which denoted the completion of the investiture by which the tenant was admitted to the land. Upon the introduction of the feudal law into England, the word seisin was only applied to the possession of an estate of freehold, in contradistinction to that precarious kind of possession by which tenants in villeinage held their land, which was considered to be the possession of their lords, in whom the freehold continued.¹ Where a freehold estate is conveyed to a person by feoffment, with livery of seisin, or by any of those conveyances which derive their effect from the statute of uses, he acquires a seisin in deed, and a freehold in deed. But where a freehold estate is devolved upon a person by act of law, as by descent, he only acquires a seisin in law, that is, a right to the possession, and his estate is called a freehold in law ; for he must make an actual entry on the land to acquire a seisin and a freehold in deed.² The prevailing doctrine in the United States is that no actual entry is necessary, either by an heir or a grantee, in order to give him a seisin in deed ; provided the ancestor or grantor was seized at the time, or the possession was vacant, and the ancestor or grantor had the right.³

SEC. 233. **Same—Entry.**—According to the common-law rule, entry must be made by the person having right, or some one authorized by him.⁴ The mere act of going on

429 ; s.c. 19 Am. Dec. 139 ;
 Warren v. Childs, 11 Mass. 222,
 225 ;
 Wells v. Prince, 4 Mass. 68 ;
 Englishbe v. Helmuth, 3 N. Y. 294.
¹ Taylor v. Horde, 1 Burr. 107 ;
 Grendon v. Bishop of Lincoln, 2
 Plowd. 503 ;
 Dissert., c. 1 ;
 1 Inst. 153a, 200b.
² See : 1 Inst. 266b.
³ Green v. Chelsea, 41 Mass. (2 Pick.)
 71 ;
 Magoun v. Lapham, 38 Mass. (31
 Pick.) 135 ;
 Bates v. Norcross, 31 Mass. (14
 Pick.) 224 ;
 Wells v. Prince, 4 Mass. 64 ;
 Jackson v. Howe, 14 John. (N. Y.)
 405 ;

Barr v. Gratz, 17 U. S. (4 Wheat.)
 213, 221 ; bk. 4 L. ed. 553 ;
 Green v. Litter, 12 U. S. (8 Cr.)
 229 ; bk. 3 L. ed. 545 ;
 4 Kent. Com. (13th ed.) 385–389.
⁴ Authority to enter may be given by
 parol, and if entry is made by
 a stranger in the name and on
 behalf of the owner, who after-
 ward ratifies the act, this is
 sufficient.
 Richards v. Folsom, 11 Me. 70 ;
 Tolman v. Emerson, 21 Mass. (4
 Pick.) 160.
 When part of the heirs enter on lands
 that descends to them, their
 entry is presumed to be accord-
 ing to their legal title, and it
 inures to the benefit of all, so
 that all are seized unless those

the land was not a legal entry, sufficient to vest the actual seisin in the person who had the right, but, in order to constitute a legal entry, the person was required to enter with that intent and to do some act and show some intention.¹ The act was required to be such an one that, in a stranger, would have been trespass.² In those states where the common-law doctrine has been adopted, the same rules prevail. Where the lands all lie in one county the entry of the heir upon any part of the estate will give him a seisin in deed of all the lands lying in that county, but where the lands lie in different counties there must be an entry in each county.³

SEC. 234. **Same—Livery of seisin.**—At common law the ceremony of livery of seisin was necessary to vest title.⁴ This custom was never adopted in this country;⁵ or if it was, it has been wholly superseded by the use of deeds acknowledged and recorded,⁶ which are equivalent to livery of seisin.⁷ The deed acknowledged and recorded gives to the grantee legal investiture of the land conveyed, and has the same effect as if the grantor entered upon the land and gave actual seisin by the formal delivery of the accustomed turf and twig in the ancient ceremony.⁸ In this country actual entry on the land by

who enter claim adversely, and oust the others.

Means v. Wells, 53 Mass. (12 Met.) 356.

¹ Ford v. Grey, 6 Mod. 44 ;
Pollard v. Jekyl, 1 Plowd. 92 ;
1 Inst. 245b.

² Holly v. Brown, 14 Conn. 255, 269, 270 ;

Robison v. Swett, 3 Me. 316 ;
Altamas v. Campbell, 9 Watts (Pa.) 28 ;

1 Co. Litt. (19th ed.) 245b.

³ 1 Inst. 15a, 252b.

Feoffments were anciently made on the land, before the *pares curiæ*; and the entry of the feoffee was recorded in the records of the lord's court. Afterwards, when the attestation of the *pares curiæ* was not held necessary, that of the *pares comitatus* was ; and hence an entry in each county was still held necessary, because it was

to be tried by the *pares comitatus*.

See : Gilbert's Ten. 39-40 ;
Stearns' Real Act. 3.

⁴ 2 Bl. Com. 315, 316. This was abolished by statutes 8 & 9 Vict., c. 106, § 2.

⁵ Bryan v. Bradley, 16 Conn. 474, 488 ;

Davis v. Mason, 26 U. S. (1 Pet.) 503 ; bk. 7 L. ed. 239 ;
4 Kent Com. (13th ed.) 84.

⁶ Higbee v. Rice, 5 Mass. 352 ; s.c. 4 Am. Dec. 63 ;

Pidge v. Tyler, 4 Mass. 541.

⁷ Higbee v. Rice, 5 Mass. 344, 352 ; s.c. 4 Am. Dec. 63 ;

Bradstreet v. Clarke, 12 Wend. (N. Y.) 602, 677.

⁸ See : Ward v. Fuller, 32 Mass. (15 Pick.) 185 ;

Goodwin v. Hubbard, 15 Mass. 214 ;

McKee v. Pfout, 3 U. S. (3 Dall.) 486, 489 ; bk. 1 L. ed. 690.

an heir or a grantee is not generally necessary to consummate his title and give him a seisin in deed, where the ancestor or grantor was, at the time, seized of the property, or the possession was vacant, the ancestor or grantor having the right to the possession,¹ gives the legal presumption in this country that the seisin follows the title and that they correspond with each other.²

SEC. 235. **Same—Disseisin.**—Disseisin has been defined by Lord Littleton as “where a man entereth into lands or tenements, where his entry is not congeable, and ousteth him which hath the freehold.”³ According to its accepted and general meaning, a disseisin is said to be an entry into the lands and tenements of another, accompanied with expulsion or ouster of such other from the freehold,⁴ either by first taking the profits, or secondly, by claiming the inheritance.⁵

SEC. 236. **Same—Same—Kinds of disseisin.**—There are two kinds of disseisin recognized; first, a disseisin in spite of

¹ *Green v. Chelsea*, 41 Mass. (2 Pick.) 71;

Green v. Litter, 12 U. S. (8 Cr.) 229; bk. 3 L. ed. 545.

Compare: *Jackson v. Woodman*, 29 Me. 266;

Jackson v. Howe, 14 John. (N. Y.) 405;

Hinman v. Cranmer, 9 Pa. St. 40.

² *Farwell v. Rogers*, 99 Mass. 33; *Barr v. Gratz*, 17 U. S. (4 Wheat.) 213; bk. 4 L. ed. 553.

Presumption of seisin from deed.—In the absence of evidence to the contrary the deed itself affords a presumption that the grantor had sufficient seisin for the purposes of the conveyance, and operates to vest the legal seisin in the grantee.

Ward v. Fuller, 32 Mass. (15 Pick.) 185.

³ **Definition of disseisin**—Lord Mansfield has observed justly that “the precise definition of what constituted a disseisin, which made the disseisor the tenant to the demandant’s *præcipe*, though the right owner’s entry was not taken away, was once well known, but it is not now to be found. The more we read, unless we are very care-
14

ful to distinguish, the more we shall be confounded; for after the assize of novel disseisin was introduced, the Legislature by many acts of Parliament, and the courts of law, by liberal constructions, in furtherance of justice, extended this remedy, for the sake of the owner, to every trespass or injury done to his real property, if by bringing his assize he thought fit to admit himself disseised.”

Taylor v. Horde, 1 Burr. 110.

⁴ *Towle v. Ayer*, 8 N. H. 57, 60;

People v. Van Rensselaer, 8 Barb. (N. Y.) 180, 189, 194; s.c. 9 N. Y. 291;

Smith v. Burtis, 6 Johns. (N. Y.) 197; s.c. 5 Am. Dec. 218;

Jackson v. Rogers, 1 Johns. Cas. (N. Y.) 33;

Clarke v. McClure, 10 Gratt. (Va.) 305;

Ewing’s Lessee v. Burnet, 36 U. S. (11 Pet.) 41; bk. 9 L. ed. 624;

William v. Thomas, 12 East 141. 2 Co. Litt. (19th ed.) 181a, 257a.

⁵ **Possession of disseisor must be open, notorious, exclusive, and adverse to the title of the owner.**

Taylor v. Horde, 1 Burr. 110.

the owner, which is termed a disseisin in fact ; and second, a disseisin by the election of the owner, which is termed a disseisin by construction of law. The effect of the first is to give the disseisor an absolute title in fee, against all the world, if he is suffered to remain in undisturbed possession of the land until the statute of limitations has run. The latter disseisin is created by acts without actual entrance, and in this is equivocal and not necessarily amounting to an entire immediate ouster of the freehold, but which the owner may, if he pleases, treat as usurpation of his freehold, for the sake of vindicating his title by an action at law. Such as where a tenant for life or years makes a feoffment ;¹ or where a tenant at will makes a lease for years ;² or where a stranger makes a lease and the lessee enters under it without reference.³ In this and like cases the entry is equivocal, and may be either trespass or a disseisin, according to the intent. The law will not permit the wrongdoer to classify his own wrong and explain it to be a mere trespass unless the owner likes to so consider it.⁴ To constitute a disseisin of the first class the act must be an unequivocal act of ownership, open, avowed, exclusive, adverse, and uninterrupted,⁵ and can be made only by actually and forcibly turning the owner out of possession ;⁶ or by entering under a conveyance from one

¹ *Miller v. Shackleford*, 3 Dana (Ky.) 389 ;

Taylor v. Horde, 1 Burr. 60.

² See : *Blunden v. Baugh*, Cro. Car. 302.

³ *Jerritt v. Weare*, 3 Price 575.

⁴ *Prescott v. Nevers*, 4 Mas. C. C. 326-329.

See : *Rogers v. Joyce*, 4 Me. (4 Greenl.) 93 ;

Robison v. Swett, 3 Me. (3 Greenl.) 316 ;

Allen v. Holten, 37 Mass. (20 Pick.) 458, 467 ;

White v. Reid, 2 Nott. & Mc. (S. C.) 534 ;

Ricard v. Williams, 20 U. S. (7 Wheat.) 60 ; bk. 5 L. ed. 398.

⁵ *French v. Pearce*, 8 Conn. 439, 440 ; s.c. 21 Am. Dec. 680 ;

Jones v. Chiles, 2 Dana (Ky.) 25 ;

Winthrop v. Benson, 31 Me. 381 ;

Little v. Libby, 2 Me. (2 Greenl.) 242 ; s.c. 11 Am. Dec. 68 ;

⁶ *Johnson v. Bean*, 119 Mass. 271 ;

Slater v. Jepherson, 60 Mass. (6

Cush.) 129 ;

Coburn v. Hollas, 44 Mass. (3

Met.) 125 ;

Lane v. Gould, 10 Barb. (N. Y.) 254 ;

Jackson v. Schoonmaker, 2 John. (N. Y.) 230 ;

Calhoun v. Cook, 9 Pa. St. 226 ;

Clarke v. McClure, 10 Gratt. (Va.) 305 ;

Taylor v. Horde, 1 Burr. 110.

⁶ *Wiggins v. Holley*, 11 Ind. 2 ;

Magee v. Magee, 37 Miss. 152 ;

Grant v. Fowler, 39 N. H. 101 ;

McGregor v. Comstock, 17 N. Y. 172.

Smith v. Burtis, 6 John. (N. Y.) 197 ;

See : *Varick v. Jackson*, 2 Wend. (N. Y.) 166 ; s.c. 19 Am. Dec. 571.

who has no title ;¹ or by entry under claim or color of title,² or under parol agreement ;³ by occupying and cultivating the land under the claim of title,⁴ without it be not a rightful title,⁵ such as a defective levy,⁶ or by merely a claim of the exclusive right to the possession.⁷

SEC. 237. **Same—Same—What constitutes a disseisin.**—To constitute a disseisin the entry must be adverse to the title of the true owner, utterly inconsistent therewith, together with an express and tacit denial of it ;⁸ and must consist of an occupancy of the lands in good faith and under the belief that the claimant has a good title.⁹ The intention to claim in opposition to the title of another must be clear,¹⁰ otherwise it will be presumed to be in submission

¹ Jackson ex. d. Bradstreet v. Huntington, 30 U. S. (5 Pet.) 402 ; bk. 8 L. ed. 170.

² Herbert v. Hanrick, 16 Ala. 581 ; Abercrombie v. Baldwin, 15 Ala. 363.

See : Comins v. Comins, 21 Conn. 413 ;

House v. Palmer, 9 Ga. 497 ;

Melvin v. Proprietor of Locks, 46 Mass. (5 Met.) 15 ; s.c. 38 Am. Dec. 384 ;

Hoag v. Wallace, 28 N. H. (8 Fost.) 547 ;

Thomas' Adm'r v. Kelly, 13 Ired. (N. C.) L. 269 ;

Clarke v. McClure, 10 Gratt. (Va.) 305 ;

Whitney v. French, 25 Vt. 663 ; Ewing's Lessee v. Burnet, 36 U. S. (11 Pet.) 41 ; bk. 9 L. ed. 624.

³ Pope v. Henry, 24 Vt. 560.

⁴ Robinson v. Douglass, 2 Aik. (Vt.) 364.

⁵ Warren v. Childs, 11 Mass. 222, 225 ;

Wendell v. Moulton, 26 N. H. (6 Fost.) 41 ;

Jackson v. Newton, 18 John. (N. Y.) 355 ;

Bogardus v. Trinity Church, 4 Sandf. Ch. (N. Y.) 633.

⁶ Bigelow v. Jones, 27 Mass. (10 Pick.) 161 ;

Allen v. Thayer, 17 Mass. 299.

⁷ Allyn v. Mather, 9 Conn. 114 ;

Towle v. Ayer, 8 N. H. 60.

⁸ French v. Pearce, 8 Conn. 439, 440 ;

Little v. Libby, 2 Me. (2 Greenl.) 242.

See : Armstrong v. Ristean, 5 Md. 256 ;

s.c. 59 Am. Dec. 115 ;

Hoye v. Swan, 5 Md. 237 ;

Small v. Proctor, 15 Mass. 495 ;

Takeway v. Barrett, 38 Vt. 316 ;

Clarke v. McClure, 10 Gratt. (Va.) 11.

⁹ Woodward v. McReynolds, 1 Chand. (Wis.) 244.

¹⁰ Wiggins v. Holley, 11 Ind. 2 ;

Magee v. Magee, 37 Miss. 152 ;

Grant v. Fowler, 39 N. H. 101 ;

McGregor v. Comstock, 17 N. Y. 172 ;

Smith v. Burtis, 6 John. (N. Y.) 197.

See : Varick v. Jackson, 2 Wend. (N. Y.) 166 ; s.c. 19 Am. Dec. 571.

Occupancy by mistake and through misapprehension.—Whether an occupancy by mistake, and through misapprehension of the dividing line, amounts to a disseisin, is a point the court are not perfectly agreed upon.

Same.—In Maine and in Tennessee it has been held no disseisin.

Lincoln v. Edgecomb, 31 Me. 345 ;

Ross v. Gould, 5 Me. (5 Greenl.) 204 ;

Brown v. Gay, 3 Me. (3 Greenl.) 126 ;

Gates v. Butler, 3 Humph. (Tenn.) 447.

Same.—In Connecticut and in Pennsylvania it is held otherwise.

French v. Pearce, 8 Conn. 439, 440, 445, 446 ;

Jones v. Porter, 3 Pa. St. 132.

to the title of the true owner.¹ The question of intent of the party, in taking and holding possession, is one of fact for the jury,² and may under some circumstances be imputed to those who by a general rule of law are in ordinary cases incapable of willing, or are not bound by an exercise of the will.³

SEC. 238. Abatement—Effect of.—The seisin in law which an heir acquires on the death of his ancestor may be divided by the entry of a stranger, claiming a right to the land, which entry is called an abatement; and in

See: *Takeway v. Barrett*, 38 Vt. 316.

This is on the ground that, in order to be an adverse possession, it is sufficient that the party intended to claim the land as exclusively and absolutely his own estate, and actually and visibly occupied it as such, receiving the profits to his own use, without any supposed or assumed accountability; and that this may well be the case without any knowledge or suspicion of any other title or claim.

See: *Melvin v. Proprietors of Locks, etc.*, 46 Mass. (5 Met.) 15, 31, 33; s.c. 38 Am. Dec. 384;

Parker v. Proprietors of Locks, etc., 44 Mass. (3 Met.) 91, 100, 101; s.c. 37 Am. Dec. 121;

Hale v. Glidden, 10 N. H. 397.

Same—Conveying larger tract than owner.—In Maine, if the grantor, by mistake, conveys a larger tract than he owns, and the grantee enters and actually occupies according to his deed, it is held that the grantee thereby disseises the true owner, though the rule that occupation by mistake is no disseisin is in such case applicable to the grantor.

Otis v. Moulton, 21 Me. (2 Applet.) 205.

Same—When disseisin.—But to constitute a disseisin by the grantee, in such case of occupancy by mistake, the occupancy must be actual and visible; for his entry will not be extended by mere construction beyond the limits of his title.

Hale v. Glidden, 10 N. H. 397; *Enfield v. Day*, 7 N. H. 457, 467.

¹ *Pierson v. Turner*, 2 Ind. 123;

Gwynn v. Jones, 2 Gill. & (Md.) 173;

Lund v. Parker, 3 N. H. 49;

Lane v. Gould, 10 Barb. (N. Y.) 254;

Jackson v. Sharp, 9 John. (N. Y.) 163; s.c. 6 Am. Dec. 267;

Smith v. Burtis, 6 John. (N. Y.) 197; s.c. 5 Am. Dec. 218.

² *Herbert v. Henrick*, 16 Ala. 581; *Beverly v. Burke*, 9 Ga. 440; s.c.

54 Am. Dec. 351;

Dennett v. Crocker, 8 Me. (8 Greenl.) 239;

Atherton v. Johnson, 2 N. H. 31;

Jackson v. Joy, 9 John. (N. Y.) 102;

Woodward v. McReynolds, 1 Chand. (Wis.) 244.

Declarations made by the party taking possession, even though made to a stranger, are admissible in evidence in disparagement of his claim, but not in his favor.

Crane v. Marshall, 16 Me. (4 Shep.) 27; s.c. 33 Am. Dec. 631;

Alden v. Gilmore, 13 Me. (1 Shep.) 178;

Little v. Libby, 2 Me. (2 Greenl.) 242;

Church v. Burghardt, 25 Mass. (8 Pick.) 327;

Carter v. Gregory, 25 Mass. (8 Pick.) 168;

West Cambridge v. Lexington, 19 Mass. (2 Pick.) 536.

³ *Jackson ex d. Bradstreet v. Huntington*, 30 U. S. (5 Pet.) 402; bk. 8 L. ed. 170.

such a case the only mode of regaining the seisin is by an entry of the legal owner, which will restore him to the legal possession.¹ If the abator die seized the lands will descend to his heir.² At common law where the younger brother entered upon the death of his ancestor, such entry was not an abatement; for it should be intended that the younger brother did not set up a new title, but only entered to preserve the possession of the ancestor in the family, that no one else should abate. And if the younger son die in possession, still the elder son might enter; for the law would not intend the entry of the younger son to be a wrongful act, therefore his possession became that of the elder.³

SEC. 239. *Abeyance of freeholder.*—In those cases where there is no person *in esse* in whom the freehold is vested, it is said to be in abeyance; that is, to exist only in expectation, remembrance, and contemplation of law;⁴ in other words, is under the care and protection of the law.⁵ Abeyances are of two kinds: first, of the fee-simple, as where there is an actual estate of freehold *in esse*, but the right to the fee-simple is suspended until the happening of a designated event;⁶ and, second, of the freehold estate. The latter species of abeyance occurs on the death of an incumbent and lasts until the appointment of his successor, at which event the estate revives.⁷ There is also an abeyance of the freeholder where it is sought to

¹ In most if not in all of the states of the Union, it has been provided by statute that no seisin shall take away the right of entry.

See: Stinson's Stat. L., vol. I., *passim*.

² See: 1 Co. Inst. 277a; Litt., § 385; 2 Co. Litt. (19th ed.) 237a.

³ Gill. Tenn. 28. Litt., § 396.

The doctrine of the possession in *fratris*, in the law of descents, is generally abrogated in the United States, possibly with the exception of Maryland and North Carolina, and perhaps others, by the statutes of descents and distributions, which,

either in expressed terms or by broad and general language, give to the heir, and by descent, the ancestor's right to real property without regard to the question whether or not he die actually seized.

See: *Chirac v. Reinecker*, 27 U. S. (2 Pet.) 613, 625; bk. 7 L. ed. 538, 542;

4 Kent Com. (13th ed.) 338, 389.

⁴ And. L. Dict. 6;

1 Bouv. L. Dict. (15th ed.) 74;

2 Bl. Com. 107, 216, 318;

2 Co. Litt. (19th ed.) 342b.

⁵ In *gremio legis*, say the court in *Carter v. Barnardiston*, 1 Pr. Wms. 516.

⁶ 2 Co. Litt. (19th ed.) 342b.

⁷ 2 Co. Litt. (19th ed.) 342b.

make it commence to pass *in futuro*;¹ but this does not apply to estates in remainder or reversion, which are estates in expectancy.² It is a maxim of the common law that a fee cannot be in abeyance. The reasons for this rule are found in the feudal system, and were for the purposes of enabling the superior lord to know upon whom to call for the military services that were due for the feud; and also to enable strangers who claimed the right to any particular lands to know against whom they should bring their *præcipe* for the recovery of them, such actions not being maintainable against any other than the actual freeholder.³ The reasons upon which this rule rests no longer exist, and the rule itself is not of universal application.⁴

SEC. 240. **Who may be freeholders.**—At common law all natural persons born within the dominion of the crown of England were capable of holding freehold estates; unless they were attainted of treason or felony, or had incurred the penalty of the *præmunire*, for in these cases they were considered as civilly dead, and for that reason incapable of possessing any real property.⁵ In this country there is no exception to the right to hold real estate except that arising from alienage in some states.⁶ At common law even an alien may take an estate by the act of the parties, as by purchase or devise,⁷ and hold the

¹ 1 Prest. Est. 220.

² 1 Atk. Con. 11.

Conveyance of freehold in reversion.—

It has been said that where one who holds a freehold in reversion conveys it in terms from the expiration of the intermediate estate, courts will construe it a present conveyance and of the present freehold, the enjoyment of which will be postponed until the expiration of the intermediate or prior estate.

Wealde v. Lower, Pollex 66;

1 Prest. Est. 225.

³ 1 Co. Inst. 342b.

⁴ Wallach v. Van Biswick, 92 U. S. 202, 212; bk. 23 L. ed. 473, 477.

⁵ See: Bancroft v. Consen, 95 Mass. (13 Allen) 50;

Huss v. Stephens, 51 Pa. St. 282;

Hileman v. Bouslaugh, 13 Pa. St. 344; s.c. 53 Am. Dec. 474;

Harmon v. James, 7 Smed. & M. (Miss.) 111; s.c. 45 Am. Dec. 296;

Parker v. Stuckert, 2 Miles (Pa.) 278.

⁶ See: Apthorp v. Backus, 1 Kirby (Conn.) 407; s.c. 1 Am. Dec. 26;

Fox v. Southack, 12 Mass. 143;

Montgomery v. Dorion, 7 N. H. 475, 480.

⁷ See: Wadsworth v. Wadsworth, 12 N. Y. 376;

Doe ex d. Gouverneur's Heirs v. Robertson, 24 U. S. (11 Wheat.) 332; bk. 6 L. ed. 488;

Fairfax's Devisee v. Hunter's Lessee, 11 U. S. (7 Cr.) 603, 619; bk. 3 L. ed. 453, 458;

1 Co. Litt. (19th ed.) 2.

same against all the world except the state ;¹ nor can he be divested of his estate in the land by the state, until after a formal proceeding on information filed for that purpose ;² and until this is done he may take, hold, sell, and convey,—and some courts even go so far as to hold that he may devise,—the land he has possession of and pass a good title thereto ;³ but the general rule is that upon

Alien cannot take by law.—Blackstone says, that though an alien may take real estate by purchase, yet he cannot by descent, by dower, or by the curtesy, which are the acts of the law (2 Bl. Com. 249), for the law giveth the alien nothing. Though an alien may purchase land or take it by devise, yet he is exposed to the danger of being divested of the fee and of having the land forfeited to the state upon an inquest of office found.

2 Kent. Com. (13th ed.) 53.

¹ Goodrich v. Russel, 42 N. Y. 376 ; Wadsworth v. Wadsworth, 12 N. Y. 376.

See : Fox v. Southack, 12 Mass. 143 ;

Doe ex d. Gouverneur's Heirs v. Robertson, 24 U. S. (11 Wheat.) 332 ; bk. 6 L. ed. 488 ;

Fairfax's Devisee v. Hunter's Lessee, 11 U. S. (7 Cr.) 603, 619 ; bk. 3 L. ed. 453, 458.

² Norris v. Hoyt, 18 Cal. 217 ; People v. Folsom, 4 Cal. 373 ; Halstead v. Board of Commissioners of Lake, 56 Ind. 363 ; Elmondorff v. Carmichael, 3 Litt. (Ky.) 472 ; s.c. 14 Am. Dec. 86 ; Goodrich v. Russel, 42 N. Y. 177 ; Heeney v. Brooklyn Society, 33 Barb. (N. Y.) 360 ; Jackson v. Adams, 7 Wend. (N. Y.) 367.

"Office found" is the technical name of the formal proceedings referred to.

Moers v. White, 6 John. Ch. (N. Y.) 360, 365 ;

State v. Boston, C. & M. R. Co., 25 Vt. 433 ;

Cross v. De Valle, 68 U. S. (1 Wall.) 5 ; s.c. bk. 17 L. ed. 515 ; 3 Bl. Com. 258.

Alien can hold until "office found."—It is said by the Supreme Court of the United States in the case

Gouverneur's Heirs v. Robertson, 24 U. S. (11 Wheat.) 322, 356 ; bk. 6 L. ed. 488, "that an alien can take by deed and can hold until office found must be regarded as a positive rule of law, so well established that the reason of the rule is little more than a subject for the antiquary. It no doubt owes its present authority, if not its origin, to regard to the peace of society and a desire to protect the individual from arbitrary aggression."

Non-resident aliens holding land—State regulation.—The question as to the rights of a non-resident alien to hold property, both at common law and under the civil law, is a matter between the alien and the government, and cannot be called in question in a collateral proceeding between individuals.

Racouillat v. Sansevain, 32 Cal. 376.

Common-law disabilities attached to alienage in respect to acquiring, holding, and inheriting lands have been removed by statute to a great extent in the various states.

See : Post, §

³ See : Ramires v. Kent, 2 Cal. 558, 560 ;

Murray v. Kelly, 27 Ind. 42 ;

State v. Beackmo, 8 Blackf. (Ind.) 246 ;

Greenhold v. Stanforth, 21 Iowa 595 ;

Purcell v. Smidt, 21 Iowa 540 ;

McCreery v. Allender, 4 Harr. & McH. (Md.) 409, 412 ;

Scanlan v. Wright, 30 Mass. (13 Pick.) 523, 529 ; s.c. 25 Am. Dec. 344 ;

Fox v. Southack, 12 Mass. 143 ;

Sheafe v. O'Neil, 1 Mass. 256 ;

Montgomery v. Doxion, 7 N. H. 475, 480.

the death of an alien in possession of real property, although he may leave heirs who would be capable of taking it if he were a citizen, the land escheats.¹ This was according to the common-law rule preventing aliens from taking real estate by descent, or by operation of law in any respect.²

SEC. 241. **Same—Aliens.**—At common law all persons born in a strange country, under obedience to a strange prince, and out of the lineage of the king, were incapable of taking or holding freehold estate for their own benefit, unless they were naturalized by act of Parliament or made citizens by letters patent.³ In this country an alien cannot take lands by act of law or by descent, nor transmit them to others as his heirs, by the common law,⁴

¹ *Slater v. Nason*, 32 Mass. (15 Pick.) 345, 349;

Maynard v. Maynard, 36 Hun (N. Y.) 227, 230;

Moaers v. White, 6 John. Ch. (N. Y.) 360, 365;

Rubeck v. Gardner, 7 Watts (Pa.) 455, 458.

² *Montgomery v. Doxion*, 7 N. H. 475, 480;

People v. Conklin, 2 Hill (N. Y.) 67, 69;

Moaers v. White, 6 John. Ch. (N. Y.) 360, 365;

Marshall v. Conrad, 5 Call. (Va.) 364, 402;

Blight's Lessee v. Rochester, 20 U. S. (7 Wheat.) 535, 544; bk. 5 L. ed. 516;

Orr v. Hodgson, 17 U. S. (4 Wheat.) 453; bk. 4 L. ed. 613;

Dawson v. Godfrey, 8 U. S. (4 Cr.) 321, 322; bk. 2 L. ed. 634.

Compare: Rhien v. Robbins, 20 Iowa. 45.

³ *State v. Beackmo*, 8 Blackf. (Ind.) 246;

1 Inst. 2b.

⁴ *Siemssen v. Bofer*, 6 Cal. 250;

Huddleston v. Lazenby, 1 Ind. 234;

Doe v. Lazenby, 1 Smith (Ind.) 203, 234;

Greenhold v. Stanforth, 21 Iowa 595;

Purcell v. Smidt, 21 Iowa 540;

Rhien v. Robbins, 20 Iowa 45;

Stemple v. Herminghouser, 3 Iowa 408;

Yeaker's Heirs v. Yeaker's Heirs, 4 Met. (Ky.) 33; s.c. 81 Am. Dec. 530;

White v. White, 2 Met. (Ky.) 185;

Farrar v. Dean, 24 Mo. 16;

Marx v. McGlynn, 88 N. Y. 358;

Heeney v. Brooklyn Society, 33 Barb. (N. Y.) 360;

Beck v. McGillis, 9 Barb. (N. Y.) 35;

Brown v. Sprague, 5 Den. (N. Y.) 545;

Moaers v. White, 6 John. Ch. (N. Y.) 360, 365;

Jackson v. Lunn, 3 John. Cas. (N. Y.) 109;

Copeland v. Sauls, 1 Jones (N. C.) L. 70;

Settegast v. Schrimpf, 35 Tex. 323;

Heirs of Clay v. Clay, 26 Tex. 24, 84;

Hardy v. DeLeon, 5 Tex. 211;

State v. Boston, C. M. R. Co., 25 Vt. 433;

Sullivan v. Burnett, 105 U. S. 334; bk. 26 L. ed. 1124;

Orr v. Hodgson, 17 U. S. (4 Wheat.) 453; bk. 4 L. ed. 613;

Cross v. DeValle, 1 Cliff. C. C. 282;

Hammekin v. Clayton, 2 Woods C. C. 336.

Foreigners can hold property in the territories, and may inherit, in the absence of legislation upon this subject.

People v. Folsom, 5 Cal. 373.

for he has no inheritable blood;¹ but a great change has taken place in recent years, both in England² and

See: *Beard v. Federy*, 70 U. S. (3 Wall.) 478; bk. 18 L. ed. 88.

The law existing at the time of descent cast governs the right of aliens to inherit realty.

Pilla v. German School Assoc., 23 Fed. Rep. 700;

Subsequent naturalization does not avail.—Where at the death of one seized his heirs are aliens, incapable of taking, the title vests elsewhere, and is not transferred to them by their subsequent naturalization.

Heeney v. Brooklyn Society, 33 Barb. (N. Y.) 360.

Who are aliens—Indiana doctrine.—It is said in Indiana that the term "alien" applies to one not a citizen of the state.

McDonel v. State, 90 Ind. 320.

Same—Texas rule.—A different rule, however, would seem to prevail in Texas, for it is said there, that upon the annexation of Texas to the Union, a citizen of another state ceased to be an alien; and that a conveyance made to him while an alien then became indefeasible.

Baker v. Westcot, 73 Tex. 123; s.c. 11 S. W. 157.

Foreign born child of a citizen of the United States, it seems, is subject to a double allegiance, but that on reaching maturity he has the right to elect one and repudiate the other, and that such election is conclusive upon him.

Ludlam v. Ludlam, 26 N. Y. 356.

Thus where a citizen of the United States, voluntarily, at the age of eighteen years, went to Peru, with the intention of remaining there in trade an indefinite time, but was not naturalized there; it was held, that by the common law, in the absence of any law of the United States on the subject, his child born in Peru, of a wife a native of that country, was capable of inheriting property as a citizen of the United States.

Ludlam v. Ludlam, 26 N. Y. 356.

A resident alien, widow of a naturalized citizen of South Carolina, who died intestate, leaving a brother who was also a naturalized citizen, is entitled to no share of her husband's real estate; the brother being the sole distributee.

Keenan v. Keenan, 7 Rich. (S. C.) L. 345.

Same—Subsequent naturalization.—And that though the widow subsequently becomes naturalized, her naturalization does not retroact, so as to divest the brother, and vest a share of the land in her.

Keenan v. Keenan, 7 Rich. (S. C.) L. 345.

Curtesy.—A foreigner, not naturalized, cannot hold, by curtesy, such an interest in land as may be sold by a *fi. fa.*

Copeland v. Sauls, 1 Jones (N. C.) L. 70.

Alien children and widow—Holding by devise.—In New York, aliens, and the children of aliens, have been said to be incapable of taking and holding real estate by devise; but a female, married to an alien, and residing in a foreign country, is not thereby incapacitated to take an interest in real estate under a will.

Beck v. McGillis, 9 Barb. (N. Y.) 35.

¹ *Elmendorff v. Carmichael*, 3 Litt. (Ky.) 472; s.c. 14 Am. Dec. 86;

Monroe v. Merchant, 28 N. Y. 915;

McCarthy v. Marsh, 5 N. Y. 263, 274;

McGregor v. Comstock, 3 N. Y. 408, 414;

Moers v. White, 6 John. Ch. (N. Y.) 360, 365;

Orser v. Hoag, 3 Hill (N. Y.) 79;

People v. Conklin, 2 Hill (N. Y.) 71;

Redpath v. Rich, 3 Sandf. (N. Y.) 79, 81;

Lynch v. Clarke, 1 Sandf. Ch. (N. Y.) 583;

Jackson v. Fitzsimmons, 10

² The naturalization act of 33 Vict., c. 14, § 2.

America, in the direction of obliterating all distinction between citizens and aliens in the ownership of property. In the various territories¹ and in the District of Columbia,² foreigners can hold property, and may inherit, in the absence of legislation upon the subject.³ Where there are statutes existing at the time of the descent cast, these statutes govern the right of aliens to inherit realty.⁴

SEC. 242. Same—Same—Federal and state statutes.—Congress has exercised the power conferred by the federal constitution and established a uniform rule of naturalization which prevails throughout all the states and territories, yet each state has the undoubted right to enact laws regulating the descent of, and successions to, property within its limits, and consequently to permit or prevent aliens from holding or inheriting lands.⁵ Such statutes have been passed in Alabama,⁶ Arkansas,⁷

Wend. (N. Y.) 9; s.c. 24 Am. Dec. 198;

Orr v. Hodgson, 17 U. S. (4 Wheat.) 453; bk. 4 L. ed. 613.

Alien beneficiaries of trust.—

Wherever the common-law doctrine prevails forbidding aliens from acquiring real estate for an absolute right, they can be made beneficiaries and hold equitable interest in a trust in their favor; but this does not extend to trusts in personal property.

See: Atkins v. Kron, 5 Ired. (N. C.) Eq. 207;

Leggett v. Dubois, 5 Paige Ch. (N. Y.) 114; s.c. 28 Am. Dec. 413;

Hubbard v. Goodwin, 3 Leigh (Va.) 492;

Taylor v. Benham, 46 U. S. (5 How.) 233; bk. 12 L. ed. 130.

Same—Bequest converted into money.—Consequently a bequest of land to an alien converted into money by sale is valid, although a demise of the land is void.

See: De Barante v. Gott, 6 Barb. (N. Y.) 497;

Anstice v. Browne, 6 Paige Ch. (N. Y.) 448;

Craig v. Leslie, 16 U. S. (3 Wheat.) 563; bk. 4 L. ed. 460.

Same—Secret trust voidable.—

Where by the laws of a state aliens are prohibited from acquiring and holding real property, a deed made by A to B upon a secret trust for C, who is a foreigner, A having no knowledge of the trust, is not void; the trust only is void.

Hammekin v. Clayton, 2 Woods C. C. 336.

¹ People v. Folsom, 5 Cal. 373.

See: Beard v. Federy, 70 U. S. (3 Wall.) 478; bk. 18 L. ed. 88.

² See: De Geofroy v. Riggs, 133 U. S. 258; bk. 33 L. ed. 642; 10 Sup. Ct. Rep. 259; 17 Wash. L. Rep. 438.

³ People v. Folsom, 5 Cal. 373.

⁴ Pilla v. German School Assoc., 23 Fed. Rep. 700.

⁵ Ethridge v. Malempre, 18 Ala. 565.

⁶ Ala. Code, 1886, § 1914.

See: Harley v. State, 40 Ala. 689; Ethridge v. Malempre, 18 Ala. 565;

Cong. Church v. Morris, 8 Ala. 132.

Defeasible estate of an alien.—In Alabama, under the present statute, the defeasible estate of an alien, in lands purchased by him, is perfected by his becoming a naturalized citizen before office found.

⁷ Ark. Dig. 1884, § 232, *et seq.*

California,¹ Colorado,² Connecticut,³ Florida,⁴ Georgia,⁵ Illinois,⁶ Indiana,⁷ Iowa,⁸ Kansas,⁹ Kentucky,¹⁰

Harley v. State, 40 Ala. 689.

But the statute of Alabama, giving an alien woman the right to inherit from her uncle, also an alien, in the same manner as if he, her mother, and herself were citizens, does not give the capacity of inheritance to other relatives, who are also aliens.

Congregational Church v. Morris, 8 Ala. 182.

¹ Cal. Civ. Code, §§ 671, 672. Under this statute property must be claimed within five years or it escheats.

See: State v. Smith, 70 Cal. 153; s.c. 12 Pac. Rep. 121.

California Constitution does not prohibit the Legislature from conferring upon non-resident foreigners the same rights with respect to the acquisition, possession, enjoyment, transmission, and inheritance of property, as are guaranteed by that instrument to resident foreigners.

State v. Smith, 70 Cal. 153; s.c. 12 Pac. Rep. 121.

California Constitution, art. 1, § 17, providing that "*bona fide* residents of this state shall have the same rights in respect to the acquisition, possession, enjoyment, transmission, and inheritance of property as native-born citizens," has been held not to prevent extending the right of inheritance to non-resident aliens.

Re Billings, 65 Cal. 593; s.c. 4 Pac. Rep. 639.

California Civil Code, § 671, for the succession to property by foreigners who have never been residents, provides a rule with respect to property within the state, and confers a right to be enjoyed within its jurisdiction is constitutional; and under § 672, property claimed by succession escheats if the alien does not appear within the state and claim it within five years.

State v. Smith, 70 Cal. 153; s.c. 12 Pac. 121.

"Non-resident aliens," as used in Cal. Civ. Code, § 672, requiring a claim to property by succe-

sion to be made within five years, mean those persons who are neither citizens of the United States nor residents of the state.

State v. Smith, 70 Cal. 153; s.c. 12 Pac. Rep. 121.

² Col. Gen. St. 1883, p. 182, § 61.

³ Conn. Gen. St. 1888, § 15.

The French citizens.—Land for mining purposes.—An exception is made in favor of French citizens, who are classed as resident aliens. Non-resident aliens are permitted to acquire, hold, and transmit real estate used for mining purposes.

⁴ Fla. Dig. 1881, p. 470, § 7.

⁵ Ga. Code, 1882, § 1661.

Alien friends.—It is provided in this statute that alien friends "shall have the privilege of purchasing, holding, and conveying real estate."

⁶ Starr & Cur. Ann. St. 1885, p. 264, c. VI., pars. 1 & 2.

⁷ Ind. Rev. St. 1881, § 2967.

See: Murray v. Kelley, 27 Ind. 42.

⁸ Iowa Rev. Code, 1886, § 1908.

See: Re Gill's Estate, 79 Ia. 296; s.c. 44 N. W. Rep. 553; 9 L. R. A. ;

Krogan v. Kinney, 15 Iowa 242.

Non-resident aliens.—Iowa doctrine.

—Under the statutes of Iowa, a non-resident alien can inherit real estate only when devised to him by will, and provided he will become a resident of the state subsequent to the date of such devise.

Krogan v. Kinney, 15 Iowa 242.

A "non-resident alien" whose widow under Iowa Code, § 2442, "shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser," means one who resides outside the state.

Re Gill's Estate, 79 Iowa 296; s.c. 44 N. W. Rep. 553; 9 L. R. A. .

⁹ Kan. Const. 1859, Bill of Rights, § 17; Kans. Comp. L. 1885, p. 50, § 99.

¹⁰ Ky. Gen. St. 1883, p. 191, § 1. By this statute aliens can inher-

Maine,¹ Maryland,² Massachusetts,³ Michigan,⁴ Minnesota,⁵ Mississippi,⁶ Missouri,⁷ Montana,⁸ Nebraska,⁹

it after declaring their intention to become citizens of the United States.

See: *Eustache v. Rodaquest*, 11 Bush (Ky.) 42;

White v. White, 2 Met. (Ky.) 185.

Kentucky statutes—Act of 1800.

—An alien, to inherit land under the act of 1800, must have had two years' residence in the state, and have resided here at the time of decedent's death.

White v. White, 2 Met. (Ky.) 185.

Same—Act of March 21, 1861, "to allow non-resident aliens who are heirs and devisees to hold and convey real estate," does not repeal nor is it in conflict with Rev. Stat., ch. 15, art. 3, § 1, but is merely cumulative. Nor is that act repealed, either in terms or effect, by that of March 9, 1867.

Eustache v. Rodaquest, 11 Bush (Ky.) 42.

Where an alien becomes a citizen of Kentucky and dies intestate and childless, his sister, an alien and resident of France, may take by descent his real estate under the limitations prescribed in the act of March 21, 1861, subject to the widow's right to a homestead exemption or dower.

Eustache v. Rodaquest, 11 Bush (Ky.) 42.

Alienage of wife.—By the law prior to the adoption of the Revised Statutes, the alienage of the wife rendered her incapable of inheriting from her husband, and also barred her right of dower.

White v. White, 2 Met. (Ky.) 185.

¹ Me. Rev. St. 1883, p. 604, § 2.

² Md. Rev. Code, 1878, p. 392, § 8.

³ Mass. Pub. St. 1882, p. 744, § 1.

⁴ Mich. Const. 1850, art. XVIII., § 13.

Rights and disabilities of aliens in Michigan to acquire and hold lands in Michigan, under the

ordinance of 1787, the treaty with Great Britain of 1794, and the acts of Congress and of Michigan; also the doctrine of escheats,—explained.

Crane v. Reeder, 21 Mich. 24; s.c. 4 Am. Rep. 430.

⁵ Minn. Gen. St. 1878, p. 820, § 41.

⁶ Miss. Rev. Code, 1880, § 1230.

⁷ Mo. Rev. St. 1879, § 325.

See: *Harney v. Donohoe*, 97 Mo. 141; s.c. 10 S. W. Rep. 191;

Burke v. Adams, 80 Mo. 504;

State v. Killian, 51 Mo. 80;

Greenia v. Greenia, 14 Mo. 526.

The Missouri statutes remove all disabilities of alienage. An alien, therefore, may take land by descent from an alien.

Burke v. Adams, 80 Mo. 504.

Under Missouri statutes, 1885, p. 66 (Rev. Stat. 1845, p. 115), where the heirs to real estate consisted of aliens, one of them a resident, and the others non-residents, of the United States, the resident alien was the sole heir, and those who were non-residents took no interest whatever.

Harney v. Donohoe, 97 Mo. 141; s. c. 10 S. W. Rep. 191.

Capacity to hold lands.—If a general statute of the state allows an alien to hold lands upon certain conditions, as that he shall declare his intention of becoming a citizen, a petition to enforce an escheat must show affirmatively that the conditions did not exist. The presumption is, that when he acquired the land, he was qualified to hold it.

State v. Killian, 51 Mo. 80.

⁸ **The organic act of Montana Territory**, of May 26, 1864, does not sanction the principle of the common law, which prohibits aliens from holding real property. Aliens who have declared their intentions to become citizens can hold lands in the territory.

Territory v. Lee, 2 Mont. 124.

⁹ Neb. Comp. L. 1885, c. 73, § 54.

Nevada,¹ New Hampshire,² New Jersey,³ New York,⁴

¹ Nev. L. 1879, p. 51; Nev. Gen. St. 1885, § 2655.

Chinese excepted.—An exception is made in this statute against subjects of the Chinese Empire.

See: *State v. Preble*, 18 Nev. 251; s.c. 2 Pac. Rep. 754;

Golden Fleece Co. v. Cable Con. Co., 12 Nev. 312.

Nevada Constitution gives to foreigners becoming *bona fide* residents the rights of citizens as to property, etc. Under this provision a subject of the Chinese Empire, if a *bona fide* resident, may locate and purchase public lands of the state.

State v. Preble, 18 Nev. 251.

Same—Locating mining claim.—An alien who has never declared his intention to become a citizen is not a qualified locator of mining ground, and he cannot hold a mining claim, either by actual possession or by location, against one who connects himself with the government title by compliance with the mining law.

Golden Fleece Co. v. Cable, etc., Co., 12 Nev. 312.

² N. H. Gen. L. 1878, p. 325, § 16.

³ N. J. Rev. 1877, p. 6, § 3.

See: *Colgan v. Pellens*, 48 N. J. L. (19 Vr.) 27; s.c. 2 Atl. Rep. 633; 2 Cent. Rep. 254.

⁴ 4 N. Y. Rev. St. (8th ed.) 2420, 2425; 1 Rev. St. Codes & L. 861; 3 Id. 2516, 2525, 3342.

See: *Hall v. Hall*, 81 N. Y. 130;

Luhrs v. Eimer, 80 N. Y. 171;

Goodrich v. Russel, 42 N. Y. 376;

People v. Snyder, 41 N. Y. 397;

Van Cortland v. Laidley, 32 N. Y. S. R. 585;

Re Beck's Estate, 31 N. Y. S. R. 965;

Wright v. Saddler, 20 N. Y. 320;

Duke of Cumberland v. Graves, 7 N. Y. 305; s.c. 9 Barb. (N. Y.) 595;

McCarthy v. March, 5 N. Y. 233;

Ettenheimer v. Hefferman, 66 Barb. (N. Y.) 374;

Heeney v. Brooklyn Society, 33 Barb. (N. Y.) 360;

Watson v. Donnelly, 28 Barb. (N. Y.) 653;

Parish v. Ward, 28 Barb. (N. Y.) 328;

Brown v. Sprague, 5 Den. (N. Y.) 545;

Curran v. Finn, 3 Den. (N. Y.) 229;

Matter of Leefe, 4 Edw. Ch. (N. Y.) 395;

Halsey v. Beer, 52 Hun (N. Y.) 366; s.c. 24 N. Y. S. Rep. 713; 5 N. Y. Supp. 334;

Kull v. Kull, 37 Hun (N. Y.) 476;

Dusenberry v. Dawson, 9 Hun (N. Y.) 511;

McCarty v. Terry, 7 Lans. (N. Y.) 253.

New York statute—Act, 1825.—Subsequently to the statute of 1825, in New York, aliens could not take land by purchase, without complying with the provisions of that act.

Curran v. Finn, 3 Den. (N. Y.) 229.

Same—Children of resident alien—Act, 1845.—By New York Laws of 1845, c. 115, §§ 1, 10, the children of a resident alien inherit his land at his death, although themselves non-resident aliens. The title of such of them as are males of full age is defeasible by the state unless, before the consummation of proceedings instituted for that purpose, they file declarations with the secretary of state of their intention to become citizens.

Goodrich v. Russel, 42 N. Y. 376.

Same—Revised Statutes.—Under the Revised Statutes of New York an alien can take land by purchase, and in case of lands which under those statutes would escheat to the state, the attorney-general alone can take advantage of it.

Matter of Leefe, 4 Edw. Ch. (N. Y.) 395.

Same—Devisee born after death of alien.—It is said by the Supreme Court in the recent

North Carolina,¹ Ohio,² Oregon,³ Pennsylvania,⁴ Rhode

case of *Van Cortland v. Laidley*, 32 N. Y. S. R. 585, that the disability created by 2 N. Y. Rev. Stat. 57, § 4, providing that every devise of any interest in realty to one who is an alien at the time of testator's death shall be void, and the interest so devised shall pass to the heirs or residuary estate, does not apply to alien devisees born after the death of the testator; and such devisees to whom was devised the remainder of lands devised for life can take under such devise and hold as against the heirs at law, independent of the provisions of the statute.

Same—An alien woman, who might be lawfully naturalized under the existing laws, by intermarrying with a naturalized non-resident citizen of the United States, acquires a right to take real estate by descent.

Halsey v. Beer, 52 Hun (N. Y.) 366; s.c. 24 N. Y. S. R. 713; 5 N. Y. Supp. 334.

Treaties—With Great Britain, 1783.—Although, under the 6th article of the treaty of 1783, lands held by British subjects in New York might be transmitted by descent to a citizen, they could not, upon the death of such British subjects, previous to the treaty of 1794, pass by descent to an alien born after July 4, 1776.

Brown v. Sprague, 5 Den. (N. Y.) 545.

Same—Treaty of 1794.—A British subject holding lands within the United States, and coming within the provisions of the ninth article of the treaty with Great Britain of 1794, authorizing him to "grant, sell, and devise lands to whom he pleased, in like manner as if he had been a native-born citizen of the United States," had a right to convey and devise lands to aliens as well as citizens.

Watson v. Donnelly, 28 Barb. (N. Y.) 653.

The titles derived from conveyance by the trustees of the Pul-

teney estate were held valid under the provisions of this treaty with Great Britain and the New York act of 1798, as to the capacity of British aliens to hold and convey lands in the United States.

People v. Snyder, 41 N. Y. 397.

Same—With Prussia, 1844.—Under the treaty of March 28, 1844, article 2, between the United States and Prussia, providing that, on the death of any person holding real property in one of such countries, a subject or citizen of the other to whom the property would descend were he not disqualified by alienage shall be allowed a reasonable time to sell the same and to withdraw the proceeds, upon a foreclosure sale of a decedent's lands from which a surplus is realized. Citizens of Germany who are the heirs and next of kin are entitled to withdraw their shares of the surplus within a reasonable time.

Re Beck's Estate, 31 N. Y. S. R. 965.

Same—With Wurtemberg.—The treaty between the United States and Wurtemberg provides that where the holder of real property, which but for alienage would descend to a citizen of the other country, dies, such citizen shall have two years within which to sell the property and withdraw the proceeds. Held, that the alien heir, for two years, has precisely the rights of a resident heir.

Kull v. Kull, 37 Hun (N. Y.) 476.

¹ N. C. Code, 1883, § 7.

² Ohio Rev. St. 1880, § 4173.

³ Oreg. Code, 1887, p. 1352, § 2988.

⁴ Bright. Prud. Dig. 1883, p. 84, *et seq.*

Alien friends by this statute may hold real estate not exceeding five thousand acres in extent.

Alien enemies having declared their intention to become citizens are allowed to hold lands not exceeding two hundred acres in quantity nor two thousand dollars in value.

Island,¹ South Carolina,² Tennessee,³ Texas,⁴ Virginia,⁵ West Virginia,⁶ and Wisconsin.⁷

¹ R. I. Pub. St. 1882, p. 442, § 6.

² S. C. Gen. St. 1882, § 1847.

The South Carolina statute of 1799, authorizing denizens, or persons who have taken the oath of allegiance, who are residents of that state, to hold real estate, does not render such persons capable of inheriting real estate. The effect of that statute seems only to be, to enable a denizen to hold real estate during his life, and to deprive the state of the right of escheat during that time, but not to remove the common-law disability to inherit.

McClenaghan v. McClenaghan, 1 Strob. (S. C.) Eq. 295; s.c. 47 Am. Dec. 532.

³ Tenn. Code, 1884, § 2804, *et seq.*

See: *Starks v. Traynor*, 11 Humph. (Tenn.) 292;

Emmett v. Emmett, 14 Lea (Tenn.) 369.

The Tennessee act of 1809, c. 53, provides that where any person shall die intestate and without issue, his estate shall descend to the next of kin to the decedent, resident in the United States, to the exclusion of aliens related to the decedent in a nearer degree. It results from this statute, that, contrary to the course of the common law, the course of descent is not broken or changed by the alienage of the ancestor of the next resident of kin, but that such next of kin shall inherit just as if such alien ancestor had been a resident or naturalized citizen, and had died.

Starks v. Traynor, 11 Humph. (Tenn.) 292.

Dower of wife deserted in foreign country.—In Tennessee the widow of an alien who deserted her abroad, and came to Tennessee, there acquired land, and died, was entitled to dower in such land.

Emmett v. Emmett, 14 Lea (Tenn.) 369.

⁴ Tex. Rev. St. 1887, art. 1658. Under this statute property must be claimed within nine years.

See: *Settegast v. Schrimpf*, 35 Tex. 323;

Hanrick v. Patrick, 119 U. S. 156; bk. 30 L. ed. 396.

Statutes—Act of Jan. 28, 1840, § 14, regulating descents, and its re-enactment March 8, 1848 (Pasch. Dig., art. 44), demonstrate that the rule of the common law, which disables an alien from casting descent on an alien, has not been in force in Texas.

Settegast v. Schrimpf, 35 Tex. 323.

Same—Act of 1848.—The defeasible title of a British subject in Texas, under the act of 1848, became indefeasible by virtue of the act of 1854, upon the passage of the English act of 1870, giving aliens a right to hold real property in Great Britain.

Hanrick v. Patrick, 119 U. S. 156; s.c. bk. 30 L. ed. 396.

Same—Act of 1854, giving aliens the same rights as the laws of their country gave citizens of the United States, did not repeal the act of 1848, giving an alien nine years after descent or devise of land to him in which to sell it or become a citizen.

Hanrick v. Patrick, 119 U. S. 156; bk. 30 L. ed. 396.

Declaring intention to become citizen—Invests with citizenship.—After a foreigner by birth has duly declared his intention for the purpose of being naturalized as a citizen, he is invested, under the laws of Texas, with all the rights of citizenship except the elective franchise; and therefore he could acquire real estate by purchase, and on his death could transmit it by descent to his children.

Settegast v. Schrimpf, 35 Tex. 323.

⁵ Va. Code, 1887, § 43.

See: *Foxwell v. Craddock*, 1 Patt. & H. (Va.) 250.

⁶ W. Va. Code, 1887, c. 70, §§ 1 and 2.

⁷ Wis. Rev. St. 1878, § 2220.

SEC. 243. **Same—Corporations.**—At common law corporations may hold those freehold estates that have been transmitted to them by their predecessors for any purposes not inconsistent with those for which the corporation was created.¹ In this country the creation of a corporation gives it, as incident to its existence, without express grant, the power of buying and selling land ; which power may be denied or limited either by the charter creating the corporation, which will affect that corporation only, or by general law, affecting all corporations ;² as in England by the statutes of mortmain, which provide that if land be conveyed to a corporation without license, the next lord may enter for a forfeiture. This power of corporation to receive and hold land is not restricted to the state in which the corporation is organized, in the absence of prohibited statutes in the state in which the right is sought to be exercised.³ The quantity of land that corporations may hold, how-

¹ See : *Lathrop v. Sciota Bank*, 8 Dana (Ky.) 119 ;

Binney's Case, 2 Bland (Md.) 143 ;

Overseers of Poor v. Sears, 39 Mass. (22 Pick.) 122 ;

Sutton Parish v. Cole, 20 Mass. 3 Pick.) 232, 239 ;

McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 437 ; s.c. 18 Am. Dec. 516 ;

Reynolds v. Stark Co., 5 Ohio 204, 205 ;

Banks v. Poitiaux, 3 Rand. (Va.) 136, 141 ; s.c. 15 Am. Dec. 706 ;

Blanchard's Factory v. Warner, 1 Blatchf. C. C. 258 ;

Warden v. Southeastern Ry. Co., 21 L. J. (N. S.) Ch. 886.

A corporation whose term of existence is limited to a number of years may purchase and hold land in fee-simple.

Rives v. Dudley, 3 Jones (N. C.) Eq. 126.

In England there are certain restrictions in the statutes against mortmains, which statutes are thought not to have been adopted in this country, outside of Pennsylvania.

See : *Rathbone v. Tioga Nav. Co.*, 2 Watts & S. (Pa.) 74.

² *Bank v. Poitiaux*, 3 Rand. (Va.) 136 ; s.c. 15 Am. Dec. 706.

³ *Thompson v. Waters*, 25 Mich.

214 ; s.c. 12 Am. Rep. 243 ;

State v. Boston, C. & M. R. Co., 25 Vt. 433.

Tacit adoption of foreign laws.—

It is said by Judge STORY in his work on the Conflict of Laws, §§ 35 and 37, and his position is fully approved by the Supreme Court of the United States in *Bank of Augusta v. Earle*, 38 U. S. (13 Pet.) 519, 589 ; bk. 10 L. ed. 274–308, that “ In the silence of any positive rule affirming or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation which is administered and ascertained in the same way, and guided by the same reasoning by which all other principles of municipal law are ascertained and guided.”

See : *Merrick v. Van Santvoord*, 34 N. Y. 208 ;

Runyan v. Coster's Lessee, 39 U. S. (14 Pet.) 122 ; bk. 10 L. ed. 382.

The same principle applies between the states of the Union.

ever, is generally limited by the acts creating them. If at any time the quantity or value exceeds the amount limited or specified, the charter may be fortified by the state alone.¹

SEC. 244. Division of estates.—Estates are divided into—(1) those of inheritance, and (2) those not of inheritance,² Those estates which are less than freehold, as a term for years of land, are called chattel interests or estates.³ Such interests are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life.⁴ While the utmost limit to which an estate can extend is fixed and determined, the interest thereby held in the land is reduced to a chattel interest merely.⁵ Freehold estates of inheritance are again subdivided into (1) inheritances absolute, or fee-simple; and (2) inheritances limited, one species of which is called fee-tail.⁶

¹ *Bogardus v. Trinity Church*, 4 Sand. Ch. (N. Y.) 633, 775.

See: *Howell v. Earp*, 21 Hun (N. Y.) 393, 395;

Gould v. Cayuga Co. Nat. Bank, 21 Hun (N. Y.) 293; *aff'd* 86 N. Y. 76; s.c. 13 Week. Dig. 244;

Reformed Pres. Church, 7 How. (N. Y.) Pr. 476;

Chamberlain v. Chamberlain, 3 Lans. (N. Y.) 390;

Union Nat. Bank v. Matthews, 98 U. S. 621; bk. 25 L. ed. 188;

Runyan v. Coster, 39 U. S. (14 Pet.) 128; bk. 10 L. ed. 382.

Devise to corporation—Heirs and devisees may question legality.

—While it is the province of the state to see to the enforcement of the limitations in the charter as to the real property that corporations can hold, yet it has been held that heirs, devisees, and next of kin are competent to call in question gifts of land made to corporations unable to take and hold such lands.

State v. Bates, 2 Harr. (Del.) 18;

Barton v. King, 41 Miss. 288;

Harris v. Slaght, 46 Barb. (N. Y.) 470; s.c. 2 Abb. App. Dec. 316;

Goddard v. Pomeroy, 36 Barb. (N. Y.) 546;

Ayers v. The Methodist Episcopal Church, 3 Sandf. (N. Y.) 351;

Quaker Society v. Dickenson, 1 Dev. (N. C.) L. 189;

Ruth v. Oberbrunner, 40 Wis. 238.

² 2 Bl. Com. 104.

³ *Hullenbeck v. McDonald*, 112 Mass. 347, 349;

Ex parte Gray, 5 Mass. 419.

See: *Spangler v. Stanler*, 1 Md. Ch. 36;

Chapman v. Gray, 15 Mass. 439, 445;

Brewster v. Hill, 1 N. H. 350;

Prichard v. Prichard, L. R. 11 Eq. 232;

2 Bl. Com. 386;

1 Prest. Est. 203;

Shep. Touch, 76.

⁴ See: *Prichard v. Prichard*, L. R. 11 Eq. 232;

2 Bl. Com. 386.

⁵ *Spangler v. Stanler*, 1 Md. Ch. 36;

Chapman v. Gray, 15 Mass. 439, 445;

Montague v. Smith, 13 Mass. 396;

2 Bl. Com. 386.

⁶ 2 Bl. Com. 104.

CHAPTER II.

ESTATES IN FEE-SIMPLE.

- SEC. 245. Definition of fee.
- SEC. 246. Definition of fee-simple.
- SEC. 247. Quantum of estate in fee-simple.
- SEC. 248. Same—Taken by corporation.
- SEC. 249. Tenant in fee-simple—Definition.
- SEC. 250. Words of limitation.
- SEC. 251. Same—Bastard.
- SEC. 252. Same—Informal and implied limitation.
- SEC. 253. Same—Statutory words of limitation.
- SEC. 254. Same—Executory limitation.
- SEC. 255. Same—To corporations—"Successors."
- SEC. 256. Same—Restrictions on ecclesiastical corporations.
- SEC. 257. Kinds of fees.
- SEC. 258. Inferior estates derived out of fee-simple.
- SEC. 259. Abeyance of fee.
- SEC. 260. Same—Land granted to pious uses.
- SEC. 261. Same—Franchise of corporation.
- SEC. 262. Same—Present doctrine as to abeyance of fees.

SECTION 245. **Definition of fee.**—A fee, in feudal law, was an allotment of land in consideration of military service rendered and to be rendered, and originally meant¹ that which is held of some superior on condition of rendering him services,² the ultimate property remaining in the superior;³ but this strict original meaning of the word as a beneficial or usufructuary estate soon passed into its

¹ It is said in *Wendell v. Crandall*, 1 N. Y. 491, 495, that the word "fee" was originally used in contradistinction to *allodium*, and signified that which was held of another, on condition of rendering him service. It is related to the quality, and not the quantity of the estate. And although the word is now generally employed to express

the *quantum* of estate, that is not its only meaning.

² *Wallace v. Harmstead*, 44 Pa. St. 499.

³ A fee is defined by Spelman (*Feuds*, c. I.) as the right which the tenant or vassal has to the use of lands while the absolute property remained in a superior.

modern signification of an estate of inheritance,¹ and as now used the word signifies an estate or inheritance as distinguished from a less estate.² The word "fee" was originally used in contradistinction to *allodium*, relating to the quality rather than to the quantity of the estate;³ but when the feudal law was fully established, and it was universally acknowledged that all the lands in England were held mediately or immediately of the crown, the word *feodum*, or fee, became generally used to denote the quantity of estate or interest in the land;⁴ and the word is now employed to express the *quantum* of estate, although it was not in its original use.⁵

SEC. 246. **Definition of fee-simple.** — An estate in fee-simple is a freehold estate of inheritance⁶ free of conditions, limitations, or restrictions to particular heirs, but descendable to the general heirs, both male and female, whether lineal or collateral.⁷ It is called fee-simple or *feodum simplex*, because it signifies a lawful and pure inheritance.⁸ The term "fee" standing alone implies an

¹ 2 Bl. Com. 106;

1 Co. Litt. (19th ed.) 1b;

3 Kent Com. (13th ed.) 514;

1 Prest. Est. 420.

² Littleton says that "Feodum is the same that inheritance is." Litt., § 1.

Lord Coke expressly admits that the usage here adopted is the more correct, though he has not chosen to adhere to it. "Of fee-simple it is commonly holden that there be three kinds, viz. fee-simple absolute, fee-simple conditionall, and fee-simple qualified, or a base fee. But the more genuine and apt division were to divide fee, that is, inheritance, into three parts, viz., simple or absolute, conditionall, and qualified or base." Co. Litt. 1b. On the next page he says: "And therefore, seeing fee-simple is *hereditas legitima vel pura*, it plainly confirmeth that the division of fee is by his (Littleton's) authority rather to be divided as is aforesaid than fee-simple."

³ Wendell v. Crandall, 1 N. Y. 491, 495.

⁴ It appears from Bracton, that the word *feodum* was then often

used in both those senses. Et sciendum quod feodum est id quod quis tenet, ex quacunque causa, sibi et hæredibus suis. Item dicitur feodum alio modo ejus qui alium feoffat, et quod quis tenet ab alio: ut si sit qui dicat, Talis tenet de me tot feodo per servitium militare. And it is evidently for the purpose of denoting the quantity of interest that the word *feodum* is used in pleading an inheritance in the king, viz., Rex seisitus fuit in domino suo ut de feodo; where the word *feodum* cannot possibly import an estate holden, the king not holding of any superior lord, but merely denotes an inheritance.

See: Wright's Ten. 148, 263b.

⁵ Wendell v. Crandall, 1 N. Y. 491, 495;

Taul v. Campbell, 7 Yerg. (Tenn.) 319; s.c. 27 Am. Dec. 508.

⁶ Litt. §§ 5, 7.

See: 1 Co. Litt. (19th ed.) 13b, 14b.

⁷ 2 Bl. Com. 45, 104-106.

⁸ Jackson v. Van Zandt, 12 John. (N. Y.) 169, 177.

estate of inheritance,¹ and the suffixing of the words "simple" or "absolute" adds nothing to the force of the term;² the word "simple" is used for the purpose of showing that it descends to the heirs generally, without restraint.³ The phrases "fee-simple," and "fee-simple absolute," are regarded as synonymous terms.⁴ A man is therefore possessed of an estate in fee-simple where he has an estate in lands and tenements,⁵ or hereditaments, corporeal or incorporeal,⁶ to all his heirs forever, generally, absolutely, and simply,⁷ without limitation or restriction as to heirs, but leaving the descent of the property to his own pleasure, or the disposition of the law.⁸

SEC. 247 **Quantum of estate in fee-simple.**—A fee-simple estate is the highest in quality, the most extensive in *quantum*, and the most absolute in respect to the rights which it confers, of all estates known to the law.⁹ It confers, and since the beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect to the land every act of ownership which can enter into the imagination, including the right to commit unlimited waste; and for all practicable purposes of ownership, it differs from the absolute dominion of a chattel, in nothing except the physical indestructibility of its subject.

SEC. 248. **Same—Taken by corporation.**—That a fee-simple limited to a corporation was formerly, as regards

¹ Bl. Com. 106;

1 Co. Litt. (19th ed.) 1b.

² Clark v. Baker, 14 Cal. 612, 613;
s.c. 76 Am. Dec. 449, 455;

Jecko v. Taussig, 45 Mo. 169.

³ 1 Co. Litt. (19th ed.) 1b;

1 Prest. Est. 420.

⁴ Clark v. Baker, 14 Cal. 612, 631;
s.c. 76 Am. Dec. 749, 755;

Jackson v. Van Zandt, 12 John.
(N. Y.) 169, 177.

See: Jecko v. Taussig, 45 Mo. 169;
Litt. § 1; 1 Co. Litt. (19th ed.)
1a.

⁵ Libby v. Clark, 118 U. S. 250,
255; bk. 30 L. ed. 133, 134;
Comyn's Dig. tit. "Estates."

⁶ 2 Bl. Com. 104;

Old. Nat. Brev. 41.

See: Canfield v. Ford, 28 Barb.
(N. Y.) 336.

⁷ 2 Bl. Com. 104.

See: Patterson v. McCousland, 3
Bland. Ch. (Md.) 72;

Wendell v. Crandall, 1 N. Y. 491,
495;

Holliday v. Overton, 16 Jur. 346;
s.c. 10 Eng. L. & Eq. 175.

⁸ 2 Bl. Com. 104.

⁹ Van Rensselaer v. Poucher, 5
Den. (N. Y.) 35, 40;

2 Bl. Com. 105, 106;

Cal. Civ. Code, § 762;

1 Co. Litt. (19th ed.) 1a, note.

the *quantum* of the estate, not precisely identical with a "fee-simple" limited to the grantee and his heirs, appears from the fact that upon the dissolution of a corporation there was a reverting to the donor, not, as upon a failure of the heirs, to an individual grantee and escheat to the lord; but the donor was deprived of his reverter by the alienation of the corporation. For this reason Preston speaks of corporations as having a fee-simple for the purpose of alienation, but a determinable fee for the purpose of enjoyment.¹ By reason of the existence of this possibility of reverter, a condition against alienation annexed to a fee-simple is said to be good in a limitation to a corporation, though such a limitation is bad in a limitation to an individual.²

SEC. 249. **Tenant in fee-simple—Definition.**—A tenant in fee-simple is one who has lands or tenements to hold to him and his heirs forever. He is the absolute master of all houses and other buildings erected on the land, and also of all timber growing thereon, for trees are considered as parcel of the inheritance.³ He is also entitled to all mines of metals and minerals,⁴ and to take up and dispose of all minerals and fossils which are under the land.⁵

SEC. 250. **Words of limitation.**—At common law, words of limitation are necessary to create an estate in fee-simple. The land must be conveyed to the party or parties and to his or their heirs, whether created by deed or devise, as will be more fully shown hereafter.⁶ Any departure from the settled forms of the common law in creating estates with new qualities of inheritance is looked upon with disfavor. Thus the limitation of an estate to one and his heirs "male" or "female," or to his heirs on the part of his father or of his mother, is regarded as a fee-simple, the words of limitation to the

¹ 1 Prest. Abst. 272.

² 2 Doct. Stu., c. 35;
Shep. Touch. 130.

³ See : *Ante*, § 56.

⁴ See : *Ante*, § 90, *et seq.* Except gold and silver in some of the states.

⁵ See : *Ante*, § 90, *et seq.*

⁶ See : *Post*, chapter V., "Creating Fee-simple by Deed," and chapters VI. and VII., "Creating Fee-simple by Devise."

particular class of heirs being treated as surplusage.¹ In the limitation of fee-simple the word "heirs" always bears its general meaning, when standing alone and unqualified by words to restrict it to heirs of the body. Its significance is not liable to be restricted to any particular class of heirs, by reason merely of the fact that, under the special circumstances of the case, only a particular class of heirs is capable of an actual inheritance by virtue of its use.

SEC. 251. **Same—Bastard.**—A limitation to a bastard and his heirs gives a fee-simple, not a modified fee. But where an estate is given to a bastard either by grant or devise only the heirs of his body are, under the circumstances, capable of inheriting.² And the same is true even at common law, of an alien, and a man attainted of felony; though at common law they could have no heirs.³

SEC. 252. **Same—Informal and implied limitation.**—It is to be observed that where a limitation is necessary it is not always express, but may be implied; and all limitation whatsoever is in some cases unnecessary. At common law informal limitation by words of direct and indirect reference would suffice. Thus a father might enfeoff his son, habendum to him and his heirs, and the son afterwards enfeoff his father "as fully as the father enfeoffed him."⁴ In some cases no limitation was required. Thus, one of several coparceners, or one of several joint tenants, seized in fee-simple, might release to another without words of limitation.⁵ On a partition between two coparceners seized in fee-simple, a rent granted by one to the other for equality of partition, without words of limitation, was in fee-simple.⁶ By a bargain and sale for valuable consideration, the fee-

¹ See: 1 Co. Litt. (19th ed.) 27a; Com. Dig. tit. "Estates," A. 6; Litt. § 31; 1 Co. Litt. (19th ed.) 27a;

1 Prest. Est. 461, 472.

² 1 Prest. Abst. 273;

2 Prest. Est. 358, 359.

³ 1 Co. Litt. (19th ed.) 2b.

⁴ 1 Co. Litt. (19th ed.) 9b.

⁵ 1 Co. Litt. (19th ed.) 9b; Litt., § 304.

⁶ 1 Co. Litt. (19th ed.) 10a; Prest. Shep. Touch. 101.

simple might pass without limitation ;¹ as also by a fine *como ceo*, and a fine *sur concessit* ;² and by a recovery.³

SEC. 253. **Same—Statutory words of limitation.**—In many of the states there are statutes governing conveyances in which words of limitation are dispensed with, and the English Conveyancing Act of 1881⁴ enacts that deeds shall be sufficient in the limitation on an estate in fee-simple in the use of the words “fee-simple” without the word *heirs*.

SEC. 254. **Same—Executory limitation.**—It was formerly thought that a tenant in fee-simple, whose estate is liable to be defeated by an executory limitation, stood in equity in no better position, as regards the right to commit waste, than a tenant for life punishable for waste.⁵ But it has more recently been decided that, in the absence of express provision, he is practically in the same position as a tenant for life without impeachment of waste.⁶ Such a tenant in fee-simple may be made punishable for waste by an express provision contained in the instrument under which his estate arises.⁷

SEC. 255. **Same—To corporations—“Successors.”**—In the limitation of fees-simple to corporations, the use of the word “successor” is necessary by the common law for the limitation of a fee-simple to a corporation sole, and without it only the estate passed for life to the existing incumbent.⁸ In the case of corporations aggregate, a distinction exists at common law between corporations of which not only the head, but also the body, were persons capable in law, and corporations of which all the members, except the head, were dead in law. The former took a fee-simple, by a mere grant to the corporation under its corporate name, without the use of the word “suc-

¹ 10 Vin. Abr. 235, tit. *Estate*, K. 2, pl. 2.

² 2 Prest. Est. 51, 52 ;

1 Salk. 340 ;

Shep. Touch. 4.

³ 1 Co. Litt. (19th ed.) 9b ;

2 Cruise's Fines & Rec. 15.

⁴ § 5.

⁵ Robinson v. Litton, 3 Atk. 209 ;

Stansfield v. Habbergham, 10 Ves. 273 ; s.c. 7 Rev. Rep. 409.

⁶ Turner v. Wright, 2 DeG. F. & J. 234.

⁷ Blake v. Peters, 1 DeG. U. & S. 345.

⁸ 1 Co. Litt. (19th ed.) 94b.

cessor," or of any words of express limitation.¹ In the case of the latter kind of corporations words of succession were needed in order that they might take a fee-simple to the same extent as in the case of a corporation sole. It seems that in the case of all corporations aggregate having a head, whether the body consists of persons capable in law or dead in law, the grant of an immediate estate, during a vacancy of the headship, is void ; but the grant of a remainder is good, provided that the new head be appointed during the continuance of the particular estate.²

SEC. 256. Same—Restrictions on ecclesiastical corporations.—The nature of an estate is practically ascertained by the privileges of ownership and alienation which it confers. At common law these were identical in the case of individual owners and of lay corporations. The rights of ecclesiastical corporations, who are only seized in right of their churches, were less absolute. They could not levy a fine, or bar their successors by non-claim on a fine levied by others.³ At common law ecclesiastical corporations sole could not alienate, except subject to certain precautionary consents ; alienations by bishops needing confirmation by the dean and chapter, and alienations by parsons needing confirmation by the patron and ordinary ; and being, without such confirmation, good during the life only of the existing incumbent.⁴

SEC. 257. Kinds of fees.—According to Lord Coke,⁵ fees-simple are of three kinds, to wit : (1) fee-simple absolute ; (2) fee-simple conditional ; and (3) fee-simple qualified, or a base fee. The more logical and apt course, it is thought, is to divide the inheritance into three parts, to wit : (1) simple or absolute ; (2) conditional ; and (3) qualified or base. Although it will be found difficult to classify these estates by any well-marked line of discrimination,⁶ yet we shall, for the purpose of treatment, pursue the following classification :

¹ 1 Co. Litt. (19th ed.) 95b.

² 1 Co. Litt. (19th ed.) 264a.

³ 1 Cruise's Fines & Rec. 288.

⁴ 1 Co. Litt. (19th ed.) 44a.

⁵ 1 Inst. 1b.

⁶ Chancellor Kent uses qualified

1. Determinable fees ;
2. Conditional fees ;
3. Qualified fees ; and
4. Base fees.

SEC. 258. **Inferior estates derived out of fee-simple.**—All inferior estates and interests in land are derived out of a fee-simple. For this reason qualified and particular estates, or limited interests in land vesting in the person who has the fee-simple of the same land, such particular estate or limited interest becomes immediately drowned or merged in it.¹ This is on the well-known principle that *omne majus continet in se minus*,—the greater contains or includes in itself the less.²

SEC. 259. **Abeysance of fee.**—We have already seen³ that it is against the policy of the law for the freehold to be in abeyance. The fee-simple is generally vested in some person or other, although inferior estates have been carved out of it.⁴ But the estate may be so situated that no person is seized of it in fee, as where there is a tenant of the freehold, and the remainder or reversion in fee-simple exists for a time without any particular owner, in which case it is said to be in abeyance,—that is, in expectancy, remembrance, and contemplation of law.⁵ Thus if an estate is limited to A for life, with remainder to the right heirs of B, the fee-simple is said to be in abeyance during the life of B, because of the ancient,

base, and determinable fees indiscriminately, or “promiscuously,” as he puts it. 4 Kent Com. (13th ed.) 9.

¹ See: *Post*, chapters on “Estates for Years” and “Merger.”

² Gravel Hill School District v. Old Farm School District, 55 Conn. 244; s.c. 10 Atl. Rep. 689; Chicago K. N. R. Co. v. Ozark Township, 46 Kansas 415; s.c. 26 Pac. Rep. 710.

See: *State v. Crowell*, 9 N. J. L. (4 Halst.) 390, 421;

Hubbard v. Chenango Bank, 8 Cow. (N. Y.) 88, 101;

Reynolds v. Orvis, 7 Cow. (N. Y.) 269, 272;

Farrington v. Morgan, 20 Wend. (N. Y.) 207, 208;

Williams v. Woodard, 2 Wend. (N. Y.) 487, 492;

Trutch v. Bunnell, 11 Oreg. 58, 63; s.c. 56 Am. Rep. 456; 4 Pac. Rep. 588;

In re Phillips' Estate, 48 Leg. Int. (Pa.) 232; s.c. 28 W. N. C. 229;

State ex rel. Barton County v. Kansas City F. S. G. R. Co., 32 Fed. Rep. 722.

³ See: *Ante*, § 238.

⁴ 2 Bl. Com. 107.

⁵ See: *Matter of Braye & Camoy's Peerage*, 5 Bing. N. C. 574; s.c. 35 Eng. C. L. 402; 6 Clark & F. 757; 8 Scott 108; 1 West 1; 1 Co. Litt. (19th ed.) 342.

well-established rule of law that *nemo est hæres viventes*, no one is an heir to a living person.¹ In such case, however, the contingent remainder is in abeyance, but the reversion in fee is not in abeyance; it simply results to the grantor until the contingency, or B's death, happens.

SEC. 260. **Same—Land granted to pious uses.**—At common law² land may be granted to pious uses before there is a grantee in existence to take it.³ In such a case the fee is said to be in abeyance until there is some one competent to take it.⁴ Where a grant is made to a church the fee vests in the pastor and his successors,⁵ but he simply holds in right of his parish or church; and on his death or resignation or deprivation, the fee is in abeyance until his successor is chosen⁶ with the custody and right of possession in the parish or church.⁷ The minister is

¹ See: *Slayton v. Blount*, 93 Ala. 575; s.c. 9 So. Rep. 241;

Doe d. Wright v. Gooden, 6 Houst. (Del.) 397;

Sellman v. Sellman, 63 Md. 522; *Johnson v. Whiton*, 118 Mass.

340, 345; *Putnam v. Gleason*, 99 Mass. 454,

456; *Rice v. Boston & W. R. Co.*, 94 Mass. (12 Allen) 141, 144;

Houghton v. Kendall, 89 Mass. (7 Allen) 72, 75;

Bartle's Case, 33 N. J. Eq. (6 Stew.) 47;

Heath v. Hewitt, 127 N. Y. 166; s.c. 27 N. E. Rep. 959; 38 N. Y.

S. R. 687; 13 L. R. A. 46; *Barnes v. Huson*, 60 Barb. (N. Y.)

598; *Sleight v. Read*, 9 How. (N. Y.) Pr. 278, 281;

Jackson v. Kniffen, 2 John. (N. Y.) 31, 36; s.c. 3 Am. Dec. 390;

Re Miller's Estate, 145 Pa. St. 561; s.c. 22 Atl. Rep. 1044; 29 W.

N. C. 69; 48 Leg. Int. 525; *Lott v. Thompson*, 36 S. C. 38;

s.c. 15 S. E. Rep. 278; *Re Parson's*, L. R. 45 Ch. Div. 51;

Frogmorton v. Wharrey, 2 W. Bl. 728, 730; s.c. 3 Wils. 144.

² The religious establishment of England was adopted by the colony of Virginia, together with the common law upon that subject, as far as it was

applicable to the circumstances of the colony.

Terrett v. Taylor, 13 U. S. (9 Cr.) 43; bk. 3 L. ed. 650.

³ In *Rice v. Osgood*, 9 Mass. 37, where the Legislature granted a township of land, taking security from the grantee that he should assign a certain portion to the first settled minister in fee, and a similar portion for the use of the ministry forever; it was held that a minister, afterwards settled, could not demand a partition of the proportion so to be assigned, as a tenant in common with the other proprietors of the township.

⁴ *Town of Pawlet v. Clark*, 13 U. S. (9 Cr.) 292; bk. 3 L. ed. 375.

⁵ *Brown v. Porter*, 10 Mass. 93, 97; *Terrett v. Taylor*, 13 U. S. (9 Cr.)

43; bk. 3 L. ed. 650; *Town of Pawlet v. Clark*, 13 U.

S. (9 Cr.) 292; bk. 3 L. ed. 375.

⁶ *Jewett v. Burroughs*, 15 Mass. 464; *Brown v. Porter*, 10 Mass. 93, 97;

First Parish in Brunswick v. Dunning, 7 Mass. 445;

Dillingham v. Snow, 5 Mass. 547, 555;

Weston v. Hunt, 2 Mass. 500.

⁷ *Cheever v. Pearson*, 33 Mass. (16 Pick.) 266, 299; *Brunswick v. Dunning*, 7 Mass. 445;

Weston v. Hunt, 2 Mass. 500.

simply seized during his ministry of a freehold in jure parochiæ.¹

SEC. 261. **Same — Franchise of corporation.**— From the nature of things, the artificial person called a corporation must be created before it can be capable of taking anything. When, therefore, a charter is granted and it brings the corporation into existence without any act of the natural persons who compose it, and gives such corporation any privileges, franchise, or property, the law deems the corporation to be first brought into existence and then clothes it with the granted liberties and property. When, on the other hand, the corporation is to be brought into existence by some future acts of the corporators, the franchise remains in abeyance until such acts are done, and when the corporation is brought into life the franchise is instantaneously attached to it.²

SEC. 262. **Same—Present doctrine as to abeyance of fees.**— The doctrine of a fee-simple in abeyance is attended by serious difficulties, and is not favored by the law, for the reason that the particular tenant or person in possession of the freehold is thereby rendered dispunishable, at law, for waste, because a writ of waste can only be brought, at common law, by one entitled to the fee-simple. In the second place, the title, if attacked, could not formerly be completely defended, if there was no person in being whom the tenant of the freehold could pray in aid to support his right. In the third place, the mere right itself, if subsisting in a stranger, could not be recovered in this interval, because, in a writ of right patent, a tenant for life could not join the issue on the mere right. In the fourth place, in modern times the courts do not favor the abeyance of the fee-simple, because it operates as a restraint on alienation,³ and all general restraints upon alienation are void.⁴ By the ancient common law the inheritance of land is not permitted to rest in abey-

¹ *Terrett v. Taylor*, 13 U. S. (9 Cr.) 43, 47; bk. 3 L. ed. 650. 17 U. S. (4 Wheat.) 518, 569; bk. 4 L. ed. 629, 672.

² *Dartmouth College v. Woodward*, ³ See: *Ante*, § 239.

⁴ See: *Post*, § 284, *et seq.*

ance, except from necessity,¹ and never found favor with the courts of this country,² although the maxim that a fee cannot be in abeyance is not of universal application.³ By act of law not only the fee but the freehold itself may be in abeyance.⁴ Thus where a person dies, is removed, or the like, the freehold of his glebe is in abeyance until his successor is chosen and installed.⁵ At common law an estate of freehold cannot be made to commence *in futuro*⁶ and a deed to take effect at the grantor's death is void,⁷ and therefore the

¹ *Donovan v. Pitcher*, 53 Ala. 411; s.c. 25 Am. Rep. 634, 635;

Bucksport v. Spofford, 12 Maine (3 Fairfield) 487, 495.

An estate in abeyance was odious, because, during its continuance "there was not seisin of the land, nor any tenant to the *præcipe*, nor any one of the ability to protect the inheritance from wrong, or to answer for its burdens and services. On this reasoning a particular estate for years was not allowed to support a contingent remainder in fee. The title, if attacked, could not be completely defended, because there was no one in being whom the tenant could pray in aid to support his right; and, upon a writ of right patent, the lessee for life could not join the mise upon the mere right. The particular tenant could not be punishable for waste, for the writ of waste could only be brought by him who was entitled to the inheritance." 4 Kent Com. (13th ed.) 280.

Same—Rule in *Shelley's case* prevented.—One of the reasons supporting the rule in *Shelley's case* was the prevention of an abeyance of the inheritance. A result of this doctrine was, that when lands were claimed by descent the capacity to take must have existed in the heir at the instant of the death of the ancestor. "We have no doubt," say the Supreme Court of the United States, "that the correct doctrine of the English law is that the right to inherit depends upon the existing state

of allegiance at the time of the descent cast."

Dawson v. Godfrey, 8 U. S. (4 Cr.) 321; bk. 2 L. ed. 634.

² *Fry v. Smith*, 2 Dana (Ky.) 38;

White v. White, 2 Met. (Ky.) 185; *Stevenson v. Dunlap's Heirs*, 7 T. B. Mon. (Ky.) 134;

O'Hanlin v. Den ex d. Van Kleeck, 20 N. J. L. (1 Spen.) 31;

Johnson v. Hart, 3 John. Cas. (N. Y.) 322;

Jackson v. Beach, 1 John. Cas. (N. Y.) 399;

Moares v. White, 6 John. Ch. (N. Y.) 360, 365;

Hinkle's Lessee v. Shadden, 2 Swan (Tenn.) 46;

Sands v. Lynham, 27 Gratt. (Va.) 291; s.c. 21 Am. Rep. 348;

Fairfax's Devisee v. Hunter's Lessee, 11 U. S. (7 Cr.) 603; bk. 3 L. ed. 453;

Stokes v. Dawes, 4 Mas. C. C. 268; *Collingwood v. Pays*, 1 Sid. 193.

³ See: *Wallach v. Van Riswick*, 92 U. S. 202; bk. 23 L. ed. 473.

⁴ 2 Bl. Com. 107.

⁵ See: *Ante*, § 260.

⁶ *Brewer v. Baxter*, 41 Ga. 212; s.c. 5 Am. Rep. 530;

Parker v. Nichols, 24 Mass. (7 Pick.) 115;

Welsh v. Foster, 12 Mass. 96;

Wallis v. Wallis, 4 Mass. 135; s.c. 3 Am. Dec. 210;

Jackson v. Dunsbagg, 1 John. Cas. (N. Y.) 91, 95;

Singleton v. Bremar, 4 McC. (S. C.) L. 12; s.c. 17 Am. Dec. 699;

2 Bl. Com. 167;

2 Wood. Lect. 177.

⁷ *Jones v. Jones*, 6 Conn. 111; s.c. 16 Am. Dec. 35;

Singleton v. Bremar, 4 McC. (S. C.) L. 12; s.c. 17 Am. Dec. 699.

first estate cannot be in abeyance by act of the owner ;¹ but this rule is changed by the statute of uses.² So that by a deed of bargain and sale, or by covenant to stand seised, a freehold *in futuro* will pass.³ The common law has neither been abolished nor much qualified in many of the states.⁴

¹ Jackson v. Dunsbagh, 1 John.

Cas. (N. Y.) 91 ;

2 Bl. Com. 165 ;

1 Prest. Est. 216.

² 27 Hen. VIII., c. 10.

³ See : Barnett v. French, 1 Conn. 354 ; s.c. 6 Am. Dec. 241 ;

Caulk v. Fox, 13 Fla. 150 ;

Wyman v. Brown, 50 Maine 139, 153 ;

Dennett v. Dennett, 40 N. H. 498, 499, 500 ;

Cook v. Brown, 34 N. H. 477 ;

Bell v. Scammon, 15 N. H. 381 ; s.c. 41 Am. Dec. 706 ;

Casey v. Buttulph, 12 Barb. (N.

Y.) 637, 638 ;

Jackson v. Swart, 20 John. (N. Y.) 85 ;

Jackson v. Stautts, 11 John. (N. Y.) 337 ; s.c. 6 Am. Dec. 376 ;

Roberts v. Roberts, 22 Wend. (N. Y.) 140 ;

Rogers v. Eagle Fire Ins. Co., 9 Wend. (N. Y.) 611, 641 ;

Jackson v. McKenny, 3 Wend. (N. Y.) 233 ; s.c. 20 Am. Dec. 690 ;

Wardwell v. Bassett, 8 R. I. 305.

⁴ See : Bell v. Scammon, 15 N. H. 381 ; s.c. 41 Am. Dec. 706 ;

Gorham v. Daniels, 23 Vt. 600.

CHAPTER III.

INCIDENTS OF AN ESTATE IN FEE-SIMPLE.

- SEC. 263. Introduction.
- SEC. 264. Power of alienation.
- SEC. 265. Same—Definition.
- SEC. 266. Same—Kinds of alienations.
- SEC. 267. Same—Same—Voluntary alienations.
- SEC. 268. Same—Same—Early history of voluntary alienation.
- SEC. 269. Same—Same—Under the feudal system.
- SEC. 270. Same—Same—Burgage-tenures.
- SEC. 271. Same—Same—Alienation of purchased land.
- SEC. 272. Same—Same—Gifts in maritagium.
- SEC. 273. Same—Subinfeudations—Magna Charta.
- SEC. 274. Same—Tenants in capite.
- SEC. 275. Same—Alienation in mortmain.
- SEC. 276. Same—Statute of Quia Emptores.
- SEC. 277. Same—Involuntary alienation—Definition.
- SEC. 278. Same—Same—Restrictions against, upheld when.
- SEC. 279. Same—Same—Gifts to charitable uses.
- SEC. 280. Same—Modes of alienation.
- SEC. 281. Same—Same—1. Alienation by deed.
- SEC. 282. Same—Same—2. Alienation by matters of record.
- SEC. 283. Same—Same—3. Alienation by devise.
- SEC. 284. Same—General restraints of alienation.
- SEC. 285. Same—Same—Exceptions to the general rule.
- SEC. 286. Same—Same—Fee-farm estates.
- SEC. 287. Same—Same—Ground-rent estate.
- SEC. 288. Same—Same—Estates in fee-tail.
- SEC. 289. Same—Same—Estate for life—English doctrine.
- SEC. 290. Same—Same—Same—American doctrine.
- SEC. 291. Same—Same—Reason for the American rule.

SECTION 263. Introduction.—The law has annexed to every estate and interest in lands, tenements, and hereditaments, certain peculiar incidents, rights, and privileges, which in general are so inseparably attached to those estates, that they cannot be restrained by any proviso or

condition whatever. The incidents annexed to a fee-simple estate are :

1. The right to alienate ;
2. The right of courtesy ;
3. The right of descent to heirs ;
4. The right to devise the estate ;
5. The right of dower ;
6. The forfeiture of the estate—
 - a. By treason, and
 - b. By disclaimer ;
7. The liability for debts—
 - a. Trade debts, and
 - b. Debts due the government.

We will take up these incidents in their order.

SEC. 264. **Power of alienation.**—Of the several incidents inseparably connected with an estate in fee-simple, the first is the power of alienation. Any general restrictions of this power annexed to the creation of an estate in fee-simple, either by grant or devise, are void, because repugnant to the nature of the estate.¹ The unlimited power of alienation comprises in itself all inferior powers. Hence a tenant in fee-simple may create any inferior estate or interest out of his own ; and if he does not alienate his estate during his life, he has the absolute power of testamentary disposition by a will duly executed according to the solemnities required by statute.

SEC. 265. **Same—Definition of alienation.**—An alienation is a transfer or conveying of anything from one person to another.² An alienation of estates is the transfer of the property and possession of lands, tenements, and other things, from one person to another,³ and is particularly applied to absolute conveyances of real property.⁴ A transfer short of the conveyance of the title is not an alienation of the estate.⁵

¹ Gleason v. Fayerweather, 70 Mass. (4 Gray) 348, 351 ;

Blackstone Bank v. Davis, 38 Mass. (21 Pick.) 42 ; s.c. 32 Am. Dec. 241 ;

1 Co. Litt. (19th ed.) 223a.

See : *Post*, § 284, *et seq.*

² 1 Co. Litt. (19th ed.) 118b.

³ *Terms de la Ley*, *passim*.

⁴ Conover v. Mutual Ins. Co., 1 N. Y. 290.

⁵ Masters v. Madison Co. Ins. Co., 11 Barb. (N. Y.) 524, 629–630.

See : Commercial Ins. Co. v. Spankneble, 52 Ill. 53 ; s.c. 4 Am. Rep. 582 ;

SEC. 266. **Same—Kinds of alienations.**—Alienations are of two kinds or classes : (1) voluntary alienations, and (2) involuntary alienations. The first is subdivided into (a) absolute alienations, where the transfer is without condition or qualification ; and (b) conditional alienations, in which the transfer of the estate is made to depend or rest upon some event yet to happen, or upon some act yet to be done.

SEC. 267. **Same—Same—Voluntary alienations.**—A voluntary alienation is where an estate is voluntarily resigned by one person and accepted by another person, whether the transfer be effected by sale, gift, marriage-settlement, devise, or other transmission of property by mutual consent of the parties.¹ The right to thus alienate land and other property is now regarded as one of the most valuable parts of the estate,² for, as Chief Justice SHAW says in *Gleason v. Fayerweather*,³ “a chief ingredient in the legal right of property is a right to dispose of it, a right to exchange, sell, or give it away.”

SEC. 268. **Same—Same—Early history of voluntary alienation.**—It is claimed by the old horn-book authors that an unlimited power of alienation existed in England in the time of the Saxons ;⁴ but such was not the case under the feudal system, which succeeded the overthrow of Saxon institutions. The early feudal rules regulating the alienation of estates were unnatural and oppressive. The restraint on alienation was a striking part of the feudal polity. By a general ordnance mentioned in the Book of Fiefs,⁵ the right hand of any person who knowingly wrote a deed of alienation was directed to be struck off.⁶

Ayrs v. Hartford Fire Ins. Co.,
1 Iowa 176, 180 ;

*Smith v. Monmouth Mutual Fire
Ins. Co.*, 50 Me. 96 ;

*Rollins v. Columbian Fire Ins.
Co.*, 26 N. H. (5 Fost.) 204.

¹ See : *Boyd v. Cuddeback*, 31 Ill.
113, 119 ;

² Bl. Com. 287.

³ *Gleason v. Fayerweather*, 70 Mass.
(4 Gray) 348, 351 ;

Blackstone Bank v. Davis, 38
Mass. (21 Pick.) 42 ; s.c. 32 Am.
Dec. 241.

³ 70 Mass. (4 Gray) 348, 351.

⁴ See : 1 Coke Litt. (19th ed.) 18b,
note a by Thomas ;

Wright, Ten. 154.

⁵ Lib. 2, tit. 55.

⁶ See : 3 Kent Com. (13th ed.)
506.

SEC. 269. **Same—Same—Under the feudal system.**—The genius of the feudal system¹ was strongly in favor of restraint upon alienation.² A genuine feud was inalienable without the lord's consent.³ The tenant had only a usufructuary interest in the soil, without the power of alienation in prejudice of the lord or his heir. Fealty and escheat remained in the lord. The latter constituted a reversionary interest in the soil, upon which rested the lord's right to object to any alienation of the estate, which might tend to his prejudice. This severity of the feudal system was diminished by the enactment of various statutes from time to time, till in the reign of Edward I. the statute of *Quia Emptores*,⁴ enabled all persons, except the king's tenants *in capite*, to alien their lands.

SEC. 270. **Same—Same—Burgage-tenures.**—It is thought that alienation arose, or at least first became frequent, in burgage-tenures,⁵ where the king, or other person, was lord of the ancient borough, in which the tenements were held by a rent certain,⁶ and was usually of a rural nature.⁷ It seems that the holdings in this class of tenures never was very strict. The persons living in that sort of society were sooner freed from habitual reverence for tenures, and, because of their occupation, stood in need of more exchangeable property. For these reasons it is thought that alienations might happen there more early than among other tenants.⁸

SEC. 271. **Same—Same—Alienation of purchased land.**—

¹ Grounded upon the admission of the 52d and 58th laws of William the Conqueror.

² This restraint was partly in favor of the superior lord, and partly in favor of the heir and the tenant. Whichsoever of these considerations imposed the first restriction, it is certain the first relaxation of it contained a caution that regarded the interests of the heir.

See: 1 Reeves' Hist. Eng. L. (2d ed.) 43.

A law of Henry I. says: Aquifi-

tiones faus det cui magis velit: si Bocland autem habeat, quam ei parentes fui dederint, non mittat eam extra cognationem suam. Leg. Hen. I. 70.

³ See: 2 Stubbs' Hist. Eng. Const. 172.

⁴ 18 Edw. I., c. 1.

⁵ Darl. Fend. Prop. 99.

⁶ 1 Co. Litt. (19th ed.) 108b, 109a; Glanv., lib. 7, c. 3; Litt., §§ 162, 163.

⁷ 2 Bl. Com. 82.

⁸ See: 2 Reeves' Hist. Eng. L. (2d ed.) 44.

When alienations had become established in burgage-tenures, the alienation of purchased lands in many instances, and of lands descended in some, were by degrees permitted. All these alienations broke in upon the original notion of tenure and its qualities ; and in the reign of King John prevailed to such a degree as to occasion the restrictions imposed by the Great Charter. In these alienations of land some distinctions were made between *hæritates* and *quæstus*, between land descended as an inheritance and land acquired by purchase. If it was an inheritance, the owner of the estate might give it *in maritagium*, *in remunerationem servi fui*, or to a religious place in free alms, and the like. But, on the other hand, if the owner had more sons than one who were *mulieratos*, that is, born in wedlock, he could not give any of the inheritance to the younger son or sons against the consent of the heir ; for it might then happen, from the partiality often felt by parents towards their younger children, that, to enrich them, the oldest would be stripped of the inheritance.¹ It was formerly a question whether a person having a lawful heir might give part of the inheritance to a bastard son, for if he could, the bastard would be in better condition than a younger son born in wedlock. If the person who wanted to make a donation was possessed only of land by purchase, he might make a gift, but not of all his purchased land ; for he was not, even in this case, allowed entirely to disinherit his son and heir. Though if he had no heir male or female of his body, he might give all the purchased lands forever ; and if he gave seisin thereof in his lifetime, no remote heir could invalidate the gift.² If a man had lands both by inheritance and by purchase, then he might give all his purchased lands to whomsoever he pleased, and afterwards might dispose of his lands by inheritance, in a reasonable way, as before stated. If a person had lands in free socage, and had more sons than one, who by law should inherit by equal portions, the

¹ See : 1 Reeves' Hist. Eng. L. (2d ed.) 44.

² Thus a man in some cases might give away, in his lifetime, all the land which he had himself

purchased, but not, as in the civil law, make such donee his heir ; for Glanville says : *Solus Deus hæradem facere potest, non homo.*

father could not give to one of them, either out of lands purchased or inherited, more than that reasonable part which would belong to him by descent of his father's inheritance ; but the father might give him his share.¹

SEC. 272. **Same—Same—Gifts in maritagium.**—According to Glanville,² every freeman might give a part of his land with his daughter or any other woman, *in maritagium*, whether he had an heir or not, and whether his heir agreed to it or not. According to the same authority, a person might give part of his freehold *in remunerationem fervi fui*, or to a religious place in free alms, so that should such donation be followed by seisin the land would remain in the donee and his heirs forever, if an estate of that extent had been expressed by the donor ; but if the gift was not followed by seisin, nothing could be recovered against the heir without his consent, because such an incomplete gift was considered by the law rather as a *nuda promisso* than a real donation. And one might, in his lifetime, give a reasonable part of his land to whomsoever he pleased ; but the same permission was not granted to any one *in extremis*, lest men, wrought up by a sudden impulse, at a time when they could not be supposed to have full possession of their reason, should make distributions of their inheritances highly detrimental to the interest and welfare of tenures. The presumption, therefore, of law, in a case of such gifts, was that the party was insane and that the act was the result of such insanity, and not of cool deliberation. However, even a gift made *in ultima voluntata* was good, if assented to and confirmed by the heir.³

SEC. 273. **Same—Subinfeudations—Magna Charta.**—The alteration that gradually took place in the original strictness with which the alienation of land had been restricted finally progressed to the point where, if the tenure was of a common person, he might in many cases make a feoffment of a part thereof. Such a feoffment seemed

¹ 1 Reeves' Hist. Eng. L. (2d ed.)

104, 105.

² Glanv. lib. 7, c. 1 ;

³ Reeves' Hist. Eng. L. (2d ed.)

² Glanv. lib. 7, c. 1.

104.

in no way prejudicial to the lord, who still saw land in possession of a person who was his homager ; but when the tenure was reserved to the feoffor, the homage, as far as regarded that portion of the land, passed from the lord to the feoffor.¹ These subinfeudations were very prejudicial to the objects of the feudal institutions, because they stript the mesne lord of his ability to perform his services, and for this reason it was provided in Magna Charta,² “that in the future no freeman should give or sell any more of his land, than so as what remained might be sufficient to answer the service he owed to the lord of the fee.”³

SEC. 274. **Same—Tenants in capite.**—In what manner the prohibition of Magna Charta effected tenants *in capite*⁴ we are left somewhat in doubt ; some contending that such tenants were never allowed to alien without a license from the king and paying a fine ; some, that after the Great Charta land so aliened without license was forfeited to the king. Others, again, hold that the land in such case was not forfeited, but was feoffed in the name of a distress, and a fine was thereupon paid for the trespass. This question remained undetermined for the space of a hundred years, when it was settled by a statute of Edward III.,⁵ which declares that the king should not hold such land as forfeit, but that a reasonable fine should be paid in chancery.⁶ The statute *De Prærogativa Regis*,⁷ passed in the reign of Edward II., declared, in confirmation of Magna Charta, that no one who held of the king *in capite* by knight's service might alien more of his land than the residue should be sufficient to answer

¹ 1 Reeves' Hist. Eng. L. (2d ed.) 239.

² Magna Charta, c. 32.

³ 1 Reeves' Hist. Eng. L. (2d ed.) 239.

⁴ Definition of tenant in capite.—Blackstone says (2 Bl. Com. 60) that a tenant *in capite* was one who held directly of the crown, whether by knight's service or socage. But tenure *in capite* was of two kinds, general and special. The first from the king,

called *caput regni* ; the second from the lord, called *caput feudi*. A holding of an honor in the king's lands, but not immediately of him, was yet a holding *in capite*. This class of tenure was abolished by the statute of 12 Car. II., c. 24.

⁵ Stats. 1 Edw. III., c. 12.

⁶ 1 Reeves' Hist. Eng. L. (2d ed.) 240.

⁷ Stat. 17 Edw. II., 1.

his service, unless he had the king's license for so doing.¹ But notwithstanding the sort of liberty there admitted to be in tenants *in capite*, these land-holders could never safely alien without the king's license. And if they did, the land used to be seized in the king's hand as forfeit, according to the rigor of the old law between lord and vassal.²

SEC. 275. **Same—Alienation in mortmain.**—Another means by which the end of tenure was defeated in England was alienations in mortmain; for in consequence of these, the military service decayed and lords lost the fruits of tenure. Lands given to religious houses continued in an unchangeable perpetuity without descent to an heir, and therefore never produced casualties of wardships, escheats, and the like. To put a stop to these gifts the English statute of mortmain was passed. The statute was never in force in the English colonies in America, and that statute, for that reason, never was a part of the common law of this country.³

SEC. 276. **Same—Statute of Quia Emptores.**—The restraints imposed on alienation of land by Magna Charta being not only violated but generally ignored, the statute of *Quia Emptores*⁴ was passed to remedy the evil by confirming to the people a privilege that had already been assumed.⁵

¹ See : 2 Reeves' Hist. Eng. L. (2d ed.) 307.

² 2 Reeves' Hist. Eng. L. (2d ed.) 371.

³ See : Perin v. Carey, 65 U. S. (24 How.) 465 ; bk. 16 L. ed. 701.

⁴ 18 Edw. I., c. 1x.

⁵ **Quia Emptores never in force in America—New York Cases.**—It is doubtful whether the statute of *Quia Emptores* was ever in force in this country. It is said in *De Peyster v. Michael*, 6 N. Y. 467, 495 ; s.c. 57 Am. Dec. 470, 476, that it was never in force in the state of New York. In this case Chief Justice RUGLES says : " In *Jackson v. Schutz*, 18 John. (N. Y.) 174 ; s.c. 9 Am. Dec. 195, the late Mr. Emott, in his argument in favor of the validity of the tenth

sales, insisted that the 'statute of *Quia Emptores* was never in force in this state, and Chief Justice SPENCER said that it was never supposed that it existed here."

Same—Michigan Cases.—In the case of *Mandlebaum v. McDonell*, 29 Mich. 78 ; s.c. 18 Am. Rep. 61, 73, the court say : " Whether the statute *Quia Emptores* ever became effectual in any of the United States by express or implied adoption, or as a part of common law, we need not inquire, since it is clear enough that no such statute was ever needed in this state, if in any of the Western states, as no such right of escheat or possibility of reverter ever existed here in the party having

By this statute every freeholder was at liberty to alien all his land, provided he made a reservation of services, not to himself, but to the chief lord, so that the practice of creating new seigniories soon ceased, and every tendency in the kingdom was ever after to continue a part of the same fee or manor to which it then belonged.¹

SEC. 277. **Same—Involuntary alienation—Definition.**—An involuntary alienation may be said to be any disposition made of property by the process of law, such as a sale on judgment and execution;² or a taking by condemnation proceedings under the power of eminent domain.³ Property cannot be granted or devised so that the grantee or devisee can hold it free from involuntary alienation, giving at once the benefit of the full possession and enjoyment of the estate and protecting it from the claim of creditors; such a restriction or condition would not only be repugnant to the estate granted or bequeathed, but contrary to the policy of the law;⁴ for it is a settled rule of law that the beneficial interest of the *cestui que trust*, whatever it may be, is liable for the payment of his debts. It cannot be so fenced about by inhibitions and restrictions as to secure to it the inconsistent characteristics of right and enjoyment to the beneficiary and freedom and immunity from his creditors. But a condition precedent, that the provision shall not vest until the donee's debts are paid, and a condition subsequent, that it shall be divested and forfeited by his insolvency, with a limitation over to another person, are valid. Any other protection than this against the claims of creditors, however, will not be allowed.⁵ This rule does not prevent

the estate, but the escheat could only accrue to the sovereignty of the state. And, therefore, the question of the right to impose such conditions or restrictions stands here upon common-law reasons as it stood in England since the statute in question."

¹ See: 2 Reeves' Hist. Eng. L. (2d ed.) 223.

² See: *Post*, chapter on "Executions."

³ See: *Ante*, § 222; *Post*, chapter on "Eminent Domain."

⁴ *Blackstone Bank v. Davis*, 38 Mass. (21 Pick.) 42; s.c. 32 Am. Dec. 241;

Bramhall v. Ferris, 14 N. Y. 41; s.c. 67 Am. Dec. 113, 115; *Hallett v. Thompson*, 5 Paige Ch. (N. Y.) 583;

Pace v. Pace, 73 N. C. 119; *Graves v. Dolphin*, 1 Sim. 66; *Brandon v. Robinson*, 18 Vesey 429.

⁵ *Nichol v. Levy*, 72 N. S. (5 Wall.) 433, 441; bk. 18 L. ed. 596.

a person from transferring his property so as to give the benefit of it to a particular person, and at the same time securing the *corpus* against the donee's creditors as well as his own act.¹ The right in the grantor to exempt the interest of a beneficiary from the effects of involuntary alienation rests upon principles peculiar to the law governing the administration of trusts.

SEC. 278. **Same—Same—Restrictions against, upheld when.**—Without at this time entering into a discussion of the principles involved, it may be laid down as a general rule that wherever the interest of a beneficiary is so connected with the interests of other beneficiaries in the same trust that a sale of it would impair those other interests, or estates, a restriction against any form of alienation will be sustained ;² but where the interest of the beneficiary can be separated without prejudice to the remaining interests, a court of equity will enforce the claims of creditors against the estate of the debtor, because it is against the policy of the law that it should be enjoyed, and credit received on the strength of its possession, exempt from the claims of creditors.³

SEC. 279. **Same—Same—Gifts to charitable uses.**—We have already seen that the general rules against restraints do not apply to estates granted or devised to charitable uses ; and neither does the rule against involuntary alienation. Thus where land was given in trust to a church for religious purposes, with a restriction to the effect that it should not be sold or encumbered, and it was levied upon and sold under process of law to satisfy an obligation of the society, the court held that the sale tended to defeat or impair the trust, and that a bill would lie to set the sale aside.⁴

¹ See : *Post*, chapter on " Trust Estates."

² *Hill v. McRae*, 27 Ala. 175 ;
Johnston v. Zane's Trustees, 11 Gratt. (Va.) 552 ;
Perkins v. Dickinson, 3 Gratt. (Va.) 335 ;
Markham v. Guerrant, 4 Leigh (Va.) 279 ;

Scott v. Gibbons, 5 Munf. (Va.) 86.

³ *Rugely v. Robinson*, 10 Ala. 702 ;
Nickell v. Handley, 10 Gratt. (Va.) 336 ;
Roanes v. Archer, 4 Leigh (Va.) 550 ;

Page v. Way, 3 Beav. 20 ;
Rippon v. Norton, 2 Beav. 63.
⁴ *Grissom v. Hill*, 17 Ark. 483.

SEC. 280. **Same—Modes of alienation.**—Blackstone describes four modes of alienation or transfer of title to real estate, which he calls common assurances. The first of which is by matter *in pais*, or deed ; the second by matter of record, or an assurance transacted only in the king's public courts of record ; the third by special custom ; and the fourth by devise in a last will or testament.¹

SEC. 281. **Same—Same—1. Alienation by deed.**—Alienations by deed may be by conveyances at common law, which are either original or primary, being those by means of which the benefit or estate is created or first arises ; or they are derivative or secondary conveyances, being those by which the benefit or estate originally created is enlarged, restrained, transferred, or extinguished.²

SEC. 282. **Same—Same—2. Alienation by matters of record.**—Alienation by matters of record may be either by the private acts of the Legislature, by grants, as government patents of land ; by fines,³ or by common recovery.⁴

SEC. 283. **Same—Same—3. Alienation by devise.**—The third method of alienating lands is by devise. This method of alienation is fully discussed elsewhere and need not be specifically treated at this place.⁵

SEC. 284. **Same—General restraint of alienation.**—Restraints on the alienation of property are of two classes : (1) general restraints, and (2) special restraints, and are directed against the voluntary alienation and enjoyment of estates,⁶ or against other involuntary disposition by process of law. By general restraint is to be understood such a restraint as proves co-extensive with the duration and enjoyment of the estate granted, or an approximation thereto. Such a restraint, when attached to

¹ 2 Bl. Com., c. 20.

² 2 Bl. Com., c. 20.

See : *Post*, chapters on "Deed."

³ See : *Post*, § 532.

⁴ See : *Post*, § 533, *et seq.*

⁵ See : *Post*, chapters VI. & VII.

⁶ See : *Ante*, §§ 268, 269.

a grant or a devise in fee-simple, is absolutely void,¹ and has been ever since the statute of *Quia Emptores*, passed in 1290, otherwise known as the statute of Westminster II.² And a condition requiring that the grantee or

¹ *Norris v. Hensley*, 27 Cal. 439;
McCleary v. Ellis, 54 Iowa 311;
 s.c. 37 Am. Rep. 205; 20 Am.
 L. Reg. 180; 6 N. W. Rep. 571;
Smith v. Clark, 10 Md. 186;
Lane v. Lane, 90 Mass. (8 Allen)
 350;
Gleason v. Fayerweather, 70
 Mass. (4 Gray) 348, 351;
Blackstone Bank v. Davis, 38
 Mass. (21 Pick.) 42; s.c. 32 Am.
 Dec. 241;
Hall v. Tufts, 35 Mass. (18 Pick.)
 455;
Hawley v. Inhabitants of North-
ampton, 8 Mass. 1, 37; s.c. 5
 Am. Dec. 66;
Mandlebaum v. McDonell, 29
 Mich. 78; s.c. 18 Am. Rep. 61,
 75;
McDowell v. Brown, 21 Mo. 57;
Van Rensselaer v. Dennison, 35
 N. Y. 393, 399;
Oxley v. Lane, 35 N. Y. 340, 346;
Lovett v. Gillender, 35 N. Y. 617;
De Peyster v. Michael, 6 N. Y.
 467; s.c. 57 Am. Dec. 470;
Schermerhorn v. Negus, 1 Den.
 (N. Y.) 448;
Dick v. Pitchford, 1 Dev. & Bat.
 (N. C.) Eq. 480;
Anderson v. Cary, 36 Ohio St.
 506; s.c. 38 Am. Rep. 602;
Yard's Appeal, 64 Pa. St. 95;
Doebler's Appeal, 64 Pa. St. 9;
Brothers v. McCurdy, 36 Pa. St.
 407; s.c. 78 Am. Dec. 388;
Walker v. Vincent, 19 Pa. St.
 369;
Rueifsnyder v. Hunter, 16 Pa. St.
 41;
McCullough v. Gilmore, 11 Pa.
 St. 370;
McWilliams v. Nisly, 2 Serg. &
 R. (Pa.) 507; s.c. 7 Am. Dec.
 654;
Taylor v. Mason, 22 U. S. (9
 Wheat.) 325; bk. 6 L. ed. 101;
Ware v. Cann, 10 Barn. & C. 433;
 s.c. 21 Eng. C. L. 187;
Greated v. Greated, 26 Beav. 621;
Attwater v. Attwater, 18 Beav.
 330; s.c. 18 Jur. 5; 3 L. J. Ch.
 692;
Rochford v. Hackman, 9 Hare

Stukeley v. Butler, Hob. 170;
Jones' Will, 23 L. T. N. S. 211;
Winbush v. Willoughby, 1 Plow.
 77;
Newton v. Reid, 4 Sim. 141;
Brandon v. Robinson, 18 Ves. 429;
Bradley v. Peixoto, 3 Ves. Jr.
 324; s.c. 4 Rev. Rep. 7;
 4 Kent Com. (13th ed.) 131;
 1 Shep. Touch. 129, 131.
 See: *Re Dugdale*, 33 Ch. Div.
 176; s.c. 57 L. J. Ch. 634;
Corbett v. Corbett, 14 P. D. 7;
 s.c. 57 L. J. P. 97.

This is a principle older than the common law of England.—It is said in Grotius, b. 1, c. 6, § 1, that “since the establishment of property, men who are masters of their own goods have by the law of nature the power of disposing of or of transferring all or any part of their effects to other persons: for this is the very nature of property; I mean of full and complete property.”

See: *De Peyster v. Michael*, 6 N. Y. 467, 495; s.c. 57 Am. Dec. 470, 476.

Same—Littleton says: “If a feoffment be made on this condition that the feoffee shall not alien his land to any, this condition is void; because when a man is enfeoffed of lands or tenements he hath the power to alien them to any person by law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him which should be against reason, and therefore such a condition is void.” Litt. 360. Lord Coke adds that “the like law is of a devise in fee upon a condition that the devisee shall not alien, the condition is void, and so it is of a grant, release, confirmation, or any other conveyance whereby the fee doth pass.” 1 Co. Litt. (19th ed.) 223a.

² Stats. 18 Edw. I., c. 1.

devisee, on alienating, shall pay a stipulated sum or part of the price received to the grantor or deviser is void, because it operates as a restraint upon alienation;¹ such restrictions being in the nature of the ancient fines upon alienation, incident to military tenures, clog transmission of property from hand to hand as heavily as those ancient burdens long ago abolished.²

SEC. 285. **Same—Same—Exceptions to the general rule.**—There are some exceptions to this general rule. Thus a condition in a lease of land in fee reserving the rent, with right of re-entry for non-payment, is valid,³ so also is a provision in restraint of alienation in a devise to charitable uses,⁴ as is a condition or covenant in a lease for use not to assign or alienate without license.

SEC. 286. **Same—Same—Fee-farm estates.**—The term fee-simple originally indicated the duration of an estate without reference to the tenure by which it was held; but after the statute *Quia Emptores* the term came to represent an estate to a man and his heirs, exempt from all tenure. In all those states where the statute *Quia Emptores*, or a similar one, is not in force, an estate in fee-simple held upon an annual return of rent may be created. Such estates were frequent in New York until

¹ De Peyster v. Michael, 6 N. Y. 467, 495; s.c. 57 Am. Dec. 470, 476;

King v. Burchall, Amb. 379.

Restraint on alienation by requiring money to be paid for privilege.—It is said in *De Peyster v. Michael*, *supra*, that "if the continuance of the estate can be made to depend on the payment of a tenth, or a sixth, or a fourth part of the value of the land at every sale, it may be made to depend on the payment of nine-tenths or the whole of the sale money. It is impossible on any known principle to say that a condition to pay the half or any the sale money is valid, and a condition to pay the half or any other proportion would be void. If we confirm the validity of the condition to pay a quarter,

we must confirm a condition to pay any amount. It would be a bold assertion to say that the adoption of such a principle would not operate as a fatal restraint upon alienation. That which cannot be done by a direct prohibition cannot be done indirectly. The enforcement of the restraint upon alienation, by requiring money to be paid for the privilege, and by a forfeiture in case of non-payment, separates the incident of free alienation from the estate as fully and as effectively as a direct prohibition."

² *De Peyster v. Michael*, 6 N. Y. 467, 495; s.c. 57 Am. Dec. 470, 476; *Livingston v. Stickles*, 7 Hill (N. Y.) 253, 257.

³ See: *Post*, chapter on "Estates from Year to Year."

⁴ See: *Ante*, § 279.

the adoption of the constitution of 1846. Where the estate is held in perpetuity by a tenant and his heirs by a yearly rental, it is known as a fee-farm estate;¹ and a general restraint against the alienation or enjoyment of a fee-farm estate is void for the same reason as in the case of any other fee-simple estates.² The right of the grantor to an annual rent in fee-farm estate is not such an interest in the land as will sustain the imposition of restraints against its alienation and enjoyment. The right to the rent, or of entry for non-payment of rent, does not amount to an estate in reversion, or an actual estate of any kind.³

SEC. 287. **Same—Same—Ground-rent estate.**—Where an annual rent is reserved to himself and his heirs by the grantor out of the amount conveyed as consideration or a part of the consideration of a conveyance of land in fee-simple, such reservation is known as a ground-rent. Where an estate is held in perpetuity by a tenant and his heirs on such condition, any restraint on alienation is invalid, the same as in the case of a similar condition in ordinary grants of a fee-simple estate, or of a fee-farm estate;⁴ but a condition for the payment of such rent, with a right of entry and re-entry for non-payment of rent, is not a restraint upon alienation or enjoyment of the estate, and is valid because in no way repugnant to the estate granted.⁵ Such a conveyance reserving rent oper-

¹ See : 2 Bl. Com. 63.

² *De Peyster v. Michael*, 6 N. Y. 467, 495; s. c. 57 Am. Dec. 470, 476.

³ *De Peyster v. Michael*, 6 N. Y. 467, 495; s. c. 57 Am. Dec. 470, 476;

Payn v. Beal, 4 Den. (N. Y.) 405; 4 Kent Com. (13th ed.) 353.

⁴ See : *De Peyster v. Michael*, 6 N. Y. 467; 57 Am. Dec. 470.

⁵ *De Peyster v. Michael*, 6 N. Y. 497; s. c. 57 Am. Dec. 470.

See : *Weeks v. Sego*, 9 Ga. 199;

Perkins v. Hays, 69 Mass. (3 Gray) 405;

Mebane v. Mebane, 4 Ired. (N. C.) Eq. 131, 133; s. c. 44 Am. Dec. 102;

Dick v. Pitchford, 1 Dev. & Bat. (N. C.) 484;

Van Rensselaer v. Ball, 19 N. Y. 100;

Shonk v. Brown, 61 Pa. St. 320;

Irwin v. Bank of United States, 1 Pa. St. 349;

Roab v. Beaver, 8 Watts & S. (Pa.) 126;

Franciscus v. Reigart, 4 Watts (Pa.) 98;

Ingersoll v. Sergeant, 1 Whart. (Pa.) 337;

Nixon v. Rose, 12 Gratt. (Va.) 425;

Radford v. Carwile, 13 W. Va. 572;

Pybus v. Smith, 3 Bro. C. C. 340;

Baggett v. Meux, 1 Coll. 138; s. c. 8 Jur. 391; 13 L. J. Ch. 228;

Robinson v. Wheelright, 6 DeG. M. & G. 535;

ates as an assignment of the estate without an estate in reversion,¹ or possibility of return in the grantor,² and the claim of possession under a conveyance of the kind is tantamount to a claim of title in fee.³

SEC. 288. **Same—Same—Estates in fee-tail.**—When an inheritable estate, which shall descend to certain classes of heirs, is created,⁴ which is known as an estate in fee-tail,⁵ the general rule against restraints applies, for the reason that such restraint is repugnant to the estate granted or devised,⁶ even though the grantor has a reversion in fee-simple expectant upon the estate-tail, a continuing estate in the soil, upon which the right to fetter and restrain the alienation of real estate has been rested by some.⁷ Thus it has been held that a condition attached to such an estate, stipulating that the tenant in tail shall not

Barton v. Briscoe, Jac. 605;
Tullett v. Armstrong, 4 Jur. 34;
Jackson v. Hobhouse, 2 Meriv.
483;

Woodmeston v. Walker, 2 Russ.
& M. 205;

Brandon v. Robinson, 18 Ves. 429.

¹ Van Rensselaer v. Hayes, 19 N. Y.
68.

² De Peyster v. Michael, 6 N. Y. 467,
495; s.c. 57 Am. Dec. 470, 476.
See: Tyler v. Heidorn, 46 Barb.
(N. Y.) 439;

Lyon v. Adde, 63 Barb. (N. Y.) 89,
96;

Van Rensselaer v. Dennison, 35 N.
Y. 393, 399.

³ De Peyster v. Michael, 6 N. Y. 497;
s.c. 57 Am. Dec. 470;
Bedell v. Shaw, 59 N. Y. 51.

⁴ This class of estate exists by virtue
of statute De Donis, West-
minster II., c. 1.

See: Wight v. Thayer, 67 Mass.
(Gray) 284, 286;

Hall v. Thayer, 71 Mass. (5 Gray)
523;

Maslin v. Thomas, 8 Gill. (Md.)
18;

Jewell v. Warner, 35 N. H. 176;
Ransley v. Stott, 26 Pa. St. 126.

⁵ The expression *free tail* or *feodum
talliatum* was borrowed from
the feudists, among whom it
signified any *mutilated* or
truncated inheritance, from

which the heirs general are cut
off.

See: Craig, l. 1, tit. 10, §§ 24, 25.
The word is derived from the
verb *taliare*, which meant to
cut; and from which the French
tailler and the Italian *tagliare*
are derived.

See: 2 Bl. Com. 112, note;
Spelm. Gloss. 531.

⁶ McCleary v. Ellis, 54 Iowa 311; s.c.
37 Am. Rep. 205; 20 Am. L.
Reg. 180; 6 N. W. Rep. 571;
Halley v. Northampton, 8 Mass.
37;

Mandlebaum v. McDonell, 29
Mich. 78; s.c. 18 Am. Rep. 61;

Yard's Appeal, 64 Pa. St. 95;
Bradley v. Peixoto, 3 Ves. 324;

s.c. 4 Rev. Rep. 7.

See: *Re Dugdale*, 38 Ch. D. 176;
s.c. 57 L. J. Ch. 634;

Corbett v. Corbett, 14 P. D. 7;
s.c. 57 L. J. P. 97.

The great objection to such a con-
dition is the fact that it would
create a perpetuity.

See: Halley v. Northampton, 8
Mass. 37;

Mandlebaum v. McDonell, 29
Mich. 78; s.c. 18 Am. Rep. 61;

King v. Burchell, 1 Amb. 379; s.c.
1 Eden 424.

⁷ See: De Peyster v. Michael, 6 N.
Y. 467, 495; s.c. 57 Am. Dec.
470.

make a lease for his own life, is repugnant to the nature of the estate.¹

SEC. 289. ~~Same—Same—Estate for life—English doctrine.~~—In England, it is well settled that the grant or devise of an estate for life, or an equitable interest for the life of any person, other than a married woman,² carries with it as a necessary incident the right of alienation by the *cestui que trust*. This doctrine was first announced by Lord ELDON in *Brandon v. Robinson*,³ and has been since followed by Vice-Chancellor TURNER⁴ and other eminent English jurists.⁵ The English doctrine has been followed in Alabama,⁶ Georgia,⁷ Missouri,⁸ New York,⁹ North Carolina,¹⁰ Rhode Island,¹¹ South Carolina,¹² in one of the United States District Courts¹³ and in a case in the United States Supreme Court.¹⁴

SEC. 290. ~~Same—Same—Same—American doctrine.~~—While in this country the decisions are conflicting, the better opinion, as well as the weight of judicial decision, is thought to be to the effect that the power of alienation is not a necessary incident of a life estate, or an equitable estate for life.¹⁵ In the case of *Nichols v. Eaton*,¹⁶

¹ 1 Co. Litt. (19th ed.) 223b ;
Roll. Abr. 418, cond.

² *Barton v. Briscoe*, Jac. 603.
See : *McIlvaine v. Smith*, 42 Mo.
45 ; s.c. 97 Am. Dec. 295.

³ 18 Ves. 429 ; s.c. 1 Rose 197.

⁴ See : *Rochford v. Hackin*, 9
Hare 480.

⁵ See : *Trappes v. Meredith*, L. R.
9 Eq. 229 ;

Rippon v. Norton, 2 Beav. 63 ;

Youngehusband v. Gisborne, 1
Coll. C. C. 400 ;

Snowdon v. Dales, 6 Sim. 524 ;

Lear v. Leggett, 2 Sim. 479 ;

Graves v. Dolphin, 1 Sim. 66 ;

Piercy v. Roberts, 1 Myl. & K. 4 ;

Green v. Spicer, 1 Russ. & Myl.
395 ;

Shee v. Hale, 13 Ves. 404 ; s.c. 9
Rev. Rep. 198.

⁶ *Smith v. Moore*, 37 Ala. 327 ;

Rugely v. Robinson, 10 Ala. 702.

⁷ *Baile v. McWhorter*, 56 Ga. 183.

⁸ *McIlvaine v. Smith*, 42 Mo. 45 ;
s.c. 97 Am. Dec. 295.

⁹ *Bramhall v. Ferris*, 14 N. Y. 41,
44 ;

Hallett v. Thompson, 5 Paige Ch.
(N. Y.) 583, 585.

¹⁰ *Pace v. Pace*, 73 N. C. 119 ;

Dick v. Pitchford, 1 Dev. & B. (N.
C.) Eq. 480 ;

Mebane v. Mebane, 4 Ired. (N. C.)
Eq. 31 ; s.c. 44 Am. Dec. 102.

¹¹ *Tillinghast v. Bradford*, 5 R. I.
205.

¹² *Heath v. Bishop*, 4 Rich. (S. C.)
Eq. 46 ; s.c. 55 Am. Dec. 654.

¹³ *Sanford v. Lackland*, 2 Dill. C. C.
6.

¹⁴ *Nichol v. Levy*, 72 U. S. (5 Wall.)
433, 441 ; bk. 18 L. ed. 596, 599.

¹⁵ *Nichols v. Eaton*, 91 U. S. 725,
727 ; bk. 23 L. ed. 254, 257.

See : *Sparahawk v. Cloon*, 125
Mass. 263, 266 ;

Braman v. Stiles, 19 Mass. (3
Pick.) 460, 464 ; s.c. 13 Am.
Dec. 445 ;

Arnwine v. Carroll, 8 N. J. Eq.
(4 Halst.) 620, 624 ;

¹⁶ 91 U. S. 716 ; bk. 23 L. ed. 254.

Justice MILLER, in commenting on *Brandon v. Robinson*,¹ says: "We do not see, as implied in the remark of Lord Eldon, that the power of alienation is a necessary incident to a life estate in real property, or that the rents and profits of real property, and the interest and dividends of personal property, may not be enjoyed by an individual without liability for his debts being attached as a necessary incident to such enjoyment. This doctrine is one which the English Chancery Court has engrafted upon the common law for the benefit of creditors, and is comparatively of modern origin. The doctrine, that the owner of property, in the free exercise of his will in disposing of it, cannot so dispose of it, but that the object of his bounty, who parts with nothing in return, must hold it subject to the debts due his creditors, though that may soon deprive him of all the benefits sought to be conferred by the testator's affection or generosity, is one which we are not prepared to announce as the doctrine of this court."²

SEC. 291. **Same—Same—Reason for the American rule.**—The reason for the American rule holding that the objections to general restraints on the alienation and enjoyment of estates in fee do not apply to estates for life, is obvious when we remember that the ground of objection to the restraint in the case of estates in fee is, in the language of Lord Coke, that "it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him, should restrain his feoffee

Rife v. Geyer, 59 Pa. St. 393; s.c. 98 Am. Dec. 351;

Brown v. Williamson, 36 Pa. St. 338;

Holdship v. Patterson, 7 Watts (Pa.) 547;

Camp v. Cleary, 76 Va. 140; s.c. 14 Cent. L. J. 138;

Hyde v. Woods, 94 U. S. 523, 526; bk. 24 L. ed. 264, 265;

Nichols v. Eaton, 91 U. S. 725, 727; bk. 23 L. ed. 254, 257.

¹ 18 Ves. 429.

² See: *Hill v. MacRea*, 27 Ala. 175; *Leavitt v. Bevine*, 21 Conn. 8; *Pope v. Elliott*, 8 B.Mon.(Ky.) 56;

Frazier v. Barnum, 19 N. J. Eq. (4 C. E. Gr.) 316;

Barnett's Appeal, 46 Pa. St. 392, 402;

Eyrick v. Hetrick, 13 Pa. St. 488, 491;

Norris v. Johnston, 5 Pa. St. 289; *Vaux v. Parke*, 7 Watts & S.

(Pa.) 19;

Ashurst v. Given, 5 Watts & S. (Pa.) 323;

Johnston v. Zane's Trustees, 11 Gratt. (Va.) 552;

Markham v. Guerrant, 4 Leigh (Va.) 279.

in fee-simple of all powers to alien.”¹ Another objection is that were the restraint general, being co-extensive with the estate, it would contravene the rule against perpetuities.² But after the life estate the grantor still retains an estate in land, and may be supposed not indifferent about its alienation and enjoyment, and any restriction when attached to a life estate must necessarily be discharged within a period of time falling short of any violation of the rule against perpetuities. For this reason courts have upheld restraints against the alienation of life estates as being neither opposed to the policy of the law nor repugnant to the nature of the estate to which they are attached.³

¹ 1 Co. Litt. (19th ed.) 223a.

² See: *Hawley v. Northampton*, 8 Mass. 37; *Mandlebaum v. McDonell*, 29 Mich. 78; s.c. 18 Am. Rep. 61.

³ *Jackson v. Silvernail*, 15 John. (N. Y.) 278; *McWilliams v. Nisly*, 2 Serg. & R. (Pa.) 507; s.c. 7 Am. Dec. 654;

Parry v. Harbert, 1 Dyer 45b.

Restraints in the nature of fines upon alienation have been held good in leases for life in New York.

Jackson v. Groat, 7 Cow. (N. Y.) 285;

Livingston v. Stickles, 7 Hill (N. Y.) 253.

CHAPTER IV.

INCIDENTS OF AN ESTATE IN FEE-SIMPLE.

- SEC. 292. Power of alienation—Estate for years.
- SEC. 293. Same—Estates settled on feme covert.
- SEC. 294. Same—Estates dedicated to charitable uses.
- SEC. 295. Same—Conditions in conveyance.
- SEC. 296. Same—Special restraints—Definition.
- SEC. 297. Same—Same—Large's Case.
- SEC. 298. Same—Same—Prohibiting alienation to particular persons.
- SEC. 299. Same—Same—Restricting alienations to particular persons.
- SEC. 300. Same—Same—Restricting alienation to family.
- SEC. 301. Same—Same—Restraining alienation for a particular time.
- SEC. 302. Same—Same—Condition to do certain acts.
- SEC. 303. Same—Same—Condition not to do certain acts.
- SEC. 304. Same—Same—Restraints on estates of persons *not sui juris*.
- SEC. 305. Same—Same—Restraints on marriage.
- SEC. 306. Same—Same—Restraints on second marriage.
- SEC. 307. Same—Forfeiture—Fee-simple estate.
- SEC. 308. Same—Same—Life estate.
- SEC. 309. Same—Same—Estate for years.
- SEC. 310. Same—Curtesy.
- SEC. 311. Same—Descent.
- SEC. 312. Same—Power of devise—Saxon and Danish rule.
- SEC. 313. Same—Same—Under the Normans and their successors.
- SEC. 314. Same—Same—Reason for the common-law rule.
- SEC. 315. Same—Same—American rule.
- SEC. 316. Same—Dower.
- SEC. 317. Same—Forfeiture—English doctrine.
- SEC. 318. Same—Same—American doctrine.
- SEC. 319. Same—Liability for debts—Common-law doctrine.
- SEC. 320. Same—Same—American doctrine.

SECTION 292. Power of alienation—Estate for years.—In estates for years, as in estates for life, conditions in restraints of alienation are valid,¹ and for the same reasons.

¹ Blackstone *Bank v. Davis*, 38 Mass.
(21 Pick.) 42; s.c. 32 Am. Dec.
241;
De Peyster *v. Michael*, 6 N. Y.

467, 495; s.c. 57 Am. Dec. 470,
476;
Hargrave v. King, 5 Ired. (N. C.)
Eq. 430;

SEC. 293. **Same**—**Estates settled on feme covert.**—In an instrument settling land upon a *feme covert* for her separate use, general restrictions against alienation are valid,¹ where there is a gift over, but void otherwise.² The reason for the exception from the general rule in such cases is the fact that such estates are creatures of equity, and courts of equity have the right to so mold them as to accomplish the object intended by securing the estate to the beneficiary against the husband.

SEC. 294. **Same**—**Estates dedicated to charitable uses.**—From the very nature of the uses and purposes of the grant or bequest, conditions of general restraint, on alienation in a grant or devise to charity, are valid.³ But any

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| Morgan v. Slaughter, 1 Esp.* 8;
s.c. 5 Rev. Rep. 715; | Baggett v. Meux, 1 Coll. 138; s.c.
8 Jur. 391; 13 L. J. Ch. 228; |
| Doe v. Bevan, 3 Maul. & Sel.
353; | Robinson v. Wheelright, 6 DeG.
M. & G. 535; |
| Roe ex d. Hunter v. Galliers, 2 T.
R. 133; s.c. 1 Rev. Rep. 445; | Barton v. Briscoe, Jac. 605; |
| Church v. Brown, 15 Ves. 258;
s.c. 10 Rev. Rep. 74. | Tullett v. Armstrong, 4 Jur. 34; |
| ¹ Weeks v. Sego, 9 Ga. 199; | Jackson v. Hobhouse, 2 Meriv.
483; |
| Perkins v. Hays, 69 Mass. (3
Gray) 405; | Woodmeston v. Walker, 2 Russ.
& M. 205; |
| Dick v. Pitchford, 1 Dev. & B.
(N. C.) 484; | Brandon v. Robinson, 18 Ves.
429. |
| Mebane v. Mebane, 4 Ired. (N. C.)
Eq. 131, 133; s.c. 44 Am. Dec.
102; | ² See: Woodmeston v. Walker, 2
Russ. & M. 197. |
| Shonk v. Brown, 61 Pa. St. 320; | Newton v. Reid, 4 Sim. 141. |
| Nixon v. Rose, 12 Gratt. (Va.)
425; | ³ See: Yard's Appeal, 64 Pa. St.
95; |
| Radford v. Carwile. 13 W. Va.
572; | Stanley v. Colt, 72 U. S. (5 Wall.)
119; bk. 18 L. ed. 502; |
| Pybus v. Smith, 3 Bro. C. C. 340; | Perin v. Carey, 64 U. S. (24 How.)
465; bk. 16 L. ed. 701; |
| | Jones v. Habersham, 3 Wood. C.
C. 443. |

* In speaking respecting Espinasse's Reports, on an occasion when the case of Wheeler v. Atkins, 5 Esp. N. P. C. 246, was relied upon by counsel, Lord DENMAN said: "I am tempted to remark, for the benefit of the profession, that Espinasse's Reports, in days nearer their own time, when their want of accuracy was better known than it is now, were never quoted without doubt and hesitation; and a special reason was often given as an apology for citing that particular case. Now they are often cited as if counsel thought them of equal authority with Lord Coke's Reports." Small v. Nairne, 13 Q. B. 840, 844; s.c. 66 Eng. C. L. 839, 844.

The particular case here cited was

treated as an authority by Lord KENYON in Folkingham v. Croft, 3 Anst. 700; s.c. 4 Rev. Rep. 844, decided in 1796; but doubt was thrown upon it later by Lord ELDON, in the case of Church v. Brown, 15 Ves. 258, 262; s.c. 10 Rev. Rep. 74, 77, decided in 1808. The subsequent cases of Stanways v. Bishop, 29 L. T. 120, decided in 1857; and Hampshire v. Wickens, L. R. 7 Ch. Div. 555; s.c. 47 L. J. Ch. 243; 38 L. T. 408; 23 Moak's Eng. Rep. 708, decided in 1878, in both of which cases Church v. Brown was cited by counsel in argument, show that the courts have not regarded as well founded the doubts cast upon the case by Lord ELDON.

restraint that interferes with the purposes for which the estate is granted will be void. The end and aim of every estate granted to charitable uses is to raise a revenue upon which the charity may subsist, or further its aims and the object of its creation ; consequently, a stipulation in a grant or devise to charitable uses, that the rent of the property granted or devised shall never be raised, will be held void, as repugnant to the purposes of the estate granted.¹

SEC. 295. Same—Conditions in conveyance.—Conditions in a conveyance in fee-simple, or otherwise, whether made by deed or devise, are valid so long as the beneficial enjoyment of the estate is not impaired ; but such conditions are always limited in extent and special in their character, and are fully treated under another head.²

SEC. 296. Same—Special restraints—Definition.—By special restraint is meant such parcel or limited abridgment of the right of alienation and enjoyment as will leave that right not unreasonably impaired or curtailed. Such restrictions consist of almost every conceivable form, such as injunctions against every mode of alienation, conditions, covenants, and limitations, operating indirectly against the transfer and enjoyment of estates. They will be found attached to all manner of estates, freeholds, and for use, legal and equitable.³ Some of

¹ Attorney-General *v.* Masters of Oath Hall, Jac. 381.

² See: *Post*, chapter on “Estates on Condition.”

³ **Methods of imposing restrictions.**—It is said in *Re Macleay*, L. R. 20 Eq. Cas. 86 ; s.c. 13 Moak’s Eng. Rep. 719, that you may restrict alienations in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting it to a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all these ways you may limit it, and it appears to me that in two ways,

at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale ; a person may lease, or he may mortgage, or he may settle ; therefore it is a mere limited restriction on alienation in that way. Then again, it is limited as regards class ; he is never to sell it out of the family, but he may sell it to one member of the family. It is not, therefore, limited in the sense of there being only one person to buy ; the will shows there were a great many mem-

these restrictions or prohibitions rest upon the capacity of the donee, and some are created for his protection. Special or partial restraints, reasonable as to time, are usually regarded as valid,¹ even when attached to fee-simple estates vested in persons *sui juris*, unless unreasonable and arbitrary; and no proposition is better settled in law than that a life interest may be so created and conferred as to be determinable upon the event of the

bers of the family when she made her will; a great many are named in it; therefore you have a class which probably was large, and was certainly not small. Then it is not, strictly speaking, limited as to time except in this way, that it is limited to the life of the first tenant in tail; of course, if unlimited as to time, it would be void for remoteness under another rule. So that this is strictly a limited restraint on alienation, and unless Coke upon Littleton has been overruled or is not good law, that is a good condition."

- ¹ Warner v. Bennett, 31 Conn. 468;
Collins Mfg. Co. v. Marcy, 25 Conn. 242;
O'Brien v. Wetherell, 14 Kan. 616;
Gray v. Blanchard, 25 Mass. (8 Pick.) 248;
Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 38; s.c. 13 Am. Rep. 556;
Plumb v. Tubbs, 41 N. Y. 442;
Nicoll v. N. Y. & Erie R. Co., 12 N. Y. 121;
Craig v. Wells, 11 N. Y. 315;
Stines v. Dorman, 25 Ohio St. 580;
Sperry v. Pond, 5 Ohio 388;
Doe v. Pearson, 6 East 173.
See: De Rutte v. Muldrow, 16 Cal. 505, 513;
Laffan v. Naglee, 9 Cal. 662, 676; s.c. 70 Am. Dec. 678;
Langdon v. Ingram's Guardian, 28 Ind. 360;
Stewart v. Barrow, 7 Bush (Ky.) 368;
Stewart v. Brady, 3 Bush (Ky.) 623;
Simonds v. Simonds, 44 Mass. (3 Met.) 562;

- Blackstone Bank v. Davis, 38 Mass. (21 Pick.) 42; s.c. 32 Am. Dec. 241;
Mandlebaum v. McDonell, 29 Mich. 78; s.c. 18 Am. Rep. 61;
Dougal v. Fryer, 3 Mo. 40; s.c. 22 Am. Dec. 458;
McCollough v. Gilmore, 11 Pa. St. 370;
McWilliams v. Nisly, 2 Serg. & R. (Pa.) 507; s.c. 7 Am. Dec. 654;
Cowell v. Colorado Springs Co., 100 U. S. 55; bk. 25 L. ed. 547;
Large's Case, 2 Leon. 82; s.c. 3 Id. 182;
2 Bac. Ab., tit. "Condition," L. notes;
1 Prest. Est. 478.
Compare: Schermerhorn v. Negus, 1 Den. (N. Y.) 448.
Conditions in partial restraint of alienation, as that the grantee shall not alien or assign to a particular person, or for a particular time, have been held good, but some of the cases so holding are of doubtful authority.
De Peyster v. Michael, 6 N. Y. 467, 495; s.c. 57 Am. Dec. 470, 476.
See: McCollough v. Gilmore, 11 Pa. St. 370;
Turner v. Fowler, 10 Watts (Pa.) 325.
Condition not to sell.—It is said in Anderson v. Cary, 36 Ohio St. 506; s.c. 38 Am. Rep. 602, that lands devised to the testator's son upon condition that the devisee shall not sell within a specified time, nor mortgage or encumber the lands, the conditions are void. To same effect, Rona v. Meier, 47 Iowa 607; s.c. 29 Am. Rep. 493.

donee's bankruptcy or insolvency, or any act of involuntary alienation on his part.¹

SEC. 297. **Same—Same—Large's Case.**—The doctrine of partial or particular restraints on alienation of land took its origin in Large's Case,² decided by the Court of Queen's Bench in the reign of Elizabeth. Restraints upon the assignment of leases and against the pursuit of certain trades upon premises were of more ancient origin.³ In Large's Case the testator devised his lands to his wife until his son William should attain the age of twenty-one years, with remainder as to a portion of his lands to two sons, and as to another portion to two other sons, upon condition that if any of his sons should, before William reached the age of twenty-two years, sell or go about to sell his respective estate, he should forever lose the same, in which event it was to go over to another. Before the son William attained the age of twenty-two years, one of the sons leased his lands for sixty years, and to and from sixty years until two hundred and forty years. On suit brought to forfeit the estate the condition in the devise was held valid and the lease declared a substantial breach of it. While this case is usually cited in support of the doctrine of partial restraints, it is not thought to be a very strong authority in support of subsequent conditions against alienation, because the estate that was defeated in that case had never vested in possession, and a vesting was made dependent upon this

¹ *Bramhall v. Ferris*, 14 N. Y. 41 ;
Churchill v. Marks, 1 Coll. 441 ;
Ex parte Boddam, 2 DeG. F. & J.
 625 ;
Doe v. Clarke, 8 East 186 ;
Muggeridge's Trusts, Johns.
 (Eng.) 625 ;
Whitfield v. Prickett, 2 Keen.
 609 ;
Cooper v. Wyatt, 5 Madd. 489 ;
King v. Topping, McClell. & Y.
 558 ;
Yarnold v. Moorhouse, 1 Russ. &
 My. 364 ;
Martin v. Margham, 14 Sim. 230 ;
Pym v. Lockyer, 12 Sim. 394 ;
Lewes v. Lewes, 6 Sim. 304 ;
Lear v. Leggett, 2 Sim. 479 ; s.c.
 1 Russ. & M. 690 ;

Wilson v. Greenwood, 1 Swanst.
 471 ;
Dommet v. Bedford, 6 T. R. 684,
 694 ;
Higginbotham v. Holmes, 19 Ves.
 88 ;
Brandon v. Robinson, 18 Ves.
 429 ;
Shee v. Hale, 13 Ves. 404 ; s.c. 9
 Rev. Rep. 198 ;
Brandon v. Aston, 2 Y. & C.
 24.

² 2 Leon. 82 ; 3 Id. 182.

³ See : *Chinsley v. Langley*, 1 Rolle
 Abr. 427.
 See : *King v. Castle*, 1 And. 123,
 124 ;
Anonymous, Dyer 6a.

condition, which is in the nature of a condition precedent to a full seisin of the land by the son whose act defeated it before the time had arrived for its enjoyment as well as an estate in possession.

SEC. 298. **Same—Same—Prohibiting alienation to particular persons.**—A restriction in a grant or devise prohibiting the grantee or devisee from alienating for a particular time or to a particular person is valid,¹ where they do not take away all power of alienation. The law on this subject is very old, and cannot be better stated than it is in Coke upon Littleton, in Sheppard's Touchstone, and other books of that kind, which treat it in the same way.² Littleton says: "If the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issue of such a one or the like, which conditions do not take away all power of alienation from the feoffee, then such condition is good."³ But such conditions are conditions subsequent which tend to divest the estate and are to be strictly construed.⁴

SEC. 299. **Same—Same—Restricting alienations to particular persons.**—Provisions in a conveyance, either by gift or devise, restricting alienation to particular persons or their heirs, are generally held valid, if not inconsistent with a reasonable enjoyment of the estate.⁵ But it

¹ See: *Langdon v. Ingram's Guardian*, 28 Ind. 360 ;
Simonds v. Simonds, 44 Mass. (3 Met.) 558, 562 ;
De Peyster v. Michael, 6 N. Y. 467, 495 ; s.c. 57 Am. Dec. 470, 476 ;
McWilliams v. Nisly, 2 Serg. & R. (Pa.) 507 ; s.c. 7 Am. Dec. 654.

² See : *In re Macleay*, L. R. 20 Eq. Cas. 186, 188 ; s.c. 13 Moak's Eng. Rep. 719, 721.

³ Litt., § 361.

⁴ *Bradstreet v. Clark*, 38 Mass. (21 Pick.) 389 ;
Gadberry v. Shepard, 27 Miss. 203 ;
Hoyt v. Kimball, 49 N. H. 327 ;
Page v. Palmer, 48 N. H. 385.

⁵ *McCollough v. Gilmore*, 11 Pa. St. 370 ;

Doe v. Pearson, 6 East 173 ; s.c. 2 Smith 295 ;

Re Macleay, L. R. 20 Eq. Cas. 186 ; s.c. 13 Moak's Eng. Rep. 719.

This doctrine has been questioned in some well-reasoned opinions by able judges.

See : *Schermerhorn v. Negus*, 4 Den. (N. Y.) 448 ;

Anderson v. Cary, 36 Ohio St. 506 ; s.c. 38 Am. Rep. 602 ;

Attwater v. Attwater, 18 Beav. 330 ; s.c. 18 Jur. 50 ; 23 L. J. Ch. 692.

Same—In *Attwater v. Attwater*, supra, the courts say : "It is obvious that if the introduction

is said in *Muschang v. Bluet*,¹ and approved by Lord ROMILLY in the case of *Attwater v. Attwater*,² that the restriction must not, in fact, take away all power, because, if you say that the grantee or devisee shall not alien except to A B, who you know will not or cannot purchase, that would be in effect restraining him from all alienation ; and it is well established that you cannot do indirectly that which you may not do directly.³

SEC. 300. **Same—Same—Restricting alienation to family.**—A condition in a deed or devise restricting alienation to the members of the family is valid. Thus it has been held that a devise to the testator's brother conditioned never to sell "out of the family" is valid.⁴ So also of a restriction against alienation, except to the sisters of the devisee,⁵ or to the heirs of a specified person.⁶ There is an American case where a testator, after devising land in equal shares to several children for life, with remainder in fee to other children, declared that no portion of the real estate devised should be sold or alienated by the devisees or their descendants, except to each other or their descendants. The restriction against alienation was held to be void.⁷ But there are some well-considered English cases on the same point, which seem to maintain a contrary doctrine.⁸ Thus in the case of *Doe v. Pearson*⁹ the gift was a gift in fee upon this special provision and condition, "that in case my said daughters Ann and Hannah, or either of them, shall have no lawful issue, that then, and in such case, they and she having no law-

of one person's name, as the only person to whom the property may be sold, renders such a proviso valid, a restraint on alienation may be created, as complete and perfect as if no person whatever was named ; inasmuch as the name of a person who alone is permitted to purchase might be so selected as to render it reasonably certain that he would not buy the property, and that the property could not be aliened at all."

¹ *Bridgm.* 137.

² Cited : 2 *Jarm. Wills* (3d ed.) 17 ; 18 *Beav.* 330.

³ *In re Macleay*, L. R. 20 Eq. Cas.

186, 187 ; s.c. 13 *Moak's Eng. Rep.* 719, 721.

⁴ *In re Macleay*, L. R. 20 Eq. Cas. 186 ; s.c. 13 *Moak's Eng. Rep.* 719.

⁵ *Doe v. Pearson*, 6 *East* 173 ; s.c. 2 *Smith* 295.

⁶ *McCullough v. Gilmore*, 11 *Pa. St.* 370.

⁷ *Schermerhorn v. Negus*, 1 *Den.* (N. Y.) 448.

⁸ See : *In re Macleay*, L. R. 20 Eq. Cas. 186 ; s.c. 13 *Moak's Eng. Rep.* 719 ;

Attwater v. Attwater, 18 *Beav.* 330 ;

Doe v. Pearson, 6 *East* 173.

⁹ 6 *East* 173.

ful issue as aforesaid, shall not have power to dispose of her share in the said estate so above given to them, except to her sister or sisters, or to their children." In this case the question was given great consideration by a full court, and Lord ELLENBOROUGH, who gives the judgment, goes into the authorities very carefully and holds the condition good. He says: "We think the condition is good; for, according to the case of *Daniel v. Ubley*,¹ it was not doubted but that she might have had given her a fee-simple conditional to convey it to any of the sons of the devisor; and if she did not, that the heir might enter for the condition broken."²

SEC. 301. **Same—Same—Restraining alienation for a particular time.**—It has generally been supposed to be the rule of law that a restriction or a prohibition against alienation for a limited time only is valid, provided only the limitation is for a reasonable time;³ but doubt has been thrown on the correctness of this view by recent well-reasoned opinions by able judges. In the case of *De Peyster v. Michael*,⁴ decided by the New York Court of Appeals in 1852, Chief Justice RUGGLES says: "There are cases where conditions not to sell or assign to a particular person, or for a particular time, have been held good, but some of them are of doubtful authority." In

¹ Sir W. Jones, 137; s.c. Latch. 9, 39, 134.

² Justice CHRISTIANCY, in writing the opinion in *Mandlebaum v. McDonell*, 29 Mich. 78; s.c. 18 Am. Rep. 61, 75, says: "I think there is much reason to doubt whether this case [*Doe v. Pearson*] should be recognized as law here, if, indeed, it would be now in England." This opinion was written in 1874. Early in 1875 Sir GEORGE JESSEL, Master of the Rolls, wrote the opinion in *Re Macleay*, L. R. 20 Eq. Cas. 186; s.c. 13 Moak's Eng. Rep. 719, in which he goes carefully over the cases, and adheres to the doctrine laid down in *Doe v. Pearson*, and distinguishing that in *Attwater v. Attwater*, 18 Beav. 330.

³ *Langdon v. Ingram's Guardian*, 28 Ind. 360;

Stewart v. Barrow, 7 Bush (Ky.) 368;

Stewart v. Brady, 3 Bush (Ky.) 623;

Simonds v. Simonds, 44 Mass. (3 Met.) 558, 562;

Blackstone Bank v. Davis, 38 Mass. (21 Pick.) 42;

Gray v. Blanchard, 25 Mass. (8 Pick.) 254;

Dougal v. Fryer, 3 Mo. 40; s.c. 22 Am. Dec. 458;

Jackson v. Shultz, 18 John. (N. Y.) 174, 184;

McCollough v. Gilmore, 11 Pa. St. 370;

McWilliams v. Nisly, 2 Serg. & R. (Pa.) 507; s.c. 7 Am. Dec. 654;

Large's Case, 2 Leon. 82; s.c. 3 Id. 182.

⁴ 6 N. Y. 467, 495; s.c. 57 Am. Dec. 470, 476.

the case of *Mandlebaum v. McDonell*,¹ decided by the Supreme Court of Michigan in 1874, it is declared that "there never has been a time since the statute *Quia Emptores* when a restriction in a conveyance of a vested estate in fee-simple, in possession or remainder, against selling for a particular period of time, was valid by the common law, and a condition or restriction which would suspend all power of alienation for a single day is inconsistent with the estate granted, unreasonable and void."² In the case of *Anderson v. Cary*,³ decided by the Supreme Court of Ohio in 1881, where lands were devised upon condition that the devisees should not sell within a specified time, nor mortgage or otherwise encumber the lands, the court held the devise absolute and the condition void.⁴ McILVAINE, Justice, says that by "the policy of our laws it is of the very essence of an estate in fee-simple absolute, that the owner, who is not under any personal disability imposed by law, may alien it or subject it to the payment of his debts at any and all times; and any attempt to evade or eliminate this element from a fee-simple estate, either by deed or by will, must be declared void and of no force."⁵

¹ 29 Mich. 78; s.c. 18 Am. Rep. 61.

² Good prior to statute *Quia Emptores*.—In this case Justice CHRISTIANCY says that "At common law, however, prior to the statute *Quia Emptores*, a condition against alienation would in England have been good, because prior to that statute the feoffor or grantor of such an estate was entitled to the escheat on failure of heirs of the grantee, which was properly a possibility of reverter, and was treated as a reversion; so that the vendor did not, by the feoffment or conveyance, part with the entire estate; but this reversion, dependent on this contingency, remained in him and his heirs, which gave them an interest to insist upon the condition and take the benefit accruing to them upon the breach," and that "Whether the statute *Quia Emptores* ever became

effectual in any of the United States by express or implied adoption, or as a part of the common law, we need not inquire, since it is clear enough that no such statute was ever needed in this state, if in any of the Western states, as no such right of escheat or possibility of reverter ever existed here in the party conveying the estate; but the escheat could only accrue to the sovereignty—the state. And, therefore, the question of the right to impose such conditions or restrictions stands here upon common-law reasons, as it has stood in England since the statute in question."

³ 36 Ohio St. 506; s.c. 38 Am. Rep. 602.

⁴ See: *Rona v. Meier*, 47 Iowa 607; s.c. 29 Am. Rep. 493.

⁵ See: *Hobbs v. Smith*, 15 Ohio St. 419.

SEC. 302. **Same—Same—Condition to do certain acts.**—Conveyances by deed or devise, with a condition requiring the grantee or devisee to do certain acts, have been held to be valid ;¹ such as that the devisee or grantee shall assume a given name ;² that the grantee or devisee shall actively assist in defeating a lawsuit pending against the grantor or deviser at the time the estate is given ;³ that the devisee shall reside on the premises ;⁴ that the grantee or devisee, an infant, be educated in some school, and feared in a particular faith ;⁵ that the grantee or donee shall withdraw from the priesthood,⁶ or refrain

¹ See: *Hayden v. Stoughton*, 22 Mass. (5 Pick.) 528 ;

Cornelius v. Ivins, 26 N. J. L. (2 Dutch.) 376 ;

Lessee of Sperry v. Pond, 5 Ohio 387 ; s.c. 24 Am. Dec. 296.

Distinction between condition to pay money and to do an act.—Lord ELDON says: "There is a distinction between the breach of a covenant or condition to pay money, and one requiring acts to be done. In the former case relief may be granted against a forfeiture, because the money and interest may be paid as a satisfaction. But where anything else is to be done but the payment of money, the law having ascertained the contract and the rights of the contracting parties, a court of equity could not interfere."

Hill v. Barclay, 18 Ves. 63.

² **Assuming a new name required.**—It has been said that where the devise requires the devisee to assume a new name, with a gift over upon the refusal or neglect to comply therewith within a year, the condition is void.

Musgrave v. Brooks, 26 Ch. Div. 792.

Same—Act of Legislature not necessary.—Where the donee is required to assume a new name, unless the will so requires, it is not necessary to procure an act of the Legislature changing the name of the devisee to the one he is directed to assume.

Barlow v. Bateman, 3 Pr. Wms. 65.

See: *Taylor v. Mason*, 22 U. S.

(9 Wheat.) 325 ; bk. 22 L. ed. 101.

It is sufficient that the devisee assume the required name by his own act.

See: *Davis v. Loundes*, 2 Scott 71 ;

Doe d. Litscombe v. Yates, 5 Barn. & Ald. 544 ; s.c. 7 Eng. C. L. 298.

Compare: Barlow v. Bateman, 2 B. P. C. 272.

³ *Cannon v. Apperson*, 14 Lea (Tenn.) 553.

⁴ *Lowe v. Cloud*, 45 Ga. 481 ;

Marston v. Marston, 47 Me. 495 ;

Casper v. Walker, 33 N. J. Eq. (6 Stew.) 35 ;

Astley v. Essex, L. R. 18 Eq. 295 ; s.c. 9 Moak's Eng. Rep. 809 ;

Wilkinson v. Wilkinson, L. R. 12 Eq. 604 ;

Robertson v. Mowell, 66 Md. 565 ; s.c. 10 Atl. Rep. 671.

A condition requiring residence in a certain house is satisfied by such a residence as is necessary for the creation of a legal domicile.

Wynne v. Fletcher, 24 Beav. 430 ;

Attenborough v. Thompson, 2 Hurl. & H. 559 ;

Walcot v. Botfield, Kay 534 ;

Dunne v. Dunne, 3 Smale & G. 22.

Compare: Newkerk v. Newkerk, 2 Cai. (N. Y.) 345 ;

Pardue v. Givens, 1 Jones (N. C.) Eq. 306.

⁵ *Barnum v. Mayor of Baltimore*, 62 Md. 275 ; s.c. 50 Am. Rep. 219 ; 4 Am. Prob. Rep. 305 ;

Magee v. O'Neill, 19 S. C. 170 ; s.c. 45 Am. Rep. 765.

⁶ *Barnum v. Mayor of Baltimore*,

from forming any such connection ;¹ that the grantee or devisee shall provide for the support and maintenance of the grantor ;² shall pay off an incumbrance,³ erect a school-house,⁴ maintain a road,⁵ keep a saw-mill or a grist-mill doing business on the premises,⁶ and the like. But a condition which requires the grantee or devisee to pay to the grantor or deviser a sum of money upon alienation is invalid, as a restraint upon the estate granted.⁷

SEC. 303. **Same—Same—Condition not to do certain acts.**—A grantor of land may impose limitations or restrictions on the use of an estate, and if the effect of the stipulation is not to accomplish an illegal purpose, such limitation or restriction is lawful ; and where it affects the land, or the mode of its enjoyment, its effect is to bind all deriving title under the conveyance in which the restriction is found.⁸ These special restraints or limitations imposed

- 62 Md. 275 ; s.c. 50 Am. Rep. 219 ; 4 Am. Prob. Rep. 291, 295 ;
Mitchell's Lessee v. Mitchell, 18 Md. 405 ;
Vidal v. Girard, 43 U. S. (2 How.) 127, 199 ; bk. 11 L. ed. 205, 234.
- ¹ As not to become a nun.
In re Dickerson, 20 L. J. Rep. (N. S.) 33 ; s.c. 1 Eng. L. & Eq. 149 ;
O'Hanlon v. Unthank, Jr., L. R. 7 Ex. 68.
- ² *Eastman v. Batchelder*, 36 N. H. 141 ; s.c. 72 Am. Dec. 295.
 See : *Clinton v. Fly*, 10 Me. 292 ;
Jackson v. Topping, 1 Wend. (N. Y.) 388 ; s.c. 19 Am. Dec. 515.
 A condition or reservation in favor of a stranger is void.
 See : *Craig v. Wells*, 11 N. Y. 315, 323 ;
Hornbeck v. Westbrook, 9 John. (N. Y.) 73 ;
Jackson v. Topping, 1 Wend. (N. Y.) 388 ; s.c. 7 Am. Dec. 515 ;
Moore v. Plymouth, 3 Barn. & Ald. 66 ; s.c. 5 Eng. C. L. 48 ;
 1 Co. Litt. (19th ed.) 47a, 214 ;
Shep. Touch. 80, 120.
 Conditions subsequent, it seems, can only be reserved for the benefit of the grantor and his heirs, and that no other person
- can take advantage of the breach.
Nicoll v. N. Y. & Erie R. Co., 12 N. Y. 121 ; s.c. 62 Am. Dec. 137.
³ *Spaulding v. Hallenbeck*, 35 N. Y. 204, 206 ;
Belmont v. Coman, 22 N. Y. 438 ; s.c. 78 Am. Dec. 213 ;
Trotter v. Hughes, 12 N. Y. 74.
⁴ *Hayden v. Stoughton*, 22 Mass. (5 Pick.) 528.
⁵ *Cornelius v. Ivins*, 26 N. J. L. (2 Dutch.) 376.
⁶ *Lessees of Sperry v. Pond*, 5 Ohio 387 ; s.c. 24 Am. Dec. 296.
⁷ *De Peyster v. Michael*, 6 N. Y. 467, 495 ; s.c. 57 Am. Dec. 470, 476.
 See : *Mandlebaum v. McDonell*, 29 Mich. 78 ; s.c. 18 Am. Dec. 61.
Livingston v. Stickles, 7 Hill (N. Y.) 253, 257 ;
McCullough v. Gilmore, 11 Pa. St. 370 ;
Tanner v. Fowler, 10 Watts (Pa.) 325 ;
King v. Burchell, Amb. 379.
⁸ *Warner v. Bennett*, 31 Conn. 468 ;
Collins Mfg. Co. v. Marcy, 25 Conn. 242 ;
O'Brien v. Wetherell, 14 Kan. 616 ;
Tobey v. Moore, 130 Mass. 448 ;

upon the estate are of various kinds; such as that the grantee or devisee shall not contest the will,¹ or assert certain claims against the estate of the testator;² that the grantee shall not become a nun,³ that the grantees shall not sell the estate during the lifetime of the grantor, unless the latter should sell the land on which he lived;⁴

- Dorr v. Harrahan, 101 Mass. 531 ;
s.c. 3 Am. Rep. 398 ;
Linzee v. Mixer, 101 Mass. 512,
526 ;
Gray v. Blanchard, 25 Mass. (8
Pick.) 284 ;
Cooke v. Turner, 15 Mees. & W.
727.
See : *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35 ; s.c. 13 Am.
Rep. 556 ;
Atlantic Dock Co. v. Libby, 45 N.
Y. 499 ;
Plumb v. Tubbs, 41 N. Y. 442 ;
Jackson v. Schutz, 18 John. (N.
Y.) 174 ; s.c. 9 Am. Dec. 195 ;
Barrow v. Richard, 8 Paige Ch.
(N. Y.) 351 ; s.c. 35 Am. Dec.
713 ;
Stines v. Dorman, 25 Ohio St.
580, 583 ;
McCullough v. Gilmore, 11 Pa.
St. 370 ;
McWilliams v. Nisly, 2 Serg. &
R. (Pa.) 507 ; s.c. 7 Am. Dec.
654 ;
Rogers v. Law, 66 U. S. (1 Black.)
253 ; bk. 17 L. ed. 58 ;
In re Dickson, 20 L. J. Rep. (N. S.)
Ch. 33 ; s.c. 1 Eng. L. & Eq. 149 ;
Western v. Macdermott, L. R. 2
Ch. App. 72 ;
Wilson v. Hart, L. R. 1 Ch. App.
463 ;
Lloyd v. Branton, 3 Meriv. 118 ;
Tulk v. Moxhay, 2 Ph. Ch. 774 ;
Chinsley v. Langley, 1 Rolle Abr.
427 ;
Whatman v. Gibson, 9 Sim. 196.
1 *Compare* : *Bradford v. Bradford*,
19 Ohio St. 546 ; s.c. 2 Am.
Rep. 419 ;
Chew's Appeal, 45 Pa. St. 288 ;
Thompson v. Gaut, 14 Lea (Tenn.)
310, 314, 315 ;
Evanturel v. Evanturel, 23 W. R.
32 ; s.c. L. R. 6 P. C. 1.
See : *Shivers v. Goar*, 40 Ga.
676 ;
Nallet v. Smith, 6 Rich. (S. C.)
Eq. 12 ; s.c. 60 Am. Dec. 107 ;
Runnels v. Runnels, 27 Tex. 515 ;
Gregg v. Coates, 23 Beav. 33 ;
Egg v. Devey, 10 Beav. 444 ;
*Attorney-General v. Christ's
Hospital*, Tam. 393.
Compare : *Donegan v. Wade*, 70
Ala. 501 ; s.c. 3 Am. Prob. Rep.
206.
Such a condition in a will is valid
although there is no gift over.
Violet v. Brookman, 26 L. J. Ch.
308 ;
Cooke v. Turner, 15 Mees & W. 727 ;
Anonymous, 2 Mod. 7.
In New York it has been held that
notwithstanding a clause forfeit-
ing the bequests in case of
opposition to the will, there will
be no forfeiture where the op-
position is made in good faith
and is not vexatious merely.
Jackson v. Westerfield, 61 How.
(N. Y.) Pr. 399.
In Pennsylvania a similar doctrine
seems to prevail.
Chew's Appeal, 45 Pa. St. 228.
Condition not to oppose will—
Aiding and advising suit of
another.—Under a provision in
a will that any child who “re-
sists the probate or petitions to
break or set it aside” should
forfeit all interests under it, and
that the property should pass
to those who had not “op-
posed” it, the court held that
aiding and advising a suit in-
stituted by another devisee
worked a forfeiture of the
child's interest under the will.
Donegan v. Wade, 70 Ala. 501 ;
s.c. 3 Am. Prob. Rep. 206.
2 *Chew's Appeal*, 45 Pa. St. 228 ;
Rogers v. Law, 66 U. S. (1 Black.)
253 ; bk. 17 L. ed. 58 ;
Cooke v. Turner, 15 Mees. & W.
727 ;
Lloyd v. Branton, 3 Meriv. 118.
3 *In re Dickson*, 20 L. J. Rep. (N. S.)
Ch. 33 ; s.c. 1 Eng. L. & Eq.
149 ;
O'Hanlon v. Unthank, Ir. L. R.
7 Eq. 68.
4 *McWilliams v. Nisly*, 2 Serg. &
R. (Pa.) 507 ; s.c. 7 Am. Dec. 654.

that the grantee should not leave the estate to any one but the heirs of a designated person;¹ that no wall² or buildings shall be erected within a certain distance of the street;³ that there should be erected no buildings but a dwelling-house;⁴ that no windows shall be placed in a particular wall of the house, or any house to be erected upon the premises, for thirty-five years;⁵ that the premises shall not be used or occupied as a hotel;⁶ that the property shall not be occupied for the purposes of carrying on any offensive trade or calling,⁷ or any particular trade or calling,⁸ that the grantee shall not suffer the premises to be used for the manufacture or sale of intoxicating liquors;⁹ also that there shall not be erected on

¹ *McCullough v. Gilmore*, 11 Pa. St. 370.

² *Linzee v. Mixer*, 101 Mass. 512, 526.

³ *Tobey v. Moore*, 130 Mass. 448.

Restricting improvements on lots.—Benefit of all.—Covenants or conditions inserted by the owner of a contract of lands in deeds given for different lots therein, restricting the manner of improvement or enjoyment thereof, for the benefit of all the lot-owners in the contract, is valid and will be enforced against the grantees, or those holding under them with notice.

See: *Whitney v. Union R. Co.*, 77 Mass. (11 Gray) 359, 364, 365; s.c. 71 Am. Dec. 715;

Kirkpatrick v. Peshine, 24 N. J. Eq. (9 C. E. Gr.) 206, 214;

Rogers v. Danforth, 9 N. J. Eq. (4 Halst.) 289, 294;

Gilbert v. Peteler, 38 N. Y. 165, 168; s.c. 97 Am. Dec. 785;

Tallmadge v. The East River Bank, 26 N. Y. 105, 110;

Brouwer v. Jones, 23 Barb. (N. Y.) 161;

Berringer v. Schaefer, 52 How. (N. Y.) Pr. 69, 71;

Birdsall v. Tiemann, 12 How. (N. Y.) Pr. 551;

Barrow v. Richard, 8 Paige Ch. (N. Y.) 351; s.c. 35 Am. Dec. 713;

Steward v. Winters, 4 Sandf. Ch. (N. Y.) 587, 592;

Stines v. Dorman, 25 Ohio St. 583;

Easter v. Little Miami R. Co., 14 Ohio St. 48, 54;

Clark v. Martin, 49 Pa. St. 289; *King v. Large*, 7 Phil. (Pa.) 285.

⁴ *Dorr v. Harrahan*, 101 Mass. 531; s.c. 3 Am. Rep. 398.

⁵ *Gray v. Blanchard*, 25 Mass. (8 Pick.) 284.

⁶ *Stines v. Dorman*, 25 Ohio St. 580.

⁷ *Dorr v. Harrahan*, 101 Mass. 531; s.c. 3 Am. Rep. 398.

⁸ *Chinsley v. Langley*, 1 Rolle Abr. 427;

2 Prest. Abs. 184.

⁹ *Collins Mfg. Co. v. Murray*, 25 Conn. 242;

O'Brien v. Wetherell, 14 Kan. 616;

Plumb v. Tubbs, 41 N. Y. 442;

Cowell v. Colorado Springs Co., 100 U. S. 55; bk. 25 L. ed. 547;

Colt v. Towle, L. R. 4 Ch. App. 654.

Condition against buildings.—In the case of *Plumb v. Tubbs*, 41 N. Y. 442, it was said that a condition that a school-house should not be erected on the premises, or a distillery, or a blast furnace, or a livery stable, or a machine shop for iron manufacture, or a powder magazine, or a hospital, or a cemetery, have been held to be valid conditions. The court cite *Gilbert v. Peteler*, 38 N. Y. 165; s.c. 97 Am. Dec. 785, as decisive of the point at issue.

See: *Collins v. Marcy*, 25 Conn. 242;

Gray v. Blanchard, 25 Mass. (8 Pick.) 284;

the premises granted or devised a school-house, a slaughter-house, a livery stable, a machine shop, a blast furnace, a hospital, a cemetery, a brewery, or a distillery,¹ or any manufactory of gunpowder, glue, varnish, vitriol, or turpentine, or any other noxious or dangerous trade or business.² But any condition annexed to a grant or bequest tending to separate husband and wife will be void as against public policy,³ such as a condition that the grantee or devisee shall not support or cohabit with his wife.⁴

SEC. 304. **Same—Same—Restraints on estates of persons not sui juris.**—Special restraints against the alienation and enjoyment of estates are frequently imposed for the benefit and protection of persons not *sui juris*. They are necessarily of a limited duration, but they are imposed upon the person receiving the estate, and do not affect the fee beyond his existence. Thus a devise to a minor conditioned that he shall not come into possession, occupy, or have advantage of the estate, except through his guardian, is valid;⁵ and in the case of a married woman restraints against burdening and alienating may be laid upon her estate during coverture, where they are imposed

Nicoll v. N. Y. & Erie R. Co., 12 N. Y. 121;

Craig v. Wells, 11 N. Y. 315;

Lessees of Sperry v. Pond, 5 Ohio 387; s.c. 24 Am. Dec. 296.

¹ **Resin-oil—Distillery of, within prohibition.**—In Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 38; s.c. 13 Am. Rep. 556, 557, it was held that while the distillery used for the manufacture of resin-oil was probably not such a distillery as was contemplated by the parties to the deed, yet the court found, upon sufficient evidence, that the business was dangerous within the meaning of the covenants contained in the deed, and that was sufficient to show a breach thereof.

² Warner v. Bennett, 31 Conn. 468; Collins Mfg. Co. v. Marcy, 25 Conn. 242;

Gray v. Blanchard, 25 Mass. (8 Pick.) 284;

Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 38; s.c. 13 Am. Rep. 556;

Atlantic Dock Co. v. Libby, 45 N. Y. 499, 502;

Plumb v. Tubbs, 41 N. Y. 442, 446;

Nicoll v. N. Y. & Erie Railway Co., 12 N. Y. 121;

Craig v. Wells, 11 N. Y. 315;

Barrow v. Richard, 8 Paige Ch. (N. Y.) 351; s.c. 35 Am. Dec. 713;

Lessee of Sperry v. Pond, 5 Ohio 387; s.c. 24 Am. Dec. 296.

³ Conrad v. Long, 133 Mich. 78;

Wren v. Bradley, 2 DeG. & S. 49;

Brown v. Peck, 1 Eden 140.

⁴ Potter v. McAlpine, 3 Dem. (N. Y.) 108.

⁵ Smithwick v. Jordan, 15 Mass. 113.

See: Blackstone Bank v. Davis, 38 Mass. (21 Pick.) 42, 44; s.c. 32 Am. Dec. 241, 242.

in general terms.¹ And are valid during marriage, but before and after coverture they will be as invalid as when attached to the estate of any person *sui juris*.² When special restraints contravene the policy of the law, they are void in like manner as general restraints of a similar nature.³

SEC. 305. **Same—Same—Restraints on marriage.**—All conditions in a grant or devise of land in general restraint of marriage are void;⁴ and this rule applies where the grantee or devisee is a man as well as where a woman.⁵ But conditions annexed to gifts, legacies, or devises in restraint of marriage are not void if they are reasonable in themselves, and do not directly or virtually operate as an undue restraint upon the freedom of marriage. Thus a testator who has a right to concern himself with the settlement of the donee in life⁶ may impose a condition that the donee shall or shall not marry a particular person;⁷ such as a domestic servant.⁸ A reasonable condition limiting the time as to marriage is also valid; such as that the donee shall not marry until he is twenty-one years of age,⁹ or until he has secured the consent of parents, guardians, or trustees.¹⁰

¹ Tullett v. Armstrong, 4 Mylne & Cr. 390; s.c. 1 Beav. 2;

Barton v. Briscoe, 2 Jac. 603.

² See: Clarke v. Windham, 12 Ala. 798;

Brown v. Pecoek, 2 Russ. & Myl. 210;

Jones v. Salter, 2 Russ. & Myl. 208;

Woodmeston v. Walker, 2 Russ. & Myl. 197;

Newton v. Reid, 4 Sim. 141.

³ See: *Ante*, § 284.

⁴ Crawford v. Thompson, 91 Ind. 266; s.c. 46 Am. Rep. 598; 4 Am. Prob. Rep. 598;

Otis v. Prince, 76 Mass. (10 Gray) 581;

Parsons v. Winslow, 6 Mass. 169; s.c. 4 Am. Dec. 107;

Bostwick v. Blades, 59 Md. 231; s.c. 3 Am. Prob. Rep. 364, 366;

Williams v. Cowden, 13 Mo. 211; s.c. 35 Am. Dec. 422;

Maddox v. Maddox, 11 Gratt. (Va.) 804;

Morley v. Rennoldson, 2 Hare 570;

Lloyd v. Branton, 3 Meriv. 108; Reves v. Herne, 5 Vin. Abr. 343, pl. 41.

⁵ Otis v. Prince, 76 Mass. (10 Gray) 581.

⁶ Haughton v. Haughton, 1 Moll. 611;

Stackpole v. Beaumont, 3 Ves. 89; s.c. 3 Rev. Rep. 52.

⁷ Finlay v. King's Lessee, 28 U. S. (3 Pet.) 346; bk. 7 L. ed. 701;

Davis v. Angel, 4 DeG. F. & J. 524.

⁸ Jenner v. Turner, 16 Ch. Div. 188; s.c. 37 Moak's Eng. Rep. 139.

⁹ See: Shackelford v. Hall, 19 Ill. 212;

Maddox v. Maddox, 11 Gratt. (Va.) 804;

Reuff v. Coleman, 30 W. Va. 171; s.c. 3 S. E. Rep. 597;

Stackpole v. Beaumont, 3 Ves. 89; s.c. 3 Rev. Rep. 52.

¹⁰ Collier v. Slaughter, 20 Ala. 263; Collett v. Collett, 35 Beav. 312;

Dawson v. Oliver-Massey, 2 Ch. Div. 753; s.c. 17 Moak's Eng. Rep. 721;

SEC. 306. **Same—Same—Restraints on second marriage.**—Where the restraint upon marriage is in the form of a condition imposed by the husband against the re-marriage of his widow, with a forfeiture or termination of the estate resulting from a breach of the condition, the weight of authority holds it is valid; and that restraints against the enjoyment of property in the shape of conditions against second marriages, when imposed by the husband upon his widow, are not against the policy of the law.¹ But when the condition is subsequent, and the legacy is not given over, such a condition is considered merely *in terrorem* and the condition is void, because it puts a restraint upon matrimony, which ought not to be discouraged.²

SEC. 307. **Same—Forfeiture—Fee-simple estate.**—Where a legal restriction is laid upon the grant of an estate in fee-simple, a failure to comply with such restraint, do such act, or fulfill such condition as the law regards as reasonable in a grant or devise of lands, is a breach thereof, but does not divest of the title. To accomplish

- In re Stephenson's Trusts*, 18 W. R. 1066.
 ' *Vaughn v. Lovejoy*, 34 Ala. 437;
Collier v. Slaughter, 20 Ala. 263;
Doyal v. Smith, 28 Ga. 262;
Holmes v. Field, 12 Ill. 424;
Vance v. Campbell, 1 Dana (Ky.) 229;
Bostick v. Blades, 59 Md. 231; s.c. 3 Am. Prob. Rep. 364, 366;
Clark v. Tonnison, 33 Md. 85;
Gough v. Manning, 26 Md. 347;
Binnerman v. Weaver, 8 Md. 517;
O'Neale v. Ward, 3 Har. & McH. (Md.) 93;
Rogers v. American Board, 87 Mass. (5 Allen) 69;
Pringle v. Dunkley, 22 Miss. (14 Smed. & M.) 16; s.c. 3 Am. Dec. 110;
Dumey v. Schœffler, 24 Mo. 170; s.c. 69 Am. Dec. 422;
McCullough's Appeal, 12 Pa. St. 197;
Commonwealth v. Stauffer, 10 Pa. St. 350; s.c. 51 Am. Dec. 489;
Bennett v. Robinson, 10 Watts (Pa.) 348;
Hawkins v. Skeggs, 10 Humph. (Tenn.) 31;
Hughes v. Boyd, 2 Sneed (Tenn.) 512;
Doe v. Driscoll, 4 Allen (New B.) 176;
Doe v. Corrie, 3 Kerr (New B.) 450;
Jordan v. Holkham, Amb. 209;
Craven v. Brady, L. R. 4 Eq. Cas. 209;
Scott v. Tyler, 2 Dick. 712;
Morley v. Rennaldson, 2 Hare 570;
Lloyd v. Lloyd, 2 Sim. N. S. 235;
Grace v. Webb, 15 Sim. 384;
Doe v. Freeman, 1 T. R. 389;
Barton v. Barton, 2 Vern. 308.
² See: *Parsons v. Winslow*, 6 Mass. 169; s.c. 4 Am. Dec. 407;
Bellasis v. Ermine, 1 Ca. Ch. 22;
Vintner v. Pix, 1 Ch. Rep. 121;
Harvy v. Aston, Com. Rep. 726;
Earl of Salisbury v. Bennet, Skin. 286;
Bates v. Graves, 2 Ves. 293.

this end there must be an entry, or what is made equivalent thereto by statute, by the grantor or his heirs, for a breach of condition, to forfeit the estate.¹ Where land is conveyed with certain restrictions on the power of alienation, and the grantee aliens in violation thereof, but by subsequent events such restrictions are at an end, his heirs are estopped from contesting the validity of the conveyance.²

SEC. 308. **Same—Same—Life estate.**—There is no proposition in the law better settled than that a life estate may be so created and conferred as to be determinable upon the event of the donee's bankruptcy or insolvency, or any act of voluntary alienation on his part.³ Thus in the case of *Bramhall v. Ferris*⁴ the testator provided that the estate or interest granted to Ferris should terminate on the event of a decree or judgment pronounced against him in a creditor's suit instituted for the purpose of obtaining the fund; and in that event the executors were directed to apply the income to the support of his family by paying the same to his wife, or in any other mode which they in their discretion might adopt. The court say that they "know of nothing in the rules of law to prevent these provisions from taking effect according to the intention of the testator. It may, and should be, conceded, that if the bequest to Ferris had been given to

¹ *Nicoll v. N. Y. & E. R. Co.*, 12 N. Y. 121.

See: *Ludlow v. N. Y. & H. R. Co.* 12 Barb. (N. Y.) 440;

Alleghany Oil Co. v. Bradford Oil Co., 21 Hun (N. Y.) 26.

² *McWilliams v. Nisly*, 2 Serg. & R. (Pa.) 507; s.c. 7 Am. Dec. 654.

³ *Bramhall v. Ferris*, 14 N. Y. 41; *Churchill v. Marks*, 1 Coll. 441; *Ex parte Boddam*, 2 DeG. F. & J. 625;

Doe v. Clarke, 8 East 186; *Muggeridge's Trusts*, Johns. (Eng.) 625;

Whitfield v. Prickett, 2 Keen 609;

Cooper v. Wyatt, 5 Madd. 489;

King v. Topping, McClell. & Y. 558;

Yarnold v. Moorhouse, 1 Russ. & My. 364;

Martin v. Margham, 14 Sim. 230;

Pym v. Lockyer, 12 Sim. 394;

Lewes v. Lewes, 6 Sim. 304;

Lear v. Leggett, 2 Sim. 479; s.c. 1 Russ. & M. 690;

Wilson v. Greenwood, 1 Swanst. 471;

Dommet v. Bedford, 6 T. R. 684;

Higginbotham v. Holmes, 19 Ves. 88;

Brandon v. Robinson, 18 Ves. 429;

Shee v. Hale, 13 Ves. 404; s.c. 9 Rev. Rep. 198;

Brandon v. Aston, 2 Y. & C. N. R. 24.

⁴ 14 N. Y. 41.

him absolutely for life, with no provision for its earlier termination, and no limitation over in the event specified, any attempt of the testator to make the interest of the beneficiary inalienable, or to withdraw it from the claims of creditors, would have been nugatory. Such an attempt would be clearly repugnant to the estate in fact devised or bequeathed, and would be ineffectual for that reason, as well as upon the policy of the law.¹ The doctrine, however, and the cases on which it rests, do not deprive a testator of the power to declare effectually that the bequest shall cease on the happening of an event which would subject it to the claims of creditors, and then to give it a different direction. "There is," said Lord ELDON in *Brandon v. Robinson*,² "an obvious distinction between a disposition to a man until he becomes a bankrupt and then over, and an attempt to give him property and to prevent his creditors from obtaining any interest in it although it is his."³ This distinction is one of substance, and we think the principle on which it depends will sustain the will in the present case. If a testator may provide that his bounty bestowed upon one person shall cease and go to another on the occurrence of bankruptcy, I can see no reason why he may not do so in the event of an execution returned unsatisfied, followed by a creditor's suit and judgment therein."⁴

¹ The court cite in support of this proposition the following cases :

Blackstone Bank v. Davis, 38 Mass. (21 Pick.) 42 ; s.c. 32 Am. Dec. 241 ;

Hallett v. Thompson, 5 Paige Ch. (N. Y.) 583 ;

Graves v. Dolphin, 1 Sim. 66 ;

Brandon v. Robinson, 18 Ves. 429.

² 18 Ves. 429.

³ See : *Lewes v. Lewes*, 6 Sim. 304 ;

Graves v. Dolphin, 1 Sim. 66 ;

Shee v. Hale, 13 Ves. 404 ; s.c. 9 Rev. Rep. 198.

⁴ This case is approved in :

Williams v. Thorn, 70 N. Y. 270, 274 ;

Campbell v. Foster, 35 N. Y. 361, 367 ;

Roosevelt v. Roosevelt, 6 Hun (N. Y.) 31, 40.

See : *Leavitt v. Beirne*, 21 Conn. 1 ;

Pope v. Elliott, 8 B. Mon. (Ky.) 56 ;

Sparhawk v. Cloon, 125 Mass. 263, 266 ; s.c. 13 Am. Rep. 445 ;

Braman v. Stiles, 19 Mass. (2 Pick.) 460, 464 ;

Arnwine v. Carrol, 8 N. J. Eq. (4 Halst.) 620, 625 ;

Rife v. Geyer, 59 Pa. St. 393 ; s.c. 98 Am. Dec. 351 ;

Shankland's Appeal, 47 Pa. St. 113 ;

Still v. Spear, 45 Pa. St. 168 ;

Brown v. Williamson, 36 Pa. St. 338 ;

Fisher v. Taylor, 2 Rawle (Pa.) 33 ;

Holdship v. Patterson, 7 Watts (Pa.) 547 ;

Ashurst v. Given, 5 Watts & S. (Pa.) 323 ;

SEC. 309. **Same—Same—Estate for years.**—The law relating to and controlling the limitations and conditions that may be placed upon a life estate is also applicable to and controlling in the creation of estates for years.¹ The gift of an estate to a woman during her widowhood,² terminable upon her re-marriage, rests upon the same principle.³

SEC. 310. **Same—Curtesy.**—Among the incidents of an estate in fee-simple at common law, aside from the right of alienation, is the right of the husband to curtesy in all the lands of which his wife was seized during coverture,⁴ provided a child of theirs, who could have inherited the estate,⁵ was born alive before the death of the mother.⁶ This subject will be fully treated in a subsequent chapter,⁷ and need not be adverted to here farther than to remark that an unborn child, after conception, is to be considered *in esse* for the purpose of enabling it to take an estate, or for any other purpose which is for the benefit of the child if it should afterwards be born alive, or delivered by the Cæsarean operation; but it is otherwise with respect to those claiming rights through such a child.⁸

SEC. 311. **Same—Descent.**—Another incident, at common law, of an estate in fee-simple is that, if not aliened by deed of grant or the last will of the owner, the estate descends,

Tillinghast v. Bradford, 5 R. I. 205; ³ Pearse v. Owens, 2 Hayw. (N. C.) 234;

White v. White, 30 Vt. 338; Evans v. Rosser, 2 Hem. & M. 190;

Nickell v. Handly, 10 Gratt. (Va.) 336; Craven v. Brady, L. R. 4 Eq. Cas. 209.

Hyde v. Woods, 94 U. S. 523, 526; bk. 24 L. ed. 264, 266; ⁴ See: Heath v. White, 5 Conn. 228, 235;

Nichols v. Eaton, 91 U. S. 716, 727-729; bk. 23 L. ed. 254, 257-258; McDaniel v. Grace, 15 Ark. 445, 448.

Rochford v. Hackman, 9 Hare 475; ⁵ 1 Co. Litt. (19th ed.) 40a.

Godden v. Crowhurst, 10 Sim. 487; ⁶ Marsellis v. Talhimer, 2 Paige Ch. (N. Y.) 35; s.c. 21 Am. Dec. 66.

Twopenny v. Pepton, 10 Sim. 487; ⁷ See: *Post*, chapter XVII., "Curtesy."

Domett v. Bedford, 3 Ves. 149; ⁸ Marsellis v. Talhimer, 2 Paige Ch. (N. Y.) 35; s.c. 21 Am. Dec. 66.

¹ Lewin on Trusts, c. VII. See: Gillespie v. Nabors, 59 Ala. 441; s.c. 31 Am. Rep. 20;

² Doe v. Carter, 8 T. R. 61; Hawley v. James, 5 Paige Ch. (N. Y.) 464;

Roe ex d. Hunter v. Galliers, 2 T. R. 133; s.c. 1 Rev. Rep. 445. Matter of Frances Winne, 1 Lans. (N. Y.) 513.

³ See: *Ante*, § 309.

without restriction, to such persons as are by law his legal heirs, whether the estate be in possession, reversion, or remainder, vested or contingent. It is for this reason that the word simple is added to the word fee, importing an absolute inheritance clear of any condition, limitation, or restriction to particular heirs; in contradistinction to another class of estates of inheritance which are only descendable to some particular heirs. The rules of descent in this country depend rather upon the local statutes of the several states, and will be found fully treated in another chapter of this work.¹

SEC. 312. **Same—Power of devise—Saxon and Danish rule.**—Before the establishment of the feudal system by William the Conqueror and his successors, there existed in England a testamentary power over land. This power seems to have been rather adapted from the remnant of the Roman laws and customs found in that country, than brought over from their own country.²

SEC. 313. **Same—Same—Under the Normans and their successors.**—After the Norman Conquest the power of devising land ceased, except as to socage lands in some particular places, such as cities and boroughs, in which it was still preserved; and also except as to terms for years or chattel interests in land, which, on account of their original insignificance, were deemed personalty, and as such were ever disposable by will. This limitation of the testamentary power proceeded partly from the solemn form of transferring land by livery of seisin, introduced at the Conquest, which could not be complied with in the case of a last will, and partly from a jealousy of deathbed dispositions; but principally from the general restraint of alienation incident to the rigors of the feudal system, as it was established, or at least perfected, by William I.³ In the reign of Edward I. the statute of *Quia Emptores* removed in a great measure this latter bar to the exercise of testamentary power; that is, in respect to all free-

¹ See: *Post*, chapter VIII., "Descent of Fee-simple Estate."

² In writing of the ancient Germans Tacitus says: "Successores sui

cuique liberi et nullum testamentum." Tac. *Posthum.* 21. 127.

³ See: Wright's Ten. 172.

holders, except the king's tenants *in capite*. But the two former obstructions still continued to operate, though indeed this was in name and appearance only ; for soon after the statute of *Quia Emptores* feoffments to uses came into fashion, and last wills were enforced in chancery as good declarations of the use ; and thus through the medium of uses the power of devising was continually exercised in effect and reality. But at length this practice was checked, not accidentally, but designedly, during the reign of Henry VIII.,¹ by a statute which, by transferring the possession or legal estate to the use, necessarily and compulsively consolidated them into one, and so had the effect of wholly destroying all distinction between them, till the means to evade the statute, and, by a very strained construction, to make its operation dependent on the intention of parties, were invented. However, the bent of the times was so strong in favor of every kind of alienation, that the Legislature, in a few years after having interposed to restrain an indirect mode of passing land by wills, expressly made it devisable. This great change of the common law was effected by statutes also passed during the reign of Henry VIII.,² which, taken together, gave the power of devising to all having estates in fee-simple, except in joint tenancy, over the whole of their socage land, and over two-thirds of their lands holden by knight's service.³

SEC. 314. **Same—Same—Reason for the common-law rule.**—As we have seen, at early common law land could not be disposed of by will.⁴ The reason for this seems to have been the inability of the devisor to consummate the alienation by livery of seisin either in deed or in law,⁵

¹ Stat. 27 Hen. VIII.

² 32 & 34 Hen. VIII.

³ See: 1 Co. Litt. (19th ed.) 111a, note (1).

⁴ See: *Ante*, § 313;

1 Co. Litt. (19th ed.) 111b, note (1).

Lord Bacon says that lands are not "testamentary and devisable at common law." Bacon's Tracts, 316.

⁵ Kinds of livery of seisin.—"There

be two kinds of livery of seisin, viz., a livery in deed, and a livery in law. A livery in deed is when the feoffer taketh the ring of the doore, or turfe or twigge of the land, and delivereth the same upon the land to the feoffee in name of seisin of the land, etc., per hostium et per haspam et annulum vel per fustem vel baculum," etc. 1 Co. Litt. (19th ed.) 48a.

which was indispensable at common law.¹ This livery of seisin is no other than the pure feudal investiture or delivery by corporeal transactions, *nam feudum sine investitura nullo modo constitui potuit* ;² and the estate was then only perfect when there was a joinder of right and possession, *fit juris et sui nec conjunctio*.³

SEC. 315. **Same—Same—American rule.**—The power to devise real property in this country, like the rule of descent, is regulated almost exclusively by the local statutes in the various states, and will come up for full consideration hereafter.⁴

SEC. 316. **Same—Dower.**—At common law all estates in fee-simple are subject to an inchoate or actual right of dower in the wife ; and such is the rule in all the states in this country except those in which curtesy and dower have been done away with by statute. The subject is fully treated in a separate chapter hereafter.⁵

SEC. 317. **Same—Forfeiture—English doctrine.**—By the common law of England estates in fee-simple are forfeited to the crown by attainder of treason ;⁶ and the lands whereof a person so attainted died seized in fee-simple become vested forever in the crown,⁷ without any office ; because they could not descend on account of the corruption of blood of the person last seized ; and the freehold cannot be in abeyance.⁸

SEC. 318. **Same—Same—American doctrine.**—In this country, however, no attainder of treason against the federal government works corruption of blood, or forfeiture of

¹ 2 Bl. Com. 311 ;
1 Co. Litt. (19th ed.) 48a.

² For a fee cannot in any manner be made without giving possession. Wright, Ten. 37.

³ Fleta, l. 3, c. 15, § 5.

The degree of possession made a subject of very minute distinction and refinement at this time, and is discoursed on by Bracton at length. Brac. 381b.

See : 1 Reeves' Hist. Eng. L. (2d ed.) 303.

⁴ See : *Post*, chapters VI. and VII.,
"Creation of Fee-simple by Devise."

⁵ See : *Post*, chapter XVIII.,
"Dower."

⁶ 4 Bl. Com. 381 ;
2 Co. Litt. (19th ed.) 392.

⁷ Lord de la Warre's Case, 11 Co. 1a ;

4 Bl. Com. 381.
See : *Burgess v. Wheate*, 1 Eden 201 ;

Wheatly v. Thomas, Lev. 74.

⁸ 2 Hawk. P. C., c. 4, § 1.

property, except during the life of the person attainted.¹ Though forfeiture for treason against the general government of the United States has been abolished, it is thought still to exist, by common law, against those individual states which have not expressly abolished it.²

SEC. 319. Same—Liability for debts—Common-law doctrine.—Another incident of an estate in fee-simple is its liability for the debts of the owner. This liability was not originally an incident of real estate, which was first made liable to execution for the debts of the owner during his lifetime by statute of Edward I.;³ but there was no positive English law until a statute was passed in the reign of William IV.,⁴ providing for subjecting the estates of decedents to the satisfaction of all the debts of the ancestor. After this time estates of which a person died seized in fee-simple, and which descended upon the heir, were liable in the hands of the heir to the payment of all debts of the ancestor by a specialty, in which the heir was expressly mentioned as bound; but if the heir aliened before the action was brought, the creditor was without remedy; and where the person so dying seized was indebted by bond or other specialty, and devised the estate, the creditor had no remedy against the devisee.⁵

SEC. 320. Same—Same—American doctrine.—In this country lands are subject to the payment of the debts of the owner, in all forms of action, both before and after his death, and in the hands of heirs and devisees,⁶ accord-

¹ U. S. Const., art. 3, § 3.

See: *Wallach v. Van Riswick*, 92

U. S. 202; bk. 23 L. ed. 473;

Day v. Micou, 85 U. S. (18 Wall.)

156; bk. 21 L. ed. 860;

Bigelow v. Forrest, 76 U. S.

(9 Wall.) 339; bk. 19 L. ed. 696.

² See: 2 Kent Com. (13th ed.) 386.

³ Stat. 13 Edw. I., c. 18.

⁴ Stats. 3 & 4 Will. IV., c. 104.

⁵ See: *Davy v. Pepys*, 2 Plow. 439;
Buckley v. Nightingale, 1 Stran.
665.

⁶ See: *Millard v. Harris*, 119 Ill.
185; s.c. 10 N. E. Rep. 387; 8
West. Rep. 57;

Wyman v. Brigden, 4 Mass.
150;

Bellas v. McCarthy, 10 Watts
(Pa.) 13;

Petition of Johnson, 15 R. I. 438;
s.c. Atl. Rep. 248; 2 New Eng.
Rep. 635;

Watkins v. Holman, 39 U. S. (16
Pet.) 25, 63; bk. 10 L. ed. 873,
888.

The sale of the decedent's estate
will be authorized by probate
courts for the payment of his
debts at any time while such
land remains in the hand of
his heirs and devisee.

ing to the laws of the state in which the lands are situated.¹

Moaers v. White, 6 John. Ch. (N. Y.) 360 ;

Petition Re Johnson, 15 R. I. 438 ;
s.c. 8 Atl. Rep. 248 ; 3 New
Eng. Rep. 635.

An executor may sell the interest of a devisee in lands for the payment of such debts of the testator as are not barred by the statute of limitations.

Millard v. Harris, 119 Ill. 185 ;
s.c. 10 N. E. Rep. 387 ; 8 West.
Rep. 57.

¹ *Bruch v. Lantz*, 2 Rawle (Pa.)
392 ; s.c. 21 Am. Dec. 458 ;
Sands v. Lynham, 27 Gratt. (Va.)
291 ; s.c. 21 Am. Rep. 348 ;
Watkins v. Holman, 39 U. S. (16
Pet.) 25 ; bk. 10 L. ed. 873.

CHAPTER V.

CREATION OF FEE-SIMPLE ESTATE BY DEED.

- SEC. 321. Methods of creating fee-simple estates.
- SEC. 322. Same—Common-law rule—Apt words.
- SEC. 323. Same—Whole estate need not be conveyed.
- SEC. 324. Same—Reservations.
- SEC. 325. “Heirs” cannot be supplied with any other word.
- SEC. 326. Same—Must appear in operative part of deed.
- SEC. 327. Same—Supplied by reference to other instruments.
- SEC. 328. Same—Exceptions to the rule.
- SEC. 329. Same—Same—Deeds in trust and equitable estates.
- SEC. 330. Same—Same—Deed to corporation.
- SEC. 331. Same—Same—Deed to sovereign.
- SEC. 332. Same—Abrogation of rule by statute.
- SEC. 333. “Heirs”—Definition.
- SEC. 334. Same—Word of limitation, not of purchase.
- SEC. 335. Same—Construed “children” when.
- SEC. 336. Same—When to be ascertained.
- SEC. 337. Same—“Present heirs.”
- SEC. 338. Same—“Bodily heirs” or “heirs of the body.”

SECTION 321. **Methods of creating fee-simple estates.**—An estate in fee-simple may be created either by deed of gift or by devise. While estates created by these methods are alike, the words made use of in creating the respective estates, and the rules of interpretation applied by the courts to the instruments, are different. A deed is much more strictly construed than a will.¹ In this chapter will be given the rules relating to the creation of a fee-simple estate by deed, the words necessary to be used, and the rules of interpretation applied by the courts.

¹ “Heirs” necessary to vest fee-simple.—The general rule of law is that both in a deed and in a will the word “heirs” is necessary to vest a fee-simple in the devisee, the grantee

being a natural person, though the rule is more flexible and more readily relaxed in a will than in a deed.
Cleveland v. Hallett, 60 Mass. 403, 407.

SEC. 322. **Same—Common-law rule—Apt words.**—At common law an estate in fee-simple could not be created in a natural person without the use of apt words to that end,¹ among which is the word “heirs,” accompanied, it would seem, by the possessive pronoun, for these words make the estate of inheritance.² None of the rules of the common law were more inflexible and rigidly adhered to than this one, even the manifest intention of the parties to a deed being made to give way before it. This inflexible rule of the common law, in all its uncompromising nature, is applicable in this country in all the states where not abrogated or modified by statute.³ In construing a deed the question is not what estate did the grantor intend to pass, but what did he pass by apt and proper words. If he has failed to use the proper words in expression of intent, no amount of recital showing the intent will supply the omission.⁴

SEC. 323. **Same—Whole estate need not be conveyed.**—The whole estate need not be conveyed. A fee may be properly granted accompanied by a reservation of the usufruct to the grantor for life. Thus a deed providing that possession is to be given at the death of the grantor is valid;⁵ and where a deed is made to a person and to her heirs and assigns forever, in consideration of love,

¹ No particular form of words is necessary, in some states, to convey realty, any words denoting an intention to transfer the title being sufficient.

See: *Gambriel v. Doe* ex d. Rose, 8 Blackf. (Ind.) 140; s.c. 44 Am. Dec. 760;

Bridge v. Wellington, 1 Mass. 219;

2 Bl. Com. 298;

4 Kent Com. (13th ed.) 460.

² Litt., § 1.

See: 1 Co. Litt. (19th ed.) 1a.

³ *Patterson v. Moore*, 15 Ark. 222; *Edwardsville R. Co. v. Sawyer*, 92 Ill. 377;

Bean v. French, 140 Mass. 229, 231;

Sedgewick v. Laffin, 92 Mass. (10 Allen) 430;

Buffin v. Hutchinson, 83 Mass. (1 Allen) 58;

Merritt v. Disney, 48 Md. 344; *Reaume v. Chambers*, 22 Mo. 36; *Hogan's Heirs v. Welcker*, 14 Mo. 177;

Sisson v. Donnelly, 36 N. J. L. (7 Vr.) 432;

Jackson v. Myers, 3 John. (N. Y.) 388; s.c. 3 Am. Dec. 504;

Fray v. Packer, 4 Watts & S. (Pa.) 17;

Hileman v. Bouslaugh, 13 Pa. St. 344; s.c. 53 Am. Dec. 474;

Roberts v. Forsythe, 3 Dev. (S. C.) L. 26;

Adams v. Ross, 30 N. J. L. (1 Vr.) 505; s.c. 82 Am. Dec. 237;

2 Prest. Est. 11, 12.

⁴ *Adams v. Ross*, 30 N. J. L. (1 Vr.) 505; s.c. 32 Am. Dec. 237.

⁵ *Waugh's Executors v. Waugh*, 84 Pa. St. 350; s.c. 24 Am. Rep. 191.

good-will, and affection, reserving the use of the lands during the grantor's natural life, it conveys a fee *in præ-senti*, subject to the life estate.¹ It is said by the Supreme Court of South Carolina, in the case of *Cribb v. Rogers*,²—where it was “argued that under the operation of the statute of uses the fee was, at the moment of its creation, thrown upon the grantor by the execution of its uses, and thus the deed rendered ineffectual,”—that “the statute of uses could not operate until there was such a title in the grantee as the deed was intended to vest, and this was a fee. The only effect of the statute would, assuming its operation, be to cast upon the grantor an estate commensurate with the uses created by the deed, and that would be a life estate, leaving a remainder in fee vested in the grantee which would owe its existence as such, not to the deed, but to the operation of the statute. The rules of the common law, as it regards the support required for a remainder, are therefore inapplicable, for the deed does not create a remainder as such. The statute cannot operate to defeat the deed, for it was not intended to have such effect, but only to effectuate its purposes by raising estates competent to give the fullest support to its uses.”³ The present interest was conveyed by the deed in *Jenkins v. Jenkins*,⁴ as it was to take effect only upon the death of the grantor. It is contrary to the nature of a deed that it should commence to operate as such at a time subsequent to its delivery; on the contrary, it must take effect, if at all, from the moment of delivery to operate as a deed, though in certain cases it may be upheld as a covenant to stand seized to the use of the grantee.”

SEC. 324. **Same—Reservations.**—Where it is sought to create a reservation or to make an exception⁵ in favor of

¹ *Cribb v. Rogers*, 12 S. C. 564; s.c. 32 Am. Rep. 511.

² 12 S. C. 564; s.c. 32 Am. Rep. 511.

³ *Jenkins v. Jenkins*, 1 Mills (S. C.) 48.

This case fully sustains the conclusions just stated. The same conclusions were reached in *Sunday v. Boon* (MS.), cited in

Jagers v. Estes, 2 Strobb. (S. C.) Eq. 343, 376; s.c. 49 Am. Dec. 674; and *Singleton v. Bremer*, 4 McC. (S. C.) L. 15.

⁴ 1 Mills (S. C.) 48.

⁵ **Reservations and exceptions—Distinction between.**—It is said in *Bowen v. Conner*, 60 Mass. (6 Cush.) 132, 135, that in our own

any person out of an estate conveyed in fee-simple, the same rigor of rule applies to the words "his heirs," or "their heirs," and they are as necessary in the creation of the reservation or exception as in creating a fee-simple estate itself. If they are omitted, a life interest only vests.¹ No words of perpetuity will take their place. The same rule of interpretation applies to an exception out of a grant as to the deed itself, in respect to the limitation of the estate thereby created. If the whole fee is granted, and an exception be made to the grantor himself, without words of inheritance, a life estate only is excepted.² Thus it is said in the case of *Bean v. French*³ that it is the well-settled rule in deeds to an individual, that the word "heir" is necessary to create an estate of inheritance in the grantee, if he takes to his own use and not in trust.⁴

SEC. 325. "Heirs" cannot be supplied by any other word.—Under the common-law rule the word "heirs" is necessary to create an estate of inheritance in the grantee,

conveyancing this distinction is not so precisely observed, but a clause of reservation is construed to be an exception if that will best effect the intent of the parties. And so in the English cases, the term reservation is often very uncertain.

1 Co. Litt. (19th ed.) 47a ;

Shep. Touch. 80.

See : *Thompson v. Gregory*, 4 Johns. (N. Y.) 81 ; s.c. 4 Am. Dec. 255.

It is said in *Perkins v. Stockwell*, 131 Mass. 529, 530, that whether a particular provision is intended to operate as an exception or reservation is to be determined by its character, rather than by the particular words used.

Stockwell v. Couillard, 129 Mass. 231 ;

Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290, 321 ;

Ashcroft v. Eastern Railroad, 126 Mass. 196 ; s.c. 30 Am. Rep. 196 ; Shep. Touch. 80.

¹ *Bean v. French*, 140 Mass. 229, 231 ;

Ashcroft v. Eastern Ark. Co.,

126 Mass. 196, 199 ; s.c. 30 Am. Rep. 672 ;

Dennis v. Wilson, 107 Mass. 591, 593 ;

Jamaica Pond Aqueduct Corp. v. Chandler, 91 Mass. 159, 170 ;

Curtis v. Gardner, 54 Mass. (13 Met.) 457, 461 ;

Kister v. Reiser (Pa.), 38 Leg. Int. 300 ;

Shep. Touch. 100.

² *Curtis v. Gardner*, 54 Mass. (13 Met.) 457, 461 ;

Shep. Touch. 100.

³ 140 Mass. 229, 231.

⁴ *Sedgewick v. Laffin*, 92 Mass. (10 Allen) 430 ;

Buffum v. Hutchinson, 83 Mass. (1 Allen) 58.

Reservation by way of implied grant.—The same rule applies to a reservation which operates by way of an implied grant.

See : *Ashcroft v. Eastern Railroad*, 126 Mass. 196 ; s.c. 30 Am. Rep. 672 ;

Jamaica Pond Aqueduct Corp. v. Chandler, 91 Mass. (9 Allen) 159 ;

Curtis v. Gardner, 54 Mass. (13 Met.) 457.

where he takes in his own use and not in trust;¹ otherwise the only estate that will pass will be an estate for

¹ *Gambril v. Doe ex d. Ross*, 8 Blackf. (Ind.) 140; s.c. 44 Am. Dec. 760.

See: *Hogan v. Barry*, 143 Mass. 538; s.c. 10 N. E. Rep. 253;

Bean v. French, 140 Mass. 299; s.c. 3 N. E. Rep. 206; 1 New Eng. Rep. 213;

Sedgewick v. Laffin, 92 Mass. (10 Allen) 430;

Buffum v. Hutchinson, 83 Mass. (1 Allen) 58;

Cleveland v. Hallett, 60 Mass. (6 Cush.) 407;

Gould v. Lamb, 52 Mass. (11 Met.) 84; s.c. 45 Am. Dec. 187;

Rector v. Waugh, 17 Mo. 13; s.c. 57 Am. Dec. 251;

Leitensdorfer v. Delphy, 15 Mo. 160; s.c. 55 Am. Dec. 137;

Sisson v. Donnelly, 36 N. J. L. (7 Vr.) 434;

Adams v. Ross, 30 N. J. L. (1 Vr.) 505; s.c. 82 Am. Dec. 237;

Batchelor v. Whitaker, 88 N. C. 350;

Roberts v. Forsythe, 3 Dev. (N. C.) L. 26;

Brown v. Nat. Bk. of Hamilton, 44 Ohio St. 269; s.c. 6 N. E. Rep. 648; 3 West. Rep. 601;

Cromwell v. Winchester, 2 Head (Tenn.) 389;

4 Kent Com. (13th ed.) 5.

Compare: *Baker v. Hunt*, 40 Ill. 264; s.c. 89 Am. Dec. 346;

Wickersham v. Bills, 8 Ind. 387;

Ross v. Adams, 28 N. J. L. (4 Dutch.) 160;

Lemon v. Graham, 131 Pa. St. 447; s.c. 19 Atl. Rep. 48; 6 L. R. A. 663; 25 W. N. C. 339; 47 Leg. Int. 224;

Cromwell v. Winchester, 2 Head (Tenn.) 389.

Littleton on the rule.—It is said by Lord Littleton that "these words 'his heires' do not only extend to his immediate heires, but to his heires remote and most remote, born and to be born, sub quibus vocabulis 'hæredibus suis' omnes hæredes, propinqui comprehenduntur, et remoti, nati et nascituri, and hæredum appellatione veniunt, hæredes hæredum in infinitum. And the reason wherefore the law is so precise to prescribe certaine words to create an estate

of inheritance, is for avoiding of uncertainty, the mother of contention and confusion."

See: 1 Co. Litt. (19th ed.) 1a, 8b; Com. Dig., tit. "Estate," A. 2;

4 Cru. Dig., tit. 32, c. 21, c. 1;

2 Prest. Est. 1, 2, 4, 5;

1 Shep. Touch. 101.

Illinois doctrine.—In *Baker v. Hunt*, 40 Ill. 264; s.c. 89 Am. Dec. 346, it is said that the words "heirs, executors, and administrators," commonly used in the covenants of deeds, are surplusage in Illinois, as, under the statutes of that state, the heir is bound by all the demands against his ancestor, to the extent of the real estate inherited.

Indiana doctrine.—In *Wickersham v. Bills*, 8 Ind. 387, the court say that the word "heirs" is not necessary in Indiana for creating a fee-simple, where other words of inheritance, conveying a fee-simple, are used, and the intention appears clear.

New Jersey doctrine.—It seems that a fee may be passed in New Jersey without the use of the words "heirs," if other language indicating a clear intention to include the line of inheritance be substituted therefor.

Ross v. Adams, 28 N. J. L. (4 Dutch.) 160.

Pennsylvania doctrine.—In the recent case of *Lemon v. Graham*, 131 Pa. St. 447; s.c. 19 Atl. Rep. 48; 6 L. R. A. 663; 25 W. N. C. 339; 47 Leg. Int. 224, it is said that the assignment under seal of all the grantor's "right, claim, interest, and property whatever in and to" a deed, on the back of which it is written, and which deed gives the grantor an estate in fee-simple, is sufficient to transfer the fee without the use of the word "heirs" or its equivalent.

In Tennessee the common-law rule that without the use of the word heirs in deeds an estate for life only is granted, has been changed by statutory enactment.

the life of the grantee.¹ The land must be conveyed to the grantor and "his heirs," and no words of perpetuity will supply the omission of these necessary words of limitation.² Thus a grant to a man to have and to hold to him forever, or to have and to hold to him and his assigns forever, will convey only a life estate.³ The term "forever" is not equivalent to "his heirs or assigns,"⁴ and will not impart inheritable qualities.⁵ Words which show an intention on the part of the grantor that the estate shall endure forever, will not convey more than a life estate, such as a grant to a man "and his generation, to endure as long as the waters of the Delaware run ;"⁶ but if the necessary words of limitation are added, other words descriptive of the estate granted will be surplusage. Thus where the conveyance is to a man, "his heirs and assigns," "as long as wood grows and water runs," the instrument creates a fee-simple estate, the words "as long as wood grows and water runs" being treated as mere surplusage.⁷

SEC. 326. Same—Must appear in operative part of deed.—

- Cromwell v. Winchester*, 2 Head (Tenn.) 389.
- ¹ *Curtis v. Gardner*, 54 Mass. (13 Met.) 457, 461;
Gould v. Lamb, 52 Mass. (11 Met.) 84; s.c. 45 Am. Dec. 187;
Young v. Marshall, Hill & Den. (N. Y.) 93.
- ² *Curtis v. Gardner*, 54 Mass. (13 Met.) 457, 461.
 Citing: *Jackson v. Myers*, 3 John. (N. Y.) 388; s.c. 3 Am. Dec. 504;
Fray v. Packer, 4 Watts & S. (Pa.) 17;
 1 Co. Litt. (19th ed.) 8b;
 2 Prest. Est. 11, 12.
- Estate for life—Limitation over—"Heirs" necessary.—Where a deed created an estate for life in A, with limitation over to such other person or persons as would be entitled to take an estate in fee by descent from A, the word "heirs" is needful in ultimate limitation over to create fee-simple, and without it the rule in *Shelley's Case* could not be applied.
- Handy v. McKim*, 64 Md. 560; s.c. 4 Atl. Rep. 125; 3 Cent. Rep. 704.
- ³ *Curtis v. Gardner*, 54 Mass. (13 Met.) 457, 461.
 Citing: *Gould v. Lamb*, 52 Mass. (11 Met.) 86; s.c. 45 Am. Dec. 187;
Wright v. Dowley, 2 W. Bl. 1185;
 2 Crabb on R. Prop., §§ 955, 966; Litt., § 1.
- ⁴ *Dennis v. Wilson*, 107 Mass. 591, 593;
Sedgewick v. Laffin, 92 Mass. (10 Allen) 430;
Buffum v. Hutchinson, 83 Mass. (1 Allen) 58;
Bowen v. Conner, 60 Mass. (6 Cush.) 132;
Curtis v. Gardner, 54 Mass. (13 Met.) 457;
 2 Bl. Com. 107;
 2 Prest. Est. 4.
- ⁵ *Dennis v. Wilson*, 107 Mass. 591, 593.
- ⁶ *Foster v. Joice*, 3 Wash. C. C. 498.
- ⁷ *Arms v. Burt*, 1 Vt. 303; s.c. 18 Am. Dec. 680.
 See: *Stevens v. Dewing*, 2 Vt. 411.

The word "heirs," to carry an estate in fee, must appear in the operative part of the deed. It need not appear in the premises of the instrument or grant proper; it being held sufficient if it appear in the habendum clause,¹ the particular office of which is to define the amount of the estate taken by the grantor.² While the habendum may enlarge the estate named in the premises,³ yet the words in the habendum or the covenants cannot have the effect of enlarging an estate less than a fee thereto;⁴ neither will they serve to give the instrument the effect of a conveyance of the legal estate, where an equitable interest only is defined in the premises.⁵ But in the case of *Saunders v. Hanes*,⁶ where the deed contained no words of inheritance in the habendum, a restriction upon the grantee and his heirs was allowed to enlarge the estate into a fee.⁷ In *Phillips v. Thomp-*

¹ **Formal parts of a deed.**—There are eight formal or orderly parts of a deed of feoffment mentioned by Lord Coke, viz.: "1. The premises of the deed implied by Littleton; 2. the habendum, whereof Littleton here speaketh; 3. the tenendum, mentioned by Littleton; 4. the redendum; 5. the clause of warranty; 6. the in cuius rei testimonium, comprehending the sealing; 7. the date of the deed, containing the day, the month, the year and stile of the king, or of the year of our Lord; lastly, the clause of his testibus; and yet all these parts were contained in a very few and significant words, hæc fuit candida illius ætatis fides et simplicitas, quæ pauculis lineis omnia fidei firmamenta posuerunt." 1 Co. Litt. (19th ed.) 6a.

² See: *Lancaster Bank v. Myley*, 13 Pa. St. 544.

³ *Chaffee v. Dodge*, 2 Root (Conn.) 205.

⁴ *Patterson v. Moore*, 15 Ark. 222; *Den ex d. Roberts v. Forsythe*, 3 Dev. (N. C.) L. 26;

Sisson v. Donnelly, 36 N. J. L. (7 Vr.) 432;

Adams v. Ross, 30 N. J. L. (1 Vr.) 505; s.c. 82 Am. Dec. 237.

⁵ *Hastings v. Merriam*, 117 Mass. 245, 252.

See: *Chapin v. First Universalist Soc. of Chicopee*, 74 Mass. (8 Gray) 580.

⁶ 44 N. Y. 353, 359.

⁷ **Restriction enlarges to a fee when.**—

The court say if the lease granted an inheritable estate, the words (his heirs and devisee) were appropriate and had direct meaning and force. If not, they are without any significance. We are not to assume that they are used inadvertently or without meaning. The word "heirs," as here used, indicates that they were to take the estate, in case the lessee died possessed of it, and were limited by the restriction as the ancestor. The adoption of the word "heirs," in this connection, is repugnant to the limitation of the estate for the life of the lessee, arising from the want or omission of that word in the habendum clause. It occurs in the premises, a part of the lease prior to this clause, and of the most considerable importance to the lessee. It is no more probable that the word was there included unadvisedly, than that it was so omitted in the very next clause of the lease. In my opinion, this use of the word "heirs" is repugnant to the construction assign-

son,¹ where the warranty and habendum clauses were run together, the court construed the deed as passing a fee; and in *Bridge v. Wellington*,² it is said that an instrument which contains no words of grant is sufficient to pass a fee, because the habendum and the covenants which followed clearly indicated that such was the intention of the grantor. Although the habendum in a deed in general refers to the premises, and declares the estate which the grantee shall hold in them, yet it may sometimes enlarge or diminish the grant, when it is so worded as to show a clear intention to do so;³ and it may qualify, expound, or vary the estate given by the premises.⁴ But where an estate for life only is mentioned in the premises and the habendum, this cannot be enlarged into a fee, either by a warranty in fee or by a covenant for quiet enjoyment to the grantee and his heirs,⁵ even where the warranty is against the grantor, his heirs, executors, and assigns.⁶

SEC. 327. Same—Supplied by reference to other instruments.—The general rule is that the word "heirs" is absolutely necessary to create a fee-simple;⁷ yet this word need not be contained in the deed where the estate is described by reference to another instrument, in pursuance of which the deed is and professes on its face to be executed; or where the estate is given to the grantee, "as fully as it was granted in" a former deed, referring to it, where such instrument or deed referred to contains the word "heirs,"⁸ for in such a case the instrument conveying the estate borrows the words of limitation from the former instrument and conveys a fee.⁹ This

ing to the lessee a life estate only, as claimed for the plaintiffs by reason of the omission of that word in its appropriate place."

Saunders v. Hanes, 44 N. Y. 353, 359.

¹ 73 N. C. 543.

² 1 Mass. 219. 227, cited with approval in *Jamaica Pond Aqueduct Corp. v. Chandler*, 91 Mass. (9 Allen) 159, 167.

³ *Corbin v. Healy*, 37 Mass. (20 Pick.) 514.

⁴ *Moss v. Sheldon*, 3 Watts & S. (Pa.) 160.

⁵ *Snell v. Young*, 3 Ired. (N. C.) L. 379;

Register v. Rowell, 3 Jones (N. C.) L. 312.

⁶ *Patterson v. Moore*, 15 Ark. 222.

⁷ *Cleveland v. Hallett*, 60 Mass. (6 Cush.) 407;

Gould v. Lamb, 52 Mass. (11 Met.) 84; s.c. 45 Am. Dec. 187.

⁸ *Mercier v. Missouri, Ft. S. & G. R. Co.*, 54 Mo. 506.

⁹ 2 Prest. Est. 2;
Shep. Touch. 101.

rule, however, must be strictly applied, and no intention, however clearly manifested, that the instrument referred to, even though it be a will, shall pass a fee, will do so unless such instrument contained words of inheritance.¹

SEC. 328. **Same—Exceptions to the rule.**—To this general rule there are exceptions, as there are to all other general rules.² Thus if lands be given and granted to a trustee, whatever the formal words of the grant, he will be considered as taking the legal title in those cases where it should be vested in him in order to enable him to execute the purposes of the will.³ And where land is given and

In the case of *Gould v. Lamb*, 52 Mass. (11 Met.) 84; s.c. 45 Am. Dec. 187, the court say that "if one recite that B hath enfeoffed him of white acre, to have and to hold to him and his heirs, and he doth grant the same to C, by this C, the grantee, takes a fee-simple of this acre. Shep. Touch. 101. So if a father enfeoffs his son, to hold to him and his heirs, and the son re-enfeoffs the father as fully as the father enfeoffed him, an estate in fee-simple will pass. Co. Litt. 9 b; Cru. Dig., tit. 32, c. 24, sec. 8; 2 Crabb on Real Prop., § 956. And undoubtedly a fee-simple may be created by other words of reference to deeds and instruments without the use of the word "heirs," where the intention appears clear."

¹ *Reaume v. Chambers*, 22 Mo. 36; *Lytle v. Lytle*, 10 Watts (Pa.) 256.

² *Gould v. Lamb*, 52 Mass. (11 Met.) 84, 86; s.c. 45 Am. Dec. 187, 188.

³ *Chamberlain v. Thompson*, 10 Conn. 243; s.c. 26 Am. Dec. 390, 393;

Morton v. Barrett, 22 Me. 257; s.c. 39 Am. Dec. 575, 578;

Goodrich v. Proctor, 67 Mass. (1 Gray) 567, 570;

Gould v. Lamb, 52 Mass. (11 Met.) 84, 86; s.c. 45 Am. Dec. 187, 188;

Purdie v. Whitney, 37 Mass. (20 Pick.) 25;

Fisher v. Fields, 10 John. (N. Y.) 495;

Bagshaw v. Spencer, 2 Atk. 577;

Villiers v. Villiers, 2 Atk. 72;

Sanford v. Irby, 3 Barn. & Ald. 654; s.c. 5 Eng. C. L. 376;

Houston v. Hughes, 6 Barn. & Cr. 403; s.c. 13 Eng. C. L. 188;

Oates d. Markham v. Cooke, 3 Burr. 1684, 1686;

Murthwaite v. Jenkinson, 2 Barn. & Cr. 357; s.c. 9 Eng. C. L. 162;

Doe v. Nicholls, 1 Barn. & Cr. 336; s.c. 8 Eng. C. L. 144;

Shaw v. Wright, 1 Eq. Cas. Abr. 176;

Horton v. Horton, 7 T. R. 652;

Silvester v. Wilson, 2 T. R. 444;

Wykham v. Wykham, 18 Ves. 414;

Gibson v. Montfort, 1 Ves. 485;

Biscoe v. Perkins, 1 Ves. & B. 489.

In *Chamberlain v. Thompson*, 10 Conn. 243; s.c. 26 Am. Dec. 390, the court say that, "wherever an estate in fee is required, in order to satisfy the purpose of the trust, such an estate will pass without the word heirs. This principle is fully asserted by KENT, C. J., in giving the opinion of the court in the case of *Fisher v. Fields*, 10 John. (N. Y.) 495. He says: 'A trust is merely what a use was, before the statute of uses. And in exercising its executory jurisdiction over trusts, the Court of Chancery is not bound by the technical rules of law, but takes a wider range in favor of the intent of the party.' And again, in his Commentaries, the same

granted to a bishop, parson, or the like, to have and to hold to him and his successors, this is a fee-simple ;¹ and where lands are given and granted to a corporation aggregate, without the word "successors," or any other word of inheritance, it will create a fee-simple estate.²

SEC. 329. Same—Same—Deeds in trust and equitable estates.—The first and most important class of exceptions to the general rule that the word heirs is essential in a deed to pass a fee, is where there is a conveyance in trust, in which case the trustee is held to take an estate as large as may be necessary for the purposes of the trust, whether the instrument of conveyance contain words of inheritance or not.³ The primary object of such a con-

learned jurist remarks : ' An assignment or conveyance of an interest in trust will carry a fee without words of limitation, where the intent is manifest.' See : 4 Kent Com. (13th ed.) 298. In *Bagshaw v. Spencer*, 2 Atk. 577, which was the case of a devise in trust, Lord HARDWICKE says : ' The devise to sell would have carried the fee, if the word heirs had not been mentioned.' And he further says. in *Villiers v. Villiers*, 2 Atk. 72 : ' If land be given to a man without the word heirs, and a trust be declared of that estate, and it can be satisfied by no other way but by the *cestui que trust*' staking an inheritance, it has been construed that a fee passes to him."

See : *Gates d. Markham v. Cooke*, 3 Burr. 1684, 1686;

Shaw v. Wright, 1 Eq. Cas. Abr. 176 ;

Gibson v. Montfort, 1 Ves. 485.

¹ *Gould v. Lamb*, 52 Mass. (11 Met.) 84 ; s.c. 45 Am. Dec. 187.

² *Id.*

³ See : *Korn v. Cutler*, 26 Conn. 4 ; *Kirkland v. Cox*, 94 Ill. 400 ; *North v. Philbrook*, 34 Me. 532 ; *Farquharson v. Eichleberger*, 15 Md. 63 ;

Spessard v. Rohrer, 9 Gill. (Md.) 261 ;

Attorney-General v. Proprietors' Meeting-house in Federal Street, 69 Mass. (3 Gray) 1 ;

Cleveland v. Hallett, 60 Mass. (6 Cush.) 403 ;

Gould v. Lamb, 52 Mass. (11 Met.) 84 ; s.c. 45 Am. Dec. 187 ;

Newhall v. Wheeler, 7 Mass. 189, 190 ;

Angell v. Rosenbury, 12 Mich. 241 ;

Wilcox v. Wheeler, 47 N. H. 488 ;

Weller v. Rolason, 7 N. J. Eq. (2 C. E. Gr.) 13 ;

Fisher v. Fields, 10 John. (N. Y.) 495 ;

Welch v. Allen, 21 Wend. (N. Y.) 147 ;

Fox v. Phelps, 20 Wend. (N. Y.) 437 ;

Holmes v. Holmes, 86 N. C. 205 ;

Nelson v. Lagow, 53 U. S. (12 How.) 98 ; bk. 13 L. ed. 909 ;

Hardy v. Redman's Adm'r, 3 Cr. C. C. 635.

Equitable estate — In North Carolina the word "heirs" is not necessary to the creation of an equitable estate in fee, if an intention to pass such an estate can be gathered from the instrument.

Holmes v. Holmes, 86 N. C. 205.

Same — In Michigan the word "heirs" is not necessary to convey a fee in a conveyance in trust for the sale of land and the payment of debts from the proceeds, but the trustee may be held to take as large an es-

struction manifestly is to uphold trusts so created, and to secure to the respective objects of them the benefits intended; and to accomplish this purpose the trustee must have a legal estate co-extensive with the trusts. For this reason where it is the necessary implication that a fee was intended to be conveyed, this intent the law will carry into effect by holding the estate a fee.¹ In the case of *Weller v. Rolason*,² it is said that the word heirs is necessary to create an estate in fee in a common-law conveyance, and that the application of this principle is not affected by the circumstance that the conveyance is made in trust.

SEC. 330. Same—Same—Deed to corporations.—The second exception to the general rule is where a conveyance is made to a corporation, in which case the word “successors” takes the place of the word “heirs,” and carries the fee.³ And if lands be granted to a corporation aggregate without the use of the word “successors,” or other words of inheritance, it will pass the fee.⁴

SEC. 331. Same—Same—Deed to sovereign.—A third exception to the general rule, that the word heirs is necessary in a deed of conveyance to carry the fee, is where the conveyance is made to a sovereign government; it having been held by the United States Court of Claims that a grant to the government does not require the word heirs or other words of inheritance.⁵

SEC. 332. Same—Abrogation of rule by statute.—In many

tate as may be necessary for the purposes of his trust, whether the conveyance contain word of inheritance or not.

Angell v. Rosenbury, 12 Mich. 241.

Compare: *Weller v. Rolason*, 7 N. J. Eq. (2 C. E. Gr.) 13.

¹ *Cleveland v. Hallett*, 60 Mass. (6 Cush.) 403, 407;

Brooks v. Jones, 52 Mass. (11 Met.) 191;

Gould v. Lamb, 52 Mass. (11 Met.) 84; s.c. 45 Am. Dec. 187;

Stearns v. Palmer, 51 Mass. (10 Met.) 32, 35;

Newhall v. Wheeler, 7 Mass. 189, 190;

Fisher v. Fields, 10 John. (N. Y.) 495, 505;

Oates v. Cooke, 3 Burr. 1684;

Gibson v. Montfort, 1 Ves. Sr. 485.

² 14 N. J. L. (2 J. S. Gr.) 13.

³ See: *Curtis v. Gardner*, 54 Mass. (13 Met.) 457, 461.

⁴ See: *Gould v. Lamb*, 52 Mass. (11 Met.) 84; s.c. 45 Am. Dec. 187.

⁵ *Joseph v. United States*, 1 Ct. of Cl. 197.

of the states the general rule requiring the use of the word heirs in a deed of conveyance to carry the fee has been abrogated or so modified by statute that neither "heirs" nor any other technical word is required to convey or create an estate in fee-simple. Under these statutes all conveyances of lands are taken to be grants in fee-simple, unless the contrary intention is expressed in the instrument, or follows by necessary implication.¹

SEC. 333. "Heirs"—Definition.—At common law the word "heir" means he upon whom the law casts the estate immediately on the death of the ancestor.² According to modern usage the heir in law is simply one who succeeds to the estate of a deceased person.³

¹ It is said in the case of *Bridge v. Wellington*, 1 Mass. 227, that where a deed contains no words of grant, but from the terms of which it is manifest that the intention was to grant an estate, and it contains a habendum to one and his heirs, passes a fee-simple.

² *Bailey v. Bailey*, 25 Mich. 188; 2 Bl. Com. 201.

³ *Castro v. Tennent*, 44 Cal. 253; *McKinney v. Stewart*, 5 Kan. 384;

Lavery v. Egan, 143 Mass. 389; s.c. 9 N. E. Rep. 747; 3 New Eng. Rep. 441;

The word "heirs" is *nomen operativum*.

See: *Derm v. Gillot*, 2 T. R. 431, 435; s.c. 1 Rev. Rep. 516.

As to when "male heirs" are *nomen collectivum*, including all the heirs in succession.

See: *Brownell v. Brownell*, 10 R. I. 509.

"Heir" means one to whom an estate has descended from his immediate ancestor. A person is the "heir" of one from whom he has inherited through several successive descents.

Castro v. Tennent, 44 Cal. 253.

Same—Has several meanings.—The term "heir" has several significations. Sometimes it refers to one who has formally accepted a succession, and taken possession thereof; sometimes to one who is called to succeed, but still retains the

faculty of accepting or renouncing, and it is frequently used as applied to one who has formally renounced.

Mumford v. Bowman, 26 La. Ann. 413.

Same—Equivalent to "distributee."—In any instrument the word "heir" is to be taken as equivalent to "distributee"; unless a different intention is apparent.

Sweet v. Dutton, 109 Mass. 589; s.c. 12 Am. Rep. 744.

Heir in law is simply one who succeeds to the estate of a deceased person, the wife is an heir of her deceased husband, and when her deceased son has no wife, child, or father, she is his heir.

McKinney v. Stewart, 5 Kans. 384.

A "widow" is an heir in a special limited sense only.

Unfried v. Heberer, 63 Ind. 72; *Rusing v. Rusing*, 25 Ind. 63;

Clark v. Scott, 67 Pa. St. 452, 453.

A husband is neither the heir nor next of kin of his wife, not in a technical sense.

Ivins' Appeal, 106 Pa. St. 184; s.c. 51 Am. Rep. 516.

But in *Eby's Appeal*, 84 Pa. St. 241, where an administrator gave money to the heirs of his daughters, and one of them died without issue, it was held that the husband might take, as intended by the word heir.

Only where there is a plain demonstration in a deed that the word heirs was used in another than its strict legal sense will any other construction be given it.¹

SEC. 334. **Same—Word of limitation, not of purchase.**—The word heirs must be deemed, ordinarily, a word of limitation and not a word of purchase, as the equivalent of children,² and will be construed to limit or define the estate intended to be conveyed.³ The words "heirs of the body," in a deed, are words of limitation and not of purchase.⁴ It has been held that the word "heirs now living," where used in a deed, are words of limitation or purchase, as will best accord with the manifest intention of him who employs them.⁵

SEC. 335. **Same—Construed "children" when.**—The word "heirs," which is deemed, ordinarily, a word of limitation and not of purchase, is the equivalent of "children."⁶ Where in a deed the words "children" and

¹ Rivard v. Gisenhof, 35 Hun (N. Y.) 247.

² See: McCullough v. Gliddon, 33 Ala. 208;

Couch v. Anderson, 26 Ala. 676;

Knowlden v. Leavitt, 121 Mass. 307;

Rivard v. Gisenhof, 35 Hun (N. Y.) 247;

Brant v. Gelston, 2 John. Cas. (N. Y.) 384.

In grantee's covenant.—The word "heirs" is used as a word of limitation only in a grantee's covenant with P "and his heirs," that he would, upon the request of P, "his heirs, executors, administrators, or assigns," convey the land to P "and his heirs," or to such persons as "he or they" should nominate, and secures to P an equitable estate in fee-simple, which he may devise. Knowlden v. Leavitt, 121 Mass. 307.

In deed to a dead man.—The word "heirs" being a word of purchase, only limiting and defining what estate passes to the grantee, a deed to a dead man and his heirs is a nullity.

Hunter v. Watson, 12 Cal. 363; s.c. 73 Am. Dec. 543.

³ Ware v. Richardson, 3 Md. 505; s.c. 56 Am. Dec. 765.

⁴ Brant v. Gelston, 2 John. Cas. (N. Y.) 384.

But in the case of Sharman v. Jackson, 30 Ga. 234, in a gift of chattels to be equally divided among the heirs of the body of the tenant for life, the words "heirs of the body" were held not to create an estate-tail, being words of purchase.

⁵ Ware v. Richardson; 3 Md. 505; s.c. 56 Am. Dec. 762.

⁶ Twelves v. Nevill, 39 Ala. 175; Brown v. Ransey, 74 Ga. 210; Tucker v. Tucker, 78 Ky. 503; See v. Derr, 57 Mich. 369; s.c. 24 N.W. Rep. 108;

Rivard v. Gisenhof, 35 Hun (N. Y.) 247;

Grimes v. Orrand, 2 Heisk. (Tenn.) 298.

"Heirs" means children if so intended.

Brown v. Ransey, 74 Ga. 210.

When "heirs" not synonymous with "children" or "issue."

See: Sewall v. Roberts, 115 Mass. 262.

"heirs" are used indiscriminately, in order to harmonize the parts of the deed, the word "children" will be substituted for the word "heirs" in the habendum.¹ When the word heirs is used in reference to a living person as the ancestor, it means in the popular sense children who are heirs apparent.²

SEC. 336. **Same**—When to be ascertained.—Where land is conveyed to the "heirs" of a person living at the time of its execution, the delivery of the title vests in those persons who would be the heirs if the person should then die.³ And where a person gives land to the use of another for his life, and in case that person died without "children," then to "his own right heirs," in the event of such death the heirs of the grantor are to be ascertained at the donor's and not at the donee's death.⁴

SEC. 337. **Same**—"Present heirs."—The words "present heirs," used in a deed of land to a trustee for a person "and her present heirs," makes such person and the children that she then has tenants in common in the estate.⁵ The grant in a deed to a woman and her "children and their heirs and assigns forever" vests the title

When in a deed to A and the "heirs" of B, their children and assigns, "heirs of B" means B's children.

Tucker v. Tucker, 78 Ky. 503.

"Heirs" — In deed — Means "children" when in a deed to A and the "heirs" of B, their children and assigns, "heirs" of B means B's children.

Tucker v. Tucker, 78 Ky. 503.

"Heirs" — Equivalent to "children."—Where a person conveyed certain lands by deed to "the heirs" of a father who was alive at the time, it was held that the word "heirs" should not be taken in its technical signification, but to mean "children"; and that the deed takes effect at once as a present gift.

Grimes v. Orrand, 2 Heisk. (Tenn.) 298.

"Heirs" — In deed of gift — Construction.—In deed of gift to

the grantor's wife and heirs, where it is clearly shown that the word "heirs" is used as a synonym of children, the deed will be held to convey a beneficial interest to the children during the life of the mother, with the remainder at her death.

Twelves v. Nevill, 39 Ala. 175.

"Heirs"—Means "children" when.—The word "heirs" may mean "children"; so held where an improvident person deeded land to his brother, to be immediately deeded by the latter to the wife and "heirs" of the former.

See v. Derr, 57 Mich. 369 ; s.c. 24 N. W. Rep. 108.

¹ Warn v. Brown, 102 Pa. St. 347.

² Feltman v. Butts, 8 Bush (Ky.) 115.

³ Heath v. Hewitt, 49 Hun (N. Y.) 12 ; s.c. 17 N. Y. S. R. 270.

⁴ Harris v. McLaran, 30 Miss. 533.

⁵ Chess-Charlye Co. v. Purtell, 74 Ga. 467.

of the land in the grantee and her children then in being, though unborn; but those begotten and born thereafter take nothing thereof.¹

SEC. 338. Same—"Bodily heirs" or "heirs of the body."—The words "bodily heirs" or "heirs of the body," in a deed of land, may be construed as words of purchase whenever there is anything in the instrument which shows that they were used to designate certain persons answering the description of heirs at the death of the party.² When used in a deed of lands made by a father to a daughter, they will carry a fee, in the absence of anything in the deed to show that the words were used in a sense different from their technical import.³

¹ *King v. Rea*, 56 Ind. 1.

² *Williams v. Allen*, 17 Ga. 81.

The phrase "heirs of the body,"

when used in a deed, will be

construed to limit or define the

estate intended to be conveyed.

Ware v. Richardson, 3 Md. 505;

s.c. 56 Am. Dec. 762.

³ *True v. Nicholls*, 2 Duv. (Ky.) 547.

CHAPTER VI.

CREATION OF FEE-SIMPLE BY DEVISE.

- SEC. 339. Introductory.
- SEC. 340. Statute of uses—Effect of its passage.
- SEC. 341. Same—Adopted in this country.
- SEC. 342. Same—Rules of construction—Evading the statute.
- SEC. 343. Same—Same—American rules of construction.
- SEC. 344. Statute of wills—Effect on power to devise lands.
- SEC. 345. Devise of land carries fee when—Common-law doctrine.
- SEC. 346. Same—Doctrine in American courts.
- SEC. 347. Same—Precatory devise.
- SEC. 348. Same—Rule for interpretation of deeds not applicable.
- SEC. 349. Same—Words of limitation.
- SEC. 350. Same—“Heirs” not necessary to pass fee.
- SEC. 351. Same—What words carry fee
- SEC. 352. Same—“Estate” is *genus generalissimum*.
- SEC. 353. Same—What passes fee in reversion
- SEC. 354. Same—When fee vests.
- SEC. 355. Same—Words of survivorship in wills—Doctrine of early English cases.
- SEC. 356. Same—Same—Doctrine of later English cases.
- SEC. 357. Same—Same—Doctrine of the American cases.
- SEC. 358. Same—Limited remainder—Vesting of.
- SEC. 359. Same—Devise with power—Carries fee when.
- SEC. 360. Same—Same—When fee does not pass.
- SEC. 361. Same—Same—Same—Reason for the rule.
- SEC. 362. Same—Devise with limitation over—Contingent fee.
- SEC. 363. Same—Same—Limitation over void for uncertainty.
- SEC. 364. Same—Same—Same—Fee in first taker.
- SEC. 365. Same—Devise to a person and his children.
- SEC. 366. Same—Same—What children included.
- SEC. 367. Same—Residuary clause carries fee when.

SECTION 339. Introductory.—The power of alienating lands by will was of ancient origin. Its beginnings are lost in the uncertainties of early antiquity. It existed among the Saxons, but was swept away by the new order of things when William the Conqueror set up the feudal

system in England.¹ When the modification of the feudal system of laws and life and the amelioration of their rigor and severity set in, and partial liberty in regard to person and property was re-established, the power of alienating lands and creating a fee-simple estate by devise came into vogue and general use much later than the accomplishment of the same thing by deed. The reasons for this have been heretofore adverted to,² and will be hereafter fully discussed when we come to treat of uses and devises. Suffice it at the present time to say that at common law a fee-simple conferred no power to devise by will.³ But by local custom in some of the ancient boroughs, as in the city of London, a man might devise by testament his lands and tenements, which he held in fee-simple within the borough at the time of his death; and by the force of such devise, "he to whom such devise was made, after the death of the devisor, might enter into the tenement so to him devised, to have and to hold to him after the form and effect of the devise without any livery of seisin thereof to be made to him."⁴ The custom, however, never extended to a remainder or a reversion in expectancy upon a fee-tail, because, by the common law, there could be no such remainder or reversion; and the statute *De Donis*, though it made such remainders and reversions capable of existence, did not enlarge the extent of the custom.⁵

SEC. 340. Statute of uses—Effect of its passage.—In England, prior to the passage of the statute of uses,⁶ a large portion of the land was held to uses, the legal title being in one person, upon the trust and confidence that he would apply it to the use of some other person. The effect of the statute of uses was to destroy these large trust estates, and to transfer them to the *cestui que use*, the same as if the seisin or estate of the feoffee, together

¹ See: *Ante*, § 191, *et seq.*

² See: *Ante*, § 314.

³ See: 1 Co. Litt. (19th ed.) 111b.

⁴ 1 Co. Litt. (19th ed.) 111a;

Litt., § 167;

3 Reeves' Hist. Eng. L. (2d ed.) 9;

Devise of lands in London by

alien.—Lands in the city of London might be divested by the owner, although he was not a citizen. Dyer, 255a, pl. 3.

⁵ 4 Com. Dig. 119.

⁶ Stats. 27 Hen. VIII., c. 10.

with the use had *uno flatu*, passed from the feoffor to the *cestui que use*. By uniting the seisin to the use in the person who was entitled to the use, this statute had the effect to defeat the customary mode of making devises in the way of uses.¹ This, of course, had a marked effect upon the tenures of the realm. Interest in land which had heretofore been merely equitable and cognizable only according to the rules of equity became at once legal and cognizable in courts of common law; and many persons who were seized of estates to uses ceased at once to have any title either at law or in equity.

SEC. 341. **Same—Adopted in this country.**—The doctrine of uses and trusts introduced into the English law by the statute of Henry VIII. has been adopted into the jurisprudence of nearly every state in the Union, either as a part of the common law of the state or by re-enactment,² and as a consequence the doctrines established by the English courts are so interwoven with the history and judicial decisions of every American state, and the growth of our jurisprudence in regard to real estate, that the

¹ See: 4 'Reeves' Hist. Eng. L. (2d ed.) 242-246.

² See: *Horton v. Sledge*, 29 Ala. 478, 490;
Bryan v. Bradley, 16 Conn. 474, 483;
Adams v. Guerard, 29 Ga. 651; s.c. 76 Am. Dec. 624;
Blake v. Collins, 69 Me. 156;
Richardson v. Stodder, 100 Mass. 528;
Chanery v. Stevens, 97 Mass. 77, 85;
Johnson v. Johnson, 89 Mass. (7 Allen) 196;
Marshall v. Fish, 6 Mass. 31; s.c. 4 Am. Dec. 76;
Ready v. Kearsley, 14 Mich. 215;
Rollins v. Riley, 44 N. H. 1;
French v. French, 3 N. H. 239;
Exter v. Odiorne, 1 N. H. 237;
Chamberlain v. Crane, 1 N. H. 64;
Vander Volgen v. Yates, 9 N. Y. 219; s.c. 3 Barb. Ch. (N. Y.) 242;
Sprague v. Sprague, 13 R. I. 701;

Nightingale v. Hidden, 7 R. I. 115, 132;

Howard v. Henderson, 18 S. C. 184;

Hooberry v. Harding, 10 Lea (Tenn.) 392.

In New York, the statute of uses has been abolished by legislative enactment.

See: 4 N. Y. Rev. Stat. (8th ed.) 2436, § 45; 3 N. Y. Stats. Codes & L. 3176, § 1.

In Ohio, it is thought, the statute of uses was never in force.

See: *Helfenstine v. Garrard*, 7 Ohio 275;

Thompson v. Gibson, 2 Ohio 439.

In Vermont the statute is not in force.

See: *Sherman v. Dodge*, 28 Vt. 26;

Gorman v. Daniels, 23 Vt. 600, disapproving *Society for the Propagation of the Gospel v. Hartland*, 2 Paine C. C. 536.

In Virginia the statute of uses was a part of the colonial law, but was superseded by the Revised Statutes of 1793.

law of tenures, as interpreted and applied in American courts, is largely governed and controlled by the English precedents established under the statute of uses.¹

SEC. 342. Same — Rules of construction — Evading the statute.—The manifest object of the statute of uses, as declared in the English statute of Henry VIII., was to destroy uses and trusts altogether ; yet the courts have refused to carry out that intention on various grounds. The convenience of being able to keep the legal title of the estate in one person, while the beneficial interest should be in another, was too great to be given up altogether ; consequently English courts of equity found, and continue still to find, reasons to withdraw certain conveyances from the operation of the statute.

SEC. 343. Same—Same.—American rules of construction.—The American courts of law and equity, in construing the statute of uses, have adopted three general rules, under which conveyances are excepted from its operation. The first is where a use has been limited upon a use ; the second is where a copyhold or leasehold estate or personal property has been limited to uses ; and the third is where such powers or duties have been imposed with the estate upon the donee to uses as to render it necessary that he should continue to hold the legal title in order to perform his duty or execute the power.² According to the first rule of construction where a use is limited upon a use the statute executes only the first and the second remains a mere equitable interest.³ The second rule of construction

¹ 4 Kent Com. (13th ed.) 299–301.

² 1 Hill on Trustees, § 230 ;

1 Perry on Trusts (4th ed.), § 300.

See : Kellogg v. Hale, 108 Ill. 164 ;

Preachers' Aid Society v. England, 106 Ill. 129 ;

Farr v. Gilreath, 23 S. C. 511 ;

Howard v. Henderson, 18 S. C. 189 ;

Hooberry v. Harding, 10 Lea (Tenn.) 392 ;

Henderson v. Hill, 9 Lea (Tenn.) 25.

³ See : Reid v. Gordon, 35 Md. 183 ;

Matthews v. Ward, 10 Gill. & J. (Md.) 443 ;

Hutchins v. Heywood, 50 N. H. 496 ;

Cueman v. Broadnax, 37 N. J. L.

(8 Vr.) 508 ;

Ramsey v. March, 2 McC. (S. C.)

L. 252 ; s.c. 13 Am. Dec. 717 ;

Wilson v. Cheshire, 1 McC. (S. C.)

L. 233 ;

Coxall v. Sherrerd, 72 U. S. (5

Wall.) 268 ; bk. 18 L. ed. 572 ;

Durant v. Ritchie, 4 Mas. C. C.

45, 65 ;

Hurst's Lessee v. McNeil, 1 Wash.

C. C. 70 ;

Doe ex d. Lloyd v. Passingham,

6 Barn. & C. 305 ; s.c. 13 Eng.

C. L. 146.

affects only freeholds ; leaseholds and chattels, interests in land and personal property given to uses, are not affected, and the use remains unexecuted as before, the statute.¹ The third rule of construction is less technical, but of much more importance in this country, than the two preceding. According to it, where powers or duties are imposed upon a donee to uses which make it necessary that he should continue to hold the legal title in order to perform the duty imposed, or execute the power conferred, the trust is held to be a special or active trust unexecuted by the statute.² Consequently, where an active duty or power is imposed on the trustee, by the limitation to him and his heirs, either to pay rents ;³ to

The English rule is the same.

See : *Burgess v. Wheate*, 1 W. Bl. 161 ;

Tyrrel's Case, Dyer 155a ;

Williams v. Waters, 14 Mees. & W. 166 ;

Whetstone v. Saintsbury, 2 Pr. Wms. 146.

¹ See : *Pryon v. Mood*, 2 McMull. (S. C.) L. 293 ;

Joar v. Hodge, 1 Spears (S. C.) L. 593 ;

Rice v. Burnett, 1 Spears (S. C.) Eq. 579 ;

The English decisions lay down the same rule.

See : *Doe v. Routledge*, 2 Cowp. 709 ;

Symson v. Turner, 1 Eq. Cas. Abr. 383.

² See : *Morton v. Barrett*, 22 Me. 257 ; s.c. 39 Am. Dec. 575 ;

Chapin v. Universalist Soc., 74 Mass. (8 Gray) 580 ;

Norton v. Leonard, 29 Mass. (12 Pick.) 152 ;

Newhall v. Wheeler, 7 Mass. 189, 190 ;

Exter v. Odiorne, 1 N. H. 232 ;

Wood v. Wood, 5 Paige Ch. (N. Y.) 596 ; s.c. 28 Am. Dec. 451 ;

Striker v. Mott, 2 Paige Ch. (N. Y.) 387 ; s.c. 22 Am. Dec. 646.

The English courts follow the same rule.

See : *Sandford v. Irby*, 3 Barn. & Ald. 654 ; s.c. 5 Eng. C. L. 376 ;

Houston v. Hughes, 6 Barn. & C. 403 ; s.c. 13 Eng. C. L. 188 ;

Murthwaite v. Jenkinson, 2 Barn. & C. 357 ; s.c. 9 Eng. C. L. 162 ;

Doe v. Nicholls, 1 Barn. & C. 357 ; s.c. 9 Eng. C. L. 144 ;

Tenny v. Moody, 3 Bing. 3 ; s.c. 11 Eng. C. L. 12 ;

Harton v. Harton, 7 T. R. 352 ; s.c. 4 Rev. Rep. 537 ;

Silverster ex d. Law v. Wilson, 2 T. R. 444 ; s.c. 1 Rev. Rep. 519 ;

Wykham v. Wykham, 18 Ves. 414 ;

Mott v. Buxton, 7 Ves. 201 ;

Biscoe v. Perkins, 1 Ves. & B. 489.

³ *Meacham v. Steele*, 93 Ill. 135 ; *Morton v. Barrett*, 22 Me. 257 ;

s.c. 39 Am. Dec. 575 ;

Hutchins v. Haywood, 50 N. H. 500 ;

Adams v. Perry, 43 N. Y. 487 ;

Manice v. Manice, 43 N. Y. 303 ;

Leggett v. Perkins, 2 N. Y. 297 ;

Brewster v. Striker, 2 N. Y. 19 ;

McCosker v. Brady, 1 Barb. Ch. (N. Y.) 329 ;

Deibert's Appeal, 78 Pa. St. 296 ;

Ogden's Appeal, 70 Pa. St. 501 ;

Wickham v. Berry, 53 Pa. St. 70 ;

Shankland's Appeal, 47 Pa. St. 113 ;

Barnett's Appeal, 46 Pa. St. 392 ;

s.c. 86 Am. Dec. 513 ;

Doe d. Gratrex v. Hompray, 6 Ad. & El. 206 ; s.c. 33 Eng. C. L. 127 ;

White v. Barker, 1 Bing. N. C. 573 ; s.c. 27 Eng. C. L. 767 ;

Kenrick v. Beauclerk, 3 Bos. & P. 178 ; s.c. 6 Rev. Rep. 746 ;

Anthony v. Rees, 2 Crompt. & J. 75 ;

apply rents to the maintenance of the beneficiary ;¹ to invest the proceeds or principal and apply the accumulation of the estate ;² to sell the estate,³ or to mortgage it for the payment of debts, legacies, or annuities, or to purchase other lands for particular uses ;⁴ to accumulate out of the estate a sum for a prescribed purpose ;⁵ to preserve contingent remainders ;⁶ to protect the estate for a given time, such as until division, or the death of the specified person,⁷—the operation of the statute will be excluded.

SEC. 344. **Statute of wills—Effect on power to devise lands.**
—The statute of wills⁸ enabled tenants in fee-simple generally to devise the whole of their lands held by tenure in socage, and two-thirds of their lands held by tenure in knight-service ; with certain disabilities affecting the tenants of the king *in capite*, holding by knight-service *ut de corona* ; that is, directly of the king through the

- Robinson *v.* Grey, 9 East 1 ;
Jones *v.* Say, 1 Eq. Cas. Abr.
383 ;
Barker *v.* Greenwood, 4 Mees. &
W. 429 ;
Nevil *v.* Saunders, 1 Vern. 415 ;
Garth *v.* Baldwin, 2 Ves. Sr. 646.
¹ Vail *v.* Vail, 4 Paige Ch. (N. Y.)
317 ;
Gerard Ins. Co. *v.* Chambers, 46
Pa. St. 485 ;
Porter *v.* Doby, 2 Rich. (S. C.)
Eq. 49, 52 ;
Doe d. Shelley *v.* Edlin, 4 Ad. &
El. 582 ; s.c. 31 Eng. C. L. 261 ;
Tenney *v.* Moody, 3 Bing. 3 ; s.c.
11 Eng. C. L. 12 ;
Shapland *v.* Smith, 1 Bro. C. C.
75 ;
Doe *v.* Ironmonger, 3 East 533.
Silvester *ex d.* Law *v.* Wilson, 2
T. R. 444 ; s.c. 1 Rev. Rep. 519.
² Exter *v.* Odiorne, 19 N. H. 232 ;
Vaux *v.* Parke, 7 Watts & S. (Pa.)
19 ;
Ashhurst *v.* Given, 5 Watts & S.
(Pa.) 323 ;
Nickell *v.* Handley, 10 Gratt.
(Va.) 336.
³ Wood *v.* Mather, 38 Barb. (N. Y.)
473 ;
Bagshaw *v.* Spencer, 1 Ves. Sr.
143.
⁴ See : Chamberlain *v.* Thompson,
10 Conn. 243 ; s.c. 23 Am. Dec.
390 ;
Vaux *v.* Parke, 7 Watts & S. (Pa.)
19 ;
Doe d. Cadogan *v.* Ewart, 7 Ad. &
El. 636 ; s.c. 34 Eng. C. L. 337 ;
Spence *v.* Spence, 12 C. B. N. S.
199 ; s.c. 104 Eng. C. L. 198 ;
Smith *v.* Smith, 11 C. B. N. S.
121 ; s.c. 103 Eng. C. L. 119 ;
Curtis *v.* Price, 12 Ves. 89 ; s.c.
8 Rev. Rep. 303 ;
Bagshaw *v.* Spencer, 1 Ves. Sr.
142.
⁵ Wright *v.* Pierson, 1 Edw. Ch. (N.
Y.) 110 ;
Stanley *v.* Leonard, 1 Edw. Ch.
(N. Y.) 87.
⁶ Vanderheyden *v.* Crandall, 2 Den.
(N. Y.) 9 ;
Barker *v.* Greenswood, 4 Mees. &
W. 431 ;
Biscoe *v.* Perkins, 1 Ves. & B.
485.
⁷ Williams *v.* McConico, 36 Ala. 22 ;
Nelson *v.* Davis, 35 Ind. 474 ;
Morton *v.* Barrett, 22 Me. 257 ;
s.c. 39 Am. Dec. 575 ;
Pasey *v.* Cook, 1 Hill (S. C.) 413 ;
McNish *v.* Guerard, 4 Strobb. (S.
C.) Eq. 66.
⁸ Stat. 32 Hen. VIII., c. 1 ; explain-
ed and amended by 34 & 35
Hen. VIII., c. 5.

king's grant, and not mediately through an honor coming to the king's hands by forfeiture or escheat.¹ The provisions of this statute, which are exceedingly prolix, are thus summarized by Lord Coke: "These statutes take not away the custome to devise whereof Littleton² speaketh; for though lands devisable by custome be holden by knight's service, yet may the owner devise the whole land by force of the custome, and that shall stand good against the heire for the whole. But the devise of lands holden by knight's service by force of the statutes is utterly void for a third, and the same [the third part] shall descend to the heire. If he hath any lands holden by knight's service *in capite* [that is, *ut de corona*], and lands in socage, he can devise but two parts of the whole; but if he hold lands by knight's service of the king, and not *in capite* [that is, *ut de honore*], or of a mesne lord, and hath also lands in socage, he may devise two parts of his lands holden by knight's service, and all his socage lands. If he holds any land of the king *in capite*, and by act executed in his lifetime he conveyeth any part of his lands to the use of his wife or of his children, or payment of his debts, though it be with power of revocation, he can devise by his will no more, but to make up the land so conveyed [to] two parts of the whole. And if the lands so conveyed amount to two parts or more, then he can devise nothing by his will. But if he hath land onely that is holden in socage, then he may devise by his will all his socage land."³

SEC. 345. **Devise of land carries fee when—Common-law doctrine.**—At common law a much more liberal practice existed in the creation of estates in fee-simple by devise than by deed. The general rule of the common law, that words of inheritance or perpetuity are necessary to create, a fee is recognized by Justice STORY in an early case,⁴ where it can be carried into effect without a viola-

¹ See: 4 Reeves' Hist. Eng. L. (2d ed.) 248, *et seq.*

² Litt., § 167.

³ 1 Co. Litt. (19th ed.) 111b.

⁴ See: *Wright v. Denn ex d. Page*, 23 U. S. (10 Wheat.) 204, 233; bk. 6 L. ed. 303, 310-319; but

this rule has been considerably modified by the well-known rule for the construction of wills, by which it is required that the intent of the testator be allowed to control.

tion of the rules of law,¹ and it is clear and manifest from the words and expressions of the will that there was an intention to supply the legal and technical terms which carry a fee.² This intention of the testator, however, must appear from the words of the will itself, and not from conjecture.³ While it is a well-settled rule that no evidence outside of the will itself can be given to show what estate the testator intended the devisee should take, yet where the will refers to another right, the court will examine such other right and construe the will in connection with it.⁴

SEC. 346. Same—Doctrine in American courts.—It is said in *Smith v. Berry*,⁵ that a review of all the authorities, English and American, would show that the latter have gone much farther than the former in giving effect to the intention of the testator, and for a very good reason. In America the law of primogeniture is universally

The first great rule of exposition of wills, to which all rules must bend, is that the intent of the testator shall prevail provided it be consistent with the rules of law.

See: *Spooner v. Lovejoy*, 108 Mass. 529, 533.

Chief Justice MARSHALL says of this rule that "it's the polar star to guide us in the construction of wills."

Smith v. Bell, 31 U. S. (6 Pet.) 68, 75, 84; bk. 8 L. ed. 322, 325, 338.

The intention of the testator cannot prevail against a positive rule of law, however, such as the rule in *Shelley's Case*, unless it clearly appears that the word "heirs" was used by the testator in a sense different from the technical meaning assigned to it by law.

Allen v. Craft, 109 Ind. 476; s.c. 58 Am. Rep. 425; 9 N. E. Rep. 919; 7 West. Rep. 516.

Same — Prevails when.—If from the whole of the will, taken together and applied to the subject-matter, it can be collected that the testator intended to give a fee, it ought to be so construed, in order to give effect to such intention.

See: *Denn v. Gaskin*, 2 Cowp. 657;

Loveacres v. Blight, 1 Cowp. 352; *Hogan v. Jackson*, 1 Cowp. 299; *Roe v. Blackett*, 1 Cowp. 235;

Right v. Sidebotham, 2 Doug. 759. ¹ *Proprietors of Battle Sq. Church v. Grant*, 69 Mass. (3 Gray) 142; s.c. 63 Am. Dec. 725.

See: *Post*, § 368.

Statutes have been passed in many of the states of the Union for the better effecting of the will of a testator, which have done little more than change the presumption as to what estate is intended by a devise without words of inheritance.

Consult: 1 *Stimson on Stats., passim*.

² *Busby v. Busby*, 1 U. S. (1 Dall.) 226; bk. 1 L. ed. 111.

³ **Construction of wills—Growth of doctrine.**—As to growth of the doctrine of the construction of wills,

See: *Clayton v. Clayton*, 2 Binn. (Pa.) 476;

French v. McIlhenny, 2 Binn. (Pa.) 13;

Steele v. Thompson, 14 Serg. & R. (Pa.) 84.

⁴ *Jackson ex d. Herrick v. Babcock*, 12 John. (N. Y.) 389.

⁵ 8 Ohio 366, 368.

abolished, real and personal property are placed more nearly on a footing with each other, and the heir is no longer a favorite with the courts. The necessity of naming the heirs of the donee, in order to pass the inheritance, was unknown to the Roman law. It was unknown even in England before the Norman Conquest, when the introduction of fiefs first gave rise to the practice. The necessity for naming the heirs originated at a subsequent period, where the rulers of Gothic dynasties granted lands under condition of military service. These grants were sometimes made to the feudatory for life, and sometimes to his heirs. Whenever they were not specially named, the grant was only construed to be for life. Although this state of things in Great Britain has long since passed away, yet it has influenced, more or less, the interpretation even of devises. In America we have always been relieved from this artificial system, and from all the consequences which have followed in its train.

•
SEC. 347. Same—Precatory devise.—In a will, by employing the words “I wish the county in which I die and am buried to have and enjoy, for the benefit of public schools, two-thirds of the land in the county I am buried in,” taken in connection with the words “my land” and “the land I own,” used in other parts of the will, show an intention on the part of the testator to devise an estate in lands, and there being no words limiting its quantity, will be held to convey an estate in fee-simple.¹

SEC. 348. Same—Rules for interpretation of deeds not applicable.—The artificial rules for the interpretation of deeds, contracts, and other deliberate instruments are not applicable to the construction of wills. They never have been so considered at any period of the law. On the contrary, many constructions have been given to words in a will in order to effectuate the manifest intention of the testator, which would not have been permitted in a deed; and the same words have received different construc-

tions in different wills.¹ In ancient times, if a man devised lands to another *in perpetuum*, or to give and sell, or in *feodo simplici*, or to him and his assigns forever ; in those cases a fee-simple passed by the intent of the devisor.² Yet these words would not have been sufficient in deeds. In modern times, words not appropriated to real estate, such as property, interest, effects, and even legacy, have been adjudged sufficient to pass a fee.³

SEC. 349. **Same—Words of limitation.**—The rule of law is that where, in a devise of real estate, there are no words of limitation superadded to the general words of bequest, nothing passes but an estate for life ;⁴ but since, in most cases, this rule goes to defeat the probable intention of the testator, who, in general, is unacquainted with technical phrases, and is presumed to mean to make a disposition of his whole interest, unless he uses words of limitation, courts, to effectuate this intention, will lay hold of general expressions in the will, which, from their legal import, comprehend the whole interest of the testator in the thing devised. But if other words be used, restraining the meaning of the general expressions in the will, which, from their legal import, comprehend the whole interest or not, the rule of law which favors the right of the heir must prevail.⁵ Justice STORY says that “where there are no words of limitation to a devise, the general rule of law is, that the devisee takes an estate for life only, unless, from the language there used, or from other parts of the will, there is a plain intention to give a larger estate. We say a plain intention, because, if it be doubt-

¹ 2 Co. Litt. (19th ed.) 204a.

See : *Hogan v. Jackson*, 1 Cowp. 299.

² 1 Co. Litt. (19th ed.) 96a.

³ *Harper v. Blean*, 3 Watts (Pa.) 471 ; s.c. 27 Am. Dec. 267, 368.

⁴ See : *Peyton v. Smith*, 1 McC. (S. C.) L. 476 ; s.c. 11 Am. Dec. 758.

Devise without words of perpetuity.—In *Hall v. Goodwin*, 2 Nott. & McC. (S. C.) L. 383, decided in May, 1820, the constitutional court held that a devise of land without words of inheritance or perpetuity vested only a life estate ; and

in the case of *Jenkins v. Clement*, Harper's (S. C.) Eq. 73 ; s.c. 14 Am. Dec. 703, decided in 1824, the Court of Pleas in Equity, in the construction of the clause, held that a devise without words of perpetuity or inheritance passed a fee.

See : *Wright v. Denn ex d. Page*, 23 U. S. (10 Wheat.) 204, 228 ; bk. 6 L. ed. 303, 309 ;

Lambert's Lessee v. Paine, 7 U. S. (3 Cr.) 97, 130 ; bk. 2 L. ed. 377, 388.

ful or conjectural upon the terms of the will, or if full legal effect can be given to the language without such an estate, the general rule prevails. It is not sufficient that the court may entertain a private belief that the testator intended a fee; it must see that he has expressed that intention with reasonable certainty on the face of the will. For the law will not suffer the heir to be disinherited upon conjecture. He is favored by its policy; and though the testator may disinherit him, yet the law will execute that intention only when it is put in a clear and unambiguous shape.”¹

SEC. 350. **Same—“Heirs” not necessary to pass fee.**—The general rule of law in this country is that, in a will, the word “heirs,” or other express word or words of inheritance, is not necessary to create an estate of inheritance in the devisee; but if by the terms of the devisee, expounded with reference to all the other provisions in the will, it appears affirmatively that it was the intent of the testator to give an estate in fee-simple, the devise will be so construed as to pass such an estate.² Though if such

¹ *Wright v. Denn ex d. Page*, 23 U. S. (10 Wheat.) 204, 227, 228; bk. 6 L. ed. 303, 309, 310.

² *Godfrey v. Humphrey*, 35 Mass. (18 Pick.) 537, 539;

Baker v. Bridge, 29 Mass. (12 Pick.) 27.

See: *Markillie v. Ragland*, 77 Ill. 98;

Sillard v. Robinson, 3 Litt. (Ky.) 415;

Lindsay v. McCormack, 2 A. K. Marsh. (Ky.) 229;

Sears v. Cunningham, 122 Mass. 538;

Crossman v. Field, 119 Mass. 170, 172;

Lyon v. Marsh, 116 Mass. 232;

Spooner v. Lovejoy, 108 Mass. 529, 532;

Lincoln v. Lincoln, 107 Mass. 590;

Bacon v. Woodward, 78 Mass. (12 Gray) 376, 379;

Tracy v. Kilborn, 57 Mass. (3 Cush.) 557;

Putnam v. Emerson, 48 Mass. (7 Met.) 330, 333;

Kellogg v. Blair, 47 Mass. (6 Met.) 322, 325;

Brown v. Wood, 17 Mass. 73;

Wier v. Michigan Stove Co., 44 Mich. 506; s.c. 7 N. W. Rep. 78;

Tatum v. McLellan, 50 Miss. 1;

Fogg v. Clark, 1 N. H. 163;

Newkerk v. Newkerk, 2 Cal. (N. Y.) 345;

Jackson ex d. Pearson v. Housel, 17 John. (N. Y.) 281;

Jackson v. Merrill, 6 John. (N. Y.) 185, 189; s.c. 5 Am. Dec. 213;

Morrison v. Semple, 6 Binn. (Pa.) 94;

Waterman v. Greene, 12 R. I. 483;

Jenkins v. Clement, 1 Harp. (S. C.) Eq. 72;

Davis v. Bawcum, 10 Heisk. (Tenn.) 406;

King v. Ackerman, 67 U. S. (2 Black.) 408; bk. 17 L. ed. 292;

Finlay v. King's Lessee, 28 U. S. (3 Pet.) 346; bk. 7 L. ed. 701;

Lambert's Lessee v. Paine, 7 U. S. (3 Cr.) 97, 130; bk. 2 L. ed. 377, 388;

Randall v. Tuchin, 6 Taunt. 410; s.c. 2 Marsh. 117; 1 Eng. C. L. 677.

an intent can be found in the will, either expressed or implied in its terms, or drawn by fair inference from other manifest intentions expressed in the will, in favor of the heir at law, it must be construed to pass only an estate for life.¹

SEC. 351. **Same—What words carry a fee.**—It is now the well-settled rule of law in this country that in a devise of lands, words of perpetuity or inheritance are not necessary to pass a fee² where there are other words which, though not technical in form, clearly indicate the intention of the testator to dispose of his entire estate in the real estate devised.³ Such words and reference as the

“Heirs” not only word of devise.
—Although the word “heirs” is the most apt, it is not the only word to devise a fee.

Jackson ex d. Herrick v. Babcock, 12 John. (N. Y.) 189, 194.

¹ Godfrey v. Humphrey, 35 Mass. (18 Pick.) 537, 539;

Farrar v. Ayres, 22 Mass. (5 Pick.) 404;

Kellett v. Kellett, 3 Dow. 248.

² Lindsay v. McCormack, 2 A. K. Marsh. (Ky.) 229; s.c. 12 Am. Dec. 387;

Niles v. Gray, 12 Ohio St. 320, 328–330;

Lessees of Thompson v. Hoop, 6 Ohio St. 481;

Smith v. Berry, 8 Ohio 365;

Wood v. Hill, 19 Pa. St. 513;

Schrivver v. Meyer, 19 Pa. St. 87; s.c. 57 Am. Dec. 634; 1 Am. L. Reg. 236;

McCullough v. Gilmore, 11 Pa. St. 370;

Peppard v. Deal, 9 Pa. St. 140;

Miller v. Lynn, 7 Pa. St. 443;

McClure v. Douthitt, 3 Pa. St. 446;

French v. McIlhenny, 2 Binn. (Pa.) 13;

Campbell v. Carson, 12 Serg. & R. (Pa.) 54;

Cassell v. Cooke, 8 Serg. & R. (Pa.) 268; s.c. 11 Am. Dec. 610;

Harper v. Blean, 3 Watts (Pa.) 471; s.c. 27 Am. Dec. 267;

Doughty v. Browne, 4 Yeates (Pa.) 179;

Callwell v. Furgeson, 2 Yeates (Pa.) 250;

Jenkins v. Clement, 1 Harp. (S.

C.) Eq. 73; s.c. 17 Am. Dec. 698;

Peyton v. Smith, 4 McC. (S. C.) L. 476; s.c. 17 Am. Dec. 758;

Hope ex d. Brown v. Taylor, 1 Burr. 270;

Hogan v. Jackson, Cowp. 299;

Tilley v. Simpson, 2 T. R. 659;

Grayson v. Atkinson, 1 Wils. 333.

Reason for the rule—Abolition of primogeniture.—In the case of Smith v. Berry, 8 Ohio 365, the Supreme Court of Ohio say: “It was said with great force that the act abolishing the right of primogeniture, and the placing real and personal property on the same footing with personal, ought to change the rigor of the rules which require words of inheritance or perpetuity to pass a fee.”

³ **Generic terms—Construed to pass fee.**—The words “estate,” “property,” “all my property,” “the rest of my property,” and the like, are generic terms which are construed to include both real and personal property, unless it is manifest from some other portion of the will that the testator used these words in a different sense.

Beall v. Holmes, 6 Harr. & J. (Md.) 205, 210;

Laing v. Barbour, 119 Mass. 523;

Hunt v. Hunt, 70 Mass. (4 Gray) 190;

Kellogg v. Blair, 47 Mass. (6 Met.) 322;

Godfrey v. Humphrey, 35 Mass. (18 Pick.) 537;

following have been held to pass a fee: "absolutely," following a devise to a widow of "so much of my estate as the law allows her under the intestate laws," where these laws give a life estate in one half of the husband's realty;¹ "all and singular my goods and effects;"² "all his other property," in a residuary clause of the will, comprehends lands as well as personal property;³ "all I am worth;"⁴ "all I possess indoors and outdoors;"⁵ "all my estate;"⁶ "all my estate, real and

Jackson ex d. Pearson v. Housel, 17 John. (N. Y.) 281;

Jackson v. Delancy, 13 John. (N. Y.) 536; s.c. 7 Am. Dec. 403;

Mayo v. Carrington, 4 Call (Va.) 472; s.c. 2 Am. Dec. 580;

Kennon v. McRoberts, 1 Wash. (Va.) 96; s.c. 1 Am. Dec. 428;

Doe d. Evans v. Evans, 9 Ad. & El. 719; s.c. 36 Eng. C. L. 378;

Doe ex d. Morgan v. Morgan, 6 Barn. & C. 512; s.c. 9 Dow. & R. 633; 13 Eng. C. L. 235;

Hawksworth v. Hawksworth, 27 Beav. 1;

Re Greenwich Hospital Improvement Act, 20 Beav. 458;

Meeds v. Wood, 19 Beav. 215;

Patterson v. Huddart, 17 Beav. 210;

Edwards v. Barnes, 2 Bing. N. C. 252; s.c. 29 Eng. C. L. 524;

Doe v. Gilbert, 3 Brod. & B. 85;

Tanner v. Morse, Cas. temp. Talb. 384;

Midland Co. R. Co. v. Oswin, 1 Coll. 74;

Scott v. Alberry, 1 Com. 337; s.c. 8 Vin. Abr. 228, pl. 14;

Jongsma v. Jongsma, 1 Cox Eq. 362;

Footner v. Cooper, 2 Drew 7;

D'Almaine v. Moseley, 1 Drew 629;

Doe v. Langlands, 14 East 370;

Doe v. Lainchbury, 11 East 290;

Doe v. Tofield, 11 East 246;

O'Toole v. Browne, 3 El. & Bl. 572; s.c. 77 Eng. C. L. 572;

Smith v. Coffin, 2 H. Bl. 444; s.c. 3 Rev. Rep. 435;

Doe ex d. Burkett v. Chapman, 1 H. Bl. 223; s.c. 2 Rev. Rep. 755;

Lloyd v. Lloyd, L. R. 7 Eq. Cas 458;

Mayor of Hamilton v. Hodsdon, 6 Moore P. C. C. 76;

Saumarez v. Saumarez, 4 My. & Cr. 331;

Day v. Daveron, 12 Sim. 200;

Churchill v. Dubben, 9 Sim. 447;

King v. Shrivess, 5 Sim. 461;

Tilley v. Simpson, 2 T. R. 659; s.c. 1 Rev. Rep. 577;

Fletcher v. Smiton, 2 T. R. 656; s.c. 1 Rev. Rep. 575;

Beachcroft v. Beachcroft, 2 Vern. 690;

Church v. Mundy, 15 Ves. 396;

Rashleigh v. Master, 1 Ves. Jr. 201.

¹ Oswald v. Kopp, 26 Pa. St. 516.

² Lessees of Ferguson v. Zepp, 4 Wash. C. C. 645.

³ Mayo v. Carrington, 4 Call (Va.) 472; s.c. 2 Am. Dec. 580;

Read v. Payne, 3 Call (Va.) 225; s.c. 2 Am. Dec. 550.

⁴ Huxtep v. Brooman, 1 Bro. Ch. 437.

⁵ Tolar v. Tolar, 3 Hawks. (N. C.) 74; s.c. 14 Am. Dec. 575.

⁶ Hammond v. Hammond, 8 Gill & J. (Md.) 437;

Briggs v. Shaw, 91 Mass. (9 Allen) 517;

Leland v. Adams, 75 Mass. (9 Gray) 171;

Brown v. Wood, 17 Mass. 68;

Bell v. Scammon, 15 N. H. 381; s.c. 41 Am. Dec. 706;

Leavitt v. Wooster, 14 N. H. 550;

Fogg v. Clark, 1 N. H. 163;

Jackson v. Merrill, 6 John. (N. Y.) 185; s.c. 5 Am. Dec. 213;

Shinn v. Holmes, 25 Pa. St. 142;

Mayo v. Carrington, 4 Call (Va.) 472; s.c. 2 Am. Dec. 580;

Johnson v. Kerman, 1 Rol. Abr. 834;

Doe v. Williams, 1 Exch. 414;

Cliff v. Gibbons, 2 Ld. Raym. 1324;

Hopewell v. Ackland, 1 Salk. 239;

personal,"¹ "not disposed of as above mentioned;"² "all my goods and effects, both real and personal;"³ "all my inheritance;"⁴ "all my lands;"⁵ "all my landed estate;"⁶ "all my landed property;"⁷ "all and singular my lands," "to be truly possessed and enjoyed;"⁸ "all my property;"⁹ "all my property, both real and personal, of whatever name or kind;"¹⁰ "all my real estate;"¹¹ "all my real property;"¹² or "the remaining part of my realty;"¹³ "all my real and personal estate;"¹⁴ "all my real and personal property;"¹⁵

Randall v. Tuchin, 6 Taunt. 410 ;
s.c. 1 Eng. C. L. 677 ; 2 Marsh.
117 ;

Doe v. Allen, 8 T. R. 503 ;
Grayson v. Atkinson, 1 Wils.
333 ;

4 Kent Com. (13th ed.) 535.
Compare: Hart v. White, 26 Vt.
260.

¹ Brown v. Wood, 17 Mass. 68 ;
Bell v. Scammon, 15 N. H. 381 ;
s.c. 41 Am. Dec. 706 ;
Arnold v. Lincoln, 8 R. I. 384 ;
Culbertson v. Duly, 7 Watts &
S. (Pa.) 195.

² Kellogg v. Blair, 47 Mass. (6 Met.)
322, 325.

"All my estate, both real and
personal," "to be at ——'s
absolute disposal," vests a fee.
Jackson ex d. v. Babcock, 12
John. (N. Y.) 389, 393.

³ Lessees of Ferguson v. Zepp, 4
Wash. C. C. 645 ;
Tanner v. Wise, 3 Pr. Wms. 295.

⁴ Jackson ex d. Pearson v. Housel,
17 John. (N. Y.) 281.

⁵ Niles v. Gray, 12 Ohio St. 320,
331 ;

Abbott v. The Essex Co., 59 U.
S. (18 How.) 202 ; s.c. bk. 15 L.
ed. 352, 355 ; 2 Curt. C. C. 126.

⁶ Myers v. Myers, 2 McC. (S. C.)
Eq. 214 ; s.c. 16 Am. Dec. 648.

⁷ Fogg v. Clark, 1 N. H. 163 ;
Foster v. Stewart, 18 Pa. St. 23 ;
Meyers v. Meyers, 2 McC. (S. C.)
Eq. 214 ; s.c. 16 Am. Dec. 648 ;
Sharp v. Sharp, 6 Bing. 630 ; s. c.
19 Eng. C. L. 285 ;

Nicholls v. Butcher, 18 Ves. 193.

⁸ Distinction between "lands" and
"estate."—This was held to
pass a fee, upon the known
distinction between "all my
lands" and "all my estate."

Doe v. Baines, 2 Crompt. M. & R.
231.

"My last purchase."—The same
is true of "my late purchase,"
where the purchase was in fee.
Neide v. Neide, 4 Rawle (Pa.)
75.

⁹ Jackson ex d. Pearson v. Housel,
17 John. (N. Y.) 281, 283 ;
Stoever v. Stoever, 9 Serg. & R.
(Pa.) 434, 445 ;

Rosseter v. Simmons, 6 Serg. &
R. (Pa.) 452.

¹⁰ Crossman v. Field, 119 Mass. 170,
172.

¹¹ Crossman v. Field, 119 Mass. 170,
172 ;

Spooner v. Lovejoy, 108 Mass.
532 ;

Bacon v. Woodward, 78 Mass. (12
Gray) 376, 379 ;

Putnam v. Emerson, 48 Mass. (7
Met.) 333 ;

Kellogg v. Blair, 47 Mass. (6 Met.)
325 ;

Parker v. Parker, 46 Mass. (5
Met.) 134, 138 ;

Abbott v. Essex, 2 Curt. C. C. 126,
132 ; s.c. 59 U. S. (18 How.) 202 ;
bk. 15 L. ed. 352, 355.

¹² Fogg v. Clark, 1 N. H. 163 ;
Foster v. Stewart, 18 Pa. St. 23 ;

Sharp v. Sharp, 6 Bing. 630 ; s.c.
19 Eng. C. L. 285 ;

Nicholls v. Butcher, 18 Ves. 193.

¹³ Niles v. Gray, 12 Ohio St. 320,
329.

¹⁴ Godfrey v. Humphreys, 35 Mass.
(18 Pick.) 537 ; s.c. 29 Am. Dec.
621.

¹⁵ See: Hungerford v. Anderson, 4
Day (Conn.) 368, 371 ;

Smith v. Berry, 8 Ohio St. 366,
368 ;

Morrison v. Semple, 6 Binn (Pa.)
94.

"all my real effects;"¹ "all my rights;"² "all my worldly substance;"³ "all right, title, and interest in the house;"⁴ "all the estate, real and personal;"⁵ "all the rest and residue of my real and personal estate;"⁶ "all the rest of my lands and tenements;"⁷ "effects;"⁸ "I give my lands;"⁹ "in fee-simple;"¹⁰ "my landed property;"¹¹ "my late purchase;"¹² "my plantation;"¹³ "my property;"¹⁴ "my real property;"¹⁵ "my whole estate;"¹⁶ a devise of "profits, rents, and

¹ *Mayo v. Carrington*, 4 Call (Va.) 472; s.c. 2 Am. Dec. 580.

² *Newkerk v. Newkerk*, 2 Cai. (N. Y.) 345.

³ *Mayo v. Carrington*, 4 Call (Va.) 472; s.c. 2 Am. Dec. 580.

⁴ *Cole v. Rawlinson*, 3 Brown Parl. Cas. 7.

See: *Merritt v. Abendroth*, 24 Hun (N. Y.) 218.

⁵ *Bell v. Scammon*, 15 N. H. 381; s.c. 41 Am. Dec. 706.

⁶ *Donovan v. Donovan*, 4 Harr. (Del.) 177;

McConnel v. Smith, 23 Ill. 611;
Parker v. Parker, 46 Mass. (5 Met.) 138;

Davenport v. Coltman, 9 Mees. & W. 481;

Farmer v. Francis, 2 Sim. & S. 505.

Compare: *Doe d. Hurrell v. Hurrell*, 5 Barn. & Ald. 18; s.c. 7 Eng. C. L. 22.

⁷ **Must be in residuary clause.**—But does not carry a fee where not the residuary clause.

Wright v. Denn ex d. Page, 23 U. S. (10 Wheat.) 204, 229; bk. 6 L. ed. 303, 310.

⁸ *Hope ex d. Brown v. Taylor*, 1 Burr. 270;

Hogan v. Jackson, 1 Cowp. 299.

⁹ *Smith v. Berry*, 8 Ohio 366, 368.
Compare: *Wright v. Denn ex d. Page*, 23 U. S. (10 Wheat.) 204, 206-231, 232, 233; bk. 6 L. ed. 303, 319.

Giving land to be divided.—In *Whaley and Others v. Jenkins*, 3 Des. (S. C.) Eq. 80, there were no words of inheritance, and no word which had before been construed to carry a fee-simple. The testator merely gave his two tracts of land, to be equally divided between his two sons, and these words were held suf-

ficient to pass the fee. This was followed up by the cases of *Clarke v. Mikell*, 3 Des. (S. C.) Eq. 168, and *Waring v. Middleton*, 3 Des. (S. C.) Eq. 249, in which the principle of the former decision was reiterated and enforced.

¹⁰ *Bridgewater v. Bolton*, 6 Mod. 106, 109;

¹¹ *Foster v. Stewart*, 18 Pa. St. 23.

¹² *Neide v. Neide*, 4 Rawle (Pa.) 75.

¹³ *Lessees of Thompson v. Hoop*, 6 Ohio St. 481;

Price v. Taylor, 28 Pa. St. 95; s.c. 70 Am. Dec. 105;

French v. McIlhenny, 2 Binn. (Pa.) 13;

Cassell v. Cook, 8 Serg. & R. (Pa.) 268; s.c. 11 Am. Dec. 610;

Waring v. Middleton, 3 Des. (S. C.) Eq. 249;

Clarke v. Mikell, 3 Des. (S. C.) Eq. 168;

Jenkins v. Clement, 1 Harp. (S. C.) Eq. 72; s.c. 14 Am. Dec. 698;

Peyton v. Smith, 4 McC. (S. C.) 476; s.c. 17 Am. Dec. 758.

Compare: *Steele v. Thompson*, 14 Serg. & R. (Pa.) 84.

¹⁴ *Jackson ex d. Pierson v. Housel*, 17 John. (N. Y.) 281.

¹⁵ *Niles v. Gray*, 12 Ohio St. 320;

Morrison v. Semple, 6 Binn. (Pa.) 94;

Dice v. Sheffer, 3 Watts & S. (Pa.) 419.

¹⁶ *Hammond v. Hammond*, 8 Gill & J. (Md.) 437;

Briggs v. Shaw, 91 Mass. (9 Allen) 517;

Leland v. Adams, 75 Mass. (9 Gray) 171;

Jackson v. Merrill, 6 John. (N. Y.) 185; s.c. 5 Am. Dec. 213;

Shinn v. Holmes, 25 Pa. St. 142;

Doe v. Williams, 1 Exch. 414;

income" of land;¹ or of "property,"² or "leasehold," where the intention is clear;³ the devise of a "remainder" or a "reversion," after the disposition of a particular estate;⁴ or of the "residue of the real estate;"⁵ "residue or remainder" of "my estate, real and personal;"⁶ "rest and residue of all my property, real, personal, and mixed;"⁷ all "right and title to" property, the deviser having a fee;⁸ "right to certain rents;"⁹ "share," where preceded by words showing intention to dispose of the whole estate;¹⁰ a devise to several to enjoy and holds as tenants in common;¹¹ "to have, hold and enjoy forever, for the free use of her and no other person, excepting by her assignment and will;"¹² "to my wife the land her father gave me;"¹³ "undivided half" of land described;¹⁴ devise to "use forever."¹⁵

Johnson v. Kerman, 1 Rol. Abr. 834;

Randall v. Tuchin, 6 Taunt. 410; s.c. 2 Marsh. 117; 1 Eng. C. L. 677.

Compare: *Hart v. White*, 26 Vt. 260.

¹ *Earl v. Grim*, 1 John. Ch. (N. Y.) 494;

Drusadow v. Wilde, 63 Pa. St. 170;

Anderson v. Greble, 1 Ashm. (Pa.) 136, 138;

Carlyle v. Cannon, 3 Rawle (Pa.) 489.

A devise of "income, lands, and use," followed by a devise over, does not convey the fee, but a life estate only.

France's Estate, 75 Pa. St. 220.

And the same is true where they are given for a limited time only.

Earl v. Grim, 1 John. Ch. (N. Y.) 494.

² *Fogg v. Clark*, 1 N. H. 163.

See: *Jackson ex d. Pearson v. Housel*, 17 John. (N. Y.) 281;

Mayo v. Carrington, 4 Call (Va.) 472;

Wilce v. Wilce, 7 Bing. 664; s.c. 20 Eng. C. L. 296;

Billing v. Billing, 5 Sim. 232.

The word *property*, in its most strict and proper use, relates solely to the quantity of estate in the land, and, unless words restraining its significance are added, always means the whole

interest. The word *property* in such connection is synonymous with the word *estate* or *interest*, and includes everything in the land which the testator possessed.

Fogg v. Clark, 1 N. H. 163.

³ *Saylor v. Kocher*, 3 Watts & S. (Pa.) 163.

⁴ *Annable v. Patch*, 20 Mass. (3 Pick.) 360;

Cruger v. Haywood, 2 Des. (S. C.) Eq. 94.

See: *Lippen v. Eldred*, 2 Barb. (N. Y.) 180;

Doe d. Lean v. Lean, 1 Ad. & E. N. S. 229; s.c. 41 Eng. C. L. 515.

Compare: *Peiton v. Banks*, 1 Vern. 65.

⁵ *Forsaith v. Clark*, 21 N. H. 409.

⁶ *Peppard v. Deal*, 9 Pa. St. 140;

Doughty v. Browne, 4 Yeates (Pa.) 179.

⁷ *Lincoln v. Lincoln*, 107 Mass. 590.

⁸ *Merritt v. Abendroth*, 24 Hun (N. Y.) 218.

⁹ *Newkerk v. Newkerk*, 2 Cai. (N. Y.) 345.

¹⁰ *McClure's Heirs v. Douthitt*, 3 Pa. St. 446.

¹¹ *Crosky v. Dods*, 87 Pa. St. 359.

¹² *Denn d. Bolton v. Bowne*, 18 N. J. L. (3 Harr.) 210.

¹³ *Purcell v. Wilson*, 4 Gratt. (Va.) 16.

¹⁴ *Waterman v. Greene*, 12 R. I. 483.

¹⁵ Gift to use where title not required.—Where the land is given for a certain use which

And where the devise in terms imposes a personal charge upon the devisee,¹ invests him with the power of appointment,² and the like, the devise passes the fee; but the mere use of the word "tract," excluding a portion previously devised for life, will not carry a fee-simple by implication.³ At common law a devise "of the rest of my lands, in possession, reversion, or remainder," does not carry a fee.⁴ There has been said to be nothing in the words "I devise all my real estate" incompatible with the intention to devise for life only.⁵

SEC. 352. Same—"Estate" is genus generalissimum.—The word "estate" includes every kind of property, and when used in a will is *genus generalissimum*,⁶ and carries a fee, unless tied down and controlled by particular expressions,⁷

does not require the title, the testator will be presumed to have given a mere easement.

Saxton v. Mitchell, 78 Pa. St. 481.

¹ See : *Post*, § 380.

² See : *Post*, § 369, *et seq.*

³ Wilson v. Wilson, 4 T. B. Mon. (Ky.) 159.

⁴ Wright v. Denn ex d. Page, 23 U. S. (10 Wheat.) 204; bk. 6 L. ed. 303.

⁵ Terry v. Wiggins, 47 N. Y. 512, 515;

Helmer v. Shoemaker, 22 Wend. (N. Y.) 137.

⁶ Thornton v. Mulquinne, 12 Iowa 549; s.c. 79 Am. Dec. 548, 551.

⁷ Thornton v. Mulquinne, 12 Iowa 549; s.c. 79 Am. Dec. 448;

Tracy v. Kilborn, 57 Mass. (3 Cush.) 557;

Putnam v. Emerson, 48 Mass. (7 Met.) 330, 333;

Kellogg v. Blair, 47 Mass. (6 Met.) 322, 325;

Godfrey v. Humphrey, 35 Mass. (18 Pick.) 537; s.c. 29 Am. Dec. 621;

Terry v. Wiggins, 47 N. Y. 512;

Jackson ex d. Herrick v. Babcock, 12 John. (N. Y.) 389, 392;

Lambert's Lessee v. Paine, 7 U. S. (3 Cr.) 97, 130; bk. 2 L. ed. 377, 388.

See : Butler v. Little, 3 Me. (3 Greenl.) 239;

Brown v. Wood, 17 Mass. 68;

Jackson v. DeLancy, 13 John. (N. Y.) 537; s.c. 7 Am. Dec. 403;

Jackson v. DeLancy, 11 John. (N. Y.) 365;

Thurbett v. Thurbett, 3 Yeates (Pa.) 187; s.c. 2 Am. Dec. 369;

Busby v. Busby, 1 U. S. (1 Dall.) 226; bk. 1 L. ed. 111;

Blagge v. Miles, 1 Story C. C. 436, 438;

Fletcher v. Smiton, 2 T. R. 656; s.c. 1 Rev. Rep. 575;

Holdfast v. Marten, 1 T. R. 411; s.c. 1 Rev. Rep. 243;

Murry v. Wyse, 2 Vern. 564;

Tanner v. Wise, 3 Pr. Wms. 295.

"Estate" in devise refers to title —When descriptive of corpus.—

It is said in the case of Terry v. Wiggins, 47 N. Y. 512, that the word "estate" used in a devise refers to the testator's title, and indicates an intent to give all the estate or interest in the property which the testator can dispose of by will, unless by express terms or by necessary implication it appear that it was used as descriptive of, or referring to, the *corpus* of the property, but it may be controlled by other portions of the will.

It is said in the case of Putnam v. Emerson, 48 Mass. (7 Met.) 330, 333, that a devise of the testator's whole estate will pass a fee, on being seized of such an estate, is unquestionable, unless given in such words as go merely to describe the lands

or by the context of the will;¹ therefore a devise of all a man's estate, where there are no words to control or restrain its operation, will be construed not merely to mean his lands, but the quantity of interest which he has in them, so as to pass an estate of inheritance if he has one.² Justice JOHNSON says in the case of *Lambert's Lessee v. Paine*:³ "I consider the doctrine as well established, that the word estate, made use of in a devise of realty, will carry a fee, or whatever other interest the devisor possesses. And I feel no disposition to vary the legal effect of the word, whether preceded by my or the, or followed by at or in, or in the singular or plural number. The intent with which it is used is the decisive consideration;

devised, and not the extent of his interest therein.

Citing: *Kellogg v. Blair*, 47 Mass. (6 Met.) 325;

Godfrey v. Humphrey, 35 Mass. (18 Pick.) 537; s.c. 29 Am. Dec. 621;

Brown v. Wood, 17 Mass. 73;

Randall v. Tuchin, 6 Taunt. 410; s.c. 2 Marsh. 117; 1 Eng. C. L. 677.

Donovan v. Donovan, 4 Harr. (Del.) 177;

Doe v. Kinney, 3 Ind. 50;

Doe v. Harter, 7 Blackf. (Ind.) 488;

Leland v. Adams, 75 Mass. (9 Gray) 171;

Kellogg v. Blair, 47 Mass. (6 Met.) 325;

Godfrey v. Humphrey, 35 Mass. (18 Pick.) 537; s.c. 29 Am. Dec. 621;

Jackson v. Merrill, 6 John. (N. Y.) 185; s.c. 5 Am. Dec. 213;

Arnold v. Lincoln, 6 R. I. 384.

Words of locality and description referring to corpus.—And this is true although the word is accompanied by other words of locality and description, or other expression exclusively referable to the corpus of the property.

Leland v. Adams, 75 Mass. (9 Gray) 171, 175;

Doe d. Knott v. Lawton, 4 Bing. N. C. 455, 461; s.c. 6 Scott 318; 33 Eng. C. L. 802, 805;

Randall v. Tuchin, 6 Taunt. 410; s.c. 2 Marsh. 117; 1 Eng. C. L. 677.

Same — Estate of "Marrowbone." —

Such as "all the estate called Marrowbone, in the county of Hanover, containing by estimation 2,500 acres of land."

Lambert's Lessee v. Paine, 7 U. S. (3 Cr.) 97, 130; bk. 2 L. ed. 377, 388.

² *Godfrey v. Humphrey*, 35 Mass. (18 Pick.) 537, 539; s.c. 29 Am. Dec. 621.

See: *Thornton v. Mulquinne*, 13 Iowa 549; s.c. 79 Am. Dec. 548; *Hammond v. Hammond*, 8 Gill & J. (Md.) 437;

Briggs v. Shaw, 91 Mass. (9 Allen) 517;

Leland v. Adams, 75 Mass. (9 Gray) 71;

Bell v. Scammon, 15 N. H. 381; s.c. 41 Am. Dec. 706;

Jackson v. Merrill, 6 John. (N. Y.) 185; s.c. 5 Am. Dec. 213;

Shinn v. Holmes, 25 Pa. St. 142;

Zimmerman v. Anders, 6 Watts & S. (Pa.) 218; s.c. 40 Am. Dec. 552;

Myers v. Myers, 2 McC. (S. C.) Eq. 214; s.c. 16 Am. Dec. 648;

Doe v. Williams, 1 Exch. 414;

Bridgewater v. Bolton, 6 Mod. 106, 109;

Johnson v. Kerman, 1 Rol. Abr. 834;

Randall v. Tuchin, 6 Taunt. 410; s.c. 2 Marsh. 117; 1 Eng. C. L. 677;

Holdfast v. Marten, 1 T. R. 411; s.c. 1 Rev. Rep. 343.

Compare: *Hart v. White*, 26 Vt. 260.

³ 7 U. S. (3 Cr.) 97, 130; bk. 2 L. ed. 377, 388.

and I should not feel myself sanctioned in refining away the operation of that intent by discriminations so minute as those which have been attempted at different stages of English jurisprudence. The word estate, in testamentary cases, is sufficiently descriptive both of the subject and the interest existing in it. It is unquestionably true that its meaning may be restricted by circumstances or expressions indicative of its being used in a limited or particular sense, so as to confine it to the subject alone; but certainly, in its general use, it is understood to apply more pertinently to the interest in the subject."

SEC. 353. **Same—What passes fee in reversion.**—Where a testator devises to the legatee certain real property, describing it, together with certain personal property, and adds, "with whatsoever is not named that I have any right or claim to either in right or equity," will vest in such legatee the reversion in fee to real property;¹ and where a particular estate is given to a person in one part of a will, and the testator afterwards devises to him in more general terms, a fee will pass the same as though there had not been a gift of the particular estate.² Thus in *Hogan v. Jackson*³ the testator gave to his mother his home and lands at G. during her natural life, and, after several legacies to others, devised to his mother all the remainder and residue of his effects, both real and personal, which he should die possessed of, and the court held that by the residuary clause the mother took a fee in the real estate. In *Chester v. Chester*⁴ a father, on the marriage of his son, settled part of his lands on him in tail, and being seized in fee of the reversion of the lands so settled and of other lands in possession, subsequently devised all his lands and hereditaments not otherwise disposed of, and the court held that the rever-

¹ *Harper v. Blean*, 3 Watts (Pa.) 471; s.c. 27 Am. Dec. 367.

Approved: *Geyer v. Wentzel*, 68 Pa. St. 88;

Schrivver v. Meyer, 19 Pa. St. 89;

Brown v. Boyd, 9 Watts (Pa.) 129.

² Lord Mansfield says that it would be going a great ways to lay down as a general rule, that when a particular estate is

given to a person in one part of a will, and the testator afterwards devises to him in more general terms, he shall not reap any benefit from the general devise.

Hogan v. Jackson, 1 Cowp. 299, 308.

³ 1 Cowp. 299.

⁴ 3 Pr. Wms. 56.

sion in the lands settled on the son in tail passed. And in a case where a testator gave to his wife an estate for life in part of his real estate, and, after disposing of the balance in fee, bequeathed to her the residue and remainder, Lord Hardwicke held that the residuary clause carried the inheritance.¹

SEC. 354. **Same—When the fee vests.**—Where real estate is devised to a legatee without words of limitation, the fee vests immediately upon the death of the testator; and when the enjoyment of the estate is divided into successive periods, all the fragments of it vest at the same time.² Where there is a devise of real estate to one for life, and after his death to another, or to two or more persons, or the survivor or survivors of them, their heirs and assigns, forever, the remaindermen take a vested interest at the death of the testator;³ and where a devise of real estate thus made is to take effect immediately upon the death of the testator, words of survivorship refer to that time, and a fee vests, on the happening of the event, in the survivors to the exclusion of the personal representatives of such that may have died before the testator.⁴ But where the gift is of an estate to a trustee to be held until the youngest child of such testator should attain majority, and providing that the property shall then be equally divided among his children, at the death of the testator the trustee takes an estate for years,⁵ and those children living at the time of the testator's death take a vested fee-simple estate subject to the trust; and should one of the devisees die before the expiry of the trust estate his interest will descend to his heirs, if not aliened or otherwise disposed of.⁶ Where such an estate

¹ *Ridout v. Paine*, 3 Atk. 488.

² *King v. King*, 1 Watts & S. (Pa.)

205; s.c. 37 Am. Dec. 459;

Scurfield v. Howes, 3 Bro. C. C.

90;

Benyon v. Maddison, 2 Bro. C. C.

75;

Monkhouse v. Holme, 1 Bro. C. C.

298;

Blamire v. Geldart, 16 Ves. 314,

319;

Balmain v. Shore, 9 Ves. 500;

Attorney-General v. Crispin, 1

Bro. C. C. 386;

Taylor v. Langford, 3 Ves. 119.

³ *Moore v. Lyons*, 25 Wend. (N. Y.)

119;

⁴ *Branson v. Hill*, 31 Md. 181; s.c.

1 Am. Rep. 40;

Doe ex d. Long v. Prigg, 8 Barn.

& C. 231; s.c. 15 Eng. C. L. 121.

⁵ *Doe ex d. Player v. Nicholls*, 1

Barn. & C. 336; s.c. 8 Eng. C.

L. 144.

⁶ *Hempstead v. Dickson*, 20 Ill. 193;

s.c. 71 Am. Dec. 260.

is not immediate, there being a prior life carried out, and words of perpetuity qualify those of survivorship, the survivor will not take the whole gift to the exclusion of the heirs or representatives of his co-legatee.¹

SEC. 355. **Same—Words of survivorship in wills—Doctrine of early English cases.**—An examination of the earlier English cases shows that the courts uniformly thought that words of survivorship in wills of both real and personal estates referred to the death of the testator. Some of the cases are based upon the particular phraseology and context of the wills, and others upon the principal intention of the testator, making allowances for the deficiency and inaccuracy of the expressions so commonly to be found under testamentary interests to the abolishing of the law which favors the vesting of estates, and others again upon the presumption that the testator did not intend to cut off from the provisions of his will the children and descendants of such of the former legatees or devisees as might happen to die before the termination of the intermediate estate.²

- See : *Everts v. Chittendon*, 2 Day (Conn.) 388 ; s.c. 2 Am. Dec. 97 ; *King v. King*, 1 Watts & S. (Pa.) 205 ; s.c. 37 Am. Dec. 459 ; *Doe ex d. Long v. Prigg*, 8 Barn. & C. 231 ; s.c. 15 Eng. C. L. 121 ; *Doe ex d. Player v. Nicholls*, 1 Barn. & C. 336 ; s.c. 8 Eng. C. L. 144 ; *Doe ex d. Wheedon v. Lea*, 3 T. R. 41 ; s.c. 1 Rev. Rep. 631. *Stanley v. Stanley*, 16 Ves. 491.
- ¹ *Branson v. Hill*, 31 Md. 181 ; s.c. 1 Am. Rep. 40.
- See : *Scott v. Logan*, 23 Ark. 351, 352 ; *Watkins v. Quarles*, 23 Ark. 179 ; *Danforth v. Talbot*, 7 B. Mon. (Ky.) 623 ; *Roberts v. Brinker*, 4 Dana (Ky.) 570, 573 ; *Allen v. Van Meter*, 1 Met. (Ky.) 264 ; *Meyer v. Eisler*, 29 Md. 28, 32 ; *Bredell v. Collier*, 40 Mo. 287 ; *Roome v. Phillips*, 24 N. Y. 463, 465 ;
- Williamson v. Field's Ex'rs*, 2 Sandf. Ch. (N. Y.) 533 ; *Minnig v. Batdorff*, 5 Pa. St. 503 ; *Kinsey v. Lardner*, 15 Serg. & R. (Pa.) 196 ; *Rivers v. Friff*, 4 Rich. (S. C.) Eq. 276 ; *Doe d. Cadogan v. Ewart*, 7 Ad. & El. 636 ; s.c. 34 Eng. C. L. 337 ; *Goodtitle v. Whitby*, 1 Burr. 228 ; *Doe ex d. Wheedon v. Lea*, 3 T. R. 41 ; s.c. 1 Rev. Rep. 631 ; *Boraston's Case*, 3 Coke 21a, 21b.
- ² *Doe ex d. Long v. Prigg*, 8 Barn. & C. 231 ; s.c. 15 Eng. C. L. 121 ; *Rose v. Hill*, 3 Burr. 1881 ; *Goodtitle v. Whitby*, 1 Burr. 228 ; *Brown v. Bigg*, 7 Ves. 279b ; *Maberly v. Strod*, 3 Ves. 450 ; s.c. 4 Rev. Rep. 61 ; *Perry v. Woods*, 3 Ves. 204 ; *Habergham v. Vincent*, 2 Ves. Jr. 204 ; *Marryat v. Townly*, 1 Ves. Sr. 102.

SEC. 356. **Same—Same—Doctrine of later English cases.**—The later English cases manifest a disposition to break away from the array of authorities, extending in unbroken phalanx over more than two centuries, in favor of the rule of construction above set out, especially in those cases where there is a gift of personal estate to a donee for life, and after the termination of such interest to certain persons *nominatim*; in which case there is a strong inclination to refer the words of survivorship to the period of distribution, or to the termination of the intermediate estate; that is to say, the legatees surviving at that time take to the exclusion of the personal representatives of such as may have died before that period.¹

SEC. 357. **Same—Same—Doctrine of the American cases.**—In this country the weight of authority seems to be in favor of the earlier rule, which refers the words of survivorship to the death of the testator, and without recognizing any distinction between real and personal property.²

SEC. 358. **Same—Limited remainder—Vesting of.**—In the case of *Moore v. Lyons*³ the devise was “to Mary for life, and from and after her death to her three daughters, or to the survivors or survivor of them, their or her heirs and assigns forever.” The chancellor, in commenting upon this devise, remarks that where a remainder is so limited as to take effect in possession, if ever, immediately on the termination of a particular estate, which is to determine by an event which must unavoidably happen by the efflux of time, the remainder vests an interest as soon as the remainderman is *in esse* and

¹ *Goddard v. Lethbridge*, 16 Beav. 529;

Smith v. Osborne, 6 H. of L. Cas. 391;

Cripps v. Wolcott, 4 Madd. 11;

Pope v. Whitcombe, 3 Russ. 124;

Turing v. Turing, 15 Sim. 139, 510;

Newton v. Ayscough, 19 Ves. 534;

Brograve v. Winder, 2 Ves. Jr. 634;

Neatway v. Reed, 17 Jur. 169; s.c. 17 Eng. L. & Eq. 151.

² *Branson v. Hill*, 31 Md. 181; s.c. 1 Am. Rep. 40;

Blanchard v. Blanchard, 83 Mass. (1 Allen) 223;

Moore v. Lyons, 25 Wend. (N. Y.) 119;

Ross v. Drake, 37 Pa. St. 373;

Hansford v. Elliot, 9 Leigh (Va.) 79.

³ 25 Wend. (N. Y.) 119, 144.

ascertained ; provided nothing but his own death before the determination of the particular estate will prevent such remainder from vesting in possession. But, if the estate is limited over to another, in the event of such death before the particular estate determines, his vested estate is subject to be divested by that event, and the interest of the substituted remainderman, which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained, be immediately changed into a vested remainder.¹

SEC. 359. **Same—Devise with power—Carries fee when.**—It is a well-established rule that where an estate is devised to a person generally, or indefinitely, with an unlimited power of disposition, the absolute fee passes to the devisee.² The only exception to this rule is when the testator gives the first taker an estate for life only, by certain express words, and annexes to it a power of disposal.³ Thus where a testator devised lands to his wife

¹ See : *Williamson v. Field's Ex'rs*, 2 Sandf. Ch. (N. Y.) 533, 551.

Todd v. Sawyer, 147 Mass. 570 ; s.c. 17 N. E. Rep. 527 ;

Cummings v. Shaw, 108 Mass. 159.

See : *Denson v. Mitchell*, 26 Ala. 360 ;

Cook v. Walker, 15 Ga. 457 ;

Fairman v. Beal, 14 Ill. 244 ;

Benesch v. Clark, 49 Md. 497 ;

Kelley v. Meins, 135 Mass. 231 ;

Gibbins v. Shepard, 125 Mass. 541, 543 ;

Whitcomb v. Taylor, 123 Mass. 243, 248 ;

Lyon v. Marsh, 116 Mass. 232 ;

Bowen v. Dean, 110 Mass. 438 ;

Hale v. Marsh, 100 Mass. 468 ;

Jackson v. Robins, 16 John. (N. Y.) 588 ;

Second Reformed Pres. Church v. Disbrow, 54 Pa. St. 219 ;

Morris v. Phaler, 1 Watts (Pa.) 389 ;

Smith v. Starr, 3 Whart. (Pa.) 62 ; s.c. 31 Am. Dec. 498 ;

Pulliam v. Byrd, 2 Strobb. (S. C.) Eq. 134 ;

Burwell v. Anderson, 3 Leigh (Va.) 348, 356 ;

Robinson v. Dugate, 2 Vern. 181 ;

Paice v. Archbishop of Canterbury, 14 Ves. 364, 370 ;

Post, § 368.

Estate for life, with power of disposition.—It is said in *Rubey v. Barnett*, 12 Mo. 3 ; s.c. 49 Am. Dec. 112, that where an express estate for life is given by will, and a power of disposition is afterwards conferred, the devisee takes but a life estate, with a power of disposition, and if no disposition is made, the reversion will go to the heirs of the devisor. But if there is no previous devise of a life estate, but a simple power of disposition is given, then the devisee takes an absolute estate. And this rule applies both to the real and personal estate.

² *Smith v. Starr*, 3 Whart. (Pa.) 62 ; s.c. 31 Am. Dec. 498, 500.

See : *Cook v. Walker*, 15 Ga. 457 ;

Moore v. Webb, 2 B. Mon. (Ky.)

282 ;

Stevens v. Winship, 18 Mass. (1 Pick.) 318 ; s.c. 11 Am. Dec. 178 ;

Jackson v. Robins, 16 John. (N. Y.) 588 ;

Flinthan's Case, 11 Serg. & R. (Pa.) 16.

Post, § 369.

for life, and gave her power, in case of need, to sell all the estate, both real and personal, for her comfortable support, it was held that she took only a life estate with the power of sale depending on a contingency.¹ Judge AGNEW says, in the case of *Dodson v. Ball*,² that "the rule laid down is, that when an estate for life only is given, followed by a general power of appointment, and on failure to appoint to children, or to specified heirs, the power to appoint will not enlarge the estate of the *cestui que trust* to a fee; and on the failure to appoint, the children or specified donees in remainder take by purchase from the donor, and not by way of limitation as heirs of the *cestui que trust*."³ But it is thought that a limitation to heirs on the failure to appoint unquestionably enlarges the life estate to a fee by union of estates.⁴ The Supreme Judicial Court of Massachusetts, in the case of *Hale v. Marsh*,⁵ say that where a gift is of a life estate, with a full power of disposition, both by deed and will, over the entire property, at the pleasure of the devisee, without limitation or restriction as to the time, mode, or purpose of the execution of the power, the life estate and unlimited power of disposition over the remainder coalesce and form an estate in fee, and that a devise over of what may remain is void, because inconsistent with the unlimited power of disposition given to the first taker.⁶

¹ *Stevens v. Winship*, 18 Mass. (1 Pick.) 318; s.c. 11 Am. Dec. 178.

See: *Warren v. Webb*, 68 Me. 133;

Larned v. Bridge, 34 Mass. (17 Pick.) 339.

Estate for life with limited power of disposal.—The distinction between such cases as this and those where a life estate is given with an unlimited power of disposal is clearly pointed out in *Hale v. Marsh*, 100 Mass. 468, wherein it is held that in the cases of the latter kind the life estate and the power of disposal coalesce in the form of a fee, so that the devise over is void, the whole estate vesting in the first taker. To the same effect is *Jones v. Bacon*, 68 Me. 34; s.c. 28 Am. Rep. 1.

² 60 Pa. St. 492; s.c. 100 Am. Dec. 586, 590.

³ See: *Girard Life Ins. & Trust Co. v. Chambers*, 46 Pa. St. 490; s.c. 86 Am. Dec. 513;

Smith v. Starr, 3 Whart. (Pa.) 62, 66; s.c. 31 Am. Dec. 493; *Anderson v. Dawson*, 15 Ves. 532; 4 Kent Com. (13th ed.) 663.

⁴ *Nice's Appeal*, 50 Pa. St. 143; *Physick's Appeal*, 50 Pa. St. 128; *Ralston v. Waln*, 44 Pa. St. 279.

⁵ 100 Mass. 468.

⁶ See: *Jones v. Bacon*, 68 Me. 34; s.c. 28 Am. Rep. 1;

Ramsdell v. Ramsdell, 21 Me. 288;

Cummings v. Shaw, 108 Mass. 159; *Dodge v. Moore*, 100 Mass. 335;

Gleason v. Fayerweather, 70 Mass. (4 Gray) 348, 351;

Harris v. Knapp, 38 Mass. (21 Pick.) 412;

SEC. 360. **Same—Same—When fee does not pass.**—Where an express estate for life is given by a will, and the power of disposition is afterward conferred, the devisee takes but a life estate, notwithstanding the naked and distinct power of disposition of the reversion.¹ The distinction between a gift for life, with the power of disposition superadded, and a gift to a person indefinitely, with a superadded power to dispose by deed or will, is perhaps slight; but that distinction is perfectly established, and in the latter case the property vests. Thus a gift to A, and to such person as he shall appoint, is absolute property in A, without an appointment; but if it is given to him for life, and after his death to such person as he shall appoint by will, he must make an appointment in order to entitle that other person to anything.²

SEC. 361. **Same—Same—Same—Reason for the rule.**—The reason for this rule is said to be that the express estate for life negatives the intention to give an absolute property, and converts these words into words of mere power, which, standing alone, would not have been construed to convey an interest.³ There is an exception to this rule,

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| <p>Larned <i>v.</i> Bridge, 34 Mass. (17 Pick.) 339;
 Stevens <i>v.</i> Winship, 18 Mass. (1 Pick.) 318; s.c. 11 Am. Dec. 178;
 Ide <i>v.</i> Ide, 5 Mass. 500;
 Brant <i>v.</i> Gelston, 2 John. Cas. (N. Y.) 384;
 Stroud <i>v.</i> Morrow, 7 Jones (N. C.) L. 463;
 Second Reform Pres. Church <i>v.</i> Disbrow, 52 Pa. St. 219.
 ¹ <i>Rubey v. Barnett</i>, 12 Mo. 3; s.c. 49 Am. Dec. 112.
 See: <i>Denson v. Mitchell</i>, 26 Ala. 360;
 Cook <i>v.</i> Walker, 15 Ga. 457, 462;
 Haralson <i>v.</i> Redd, 15 Ga. 148;
 Funk <i>v.</i> Eggleston, 92 Ill. 515;
 Fairman <i>v.</i> Beal, 14 Ill. 244;
 Benesch <i>v.</i> Clark, 49 Md. 497;
 French <i>v.</i> Hatch, 28 N. H. 331, 350;
 Jackson <i>v.</i> Robins, 16 John. (N. Y.) 588;
 Second Reformed Pres. Church <i>v.</i> Disbrow, 52 Pa. St. 219;
 Pulliam <i>v.</i> Byrd, 2 Strobb. (S. C.) Eq. 134;</p> | <p><i>Burwell v. Anderson</i>, 3 Leigh (Va.) 348, 356;
 <i>Brant v. Virginia Coal & Iron Co.</i>, 93 U. S. (3 Otto.) 326; bk. 23 L. ed. 927; s.c. 16 Am. L. Reg. 403;
 Anonymous, Cart. 232;
 Dighton <i>v.</i> Tomlinson, 1 Com. 194; s.c. <i>sub nom.</i> Tomlinson <i>v.</i> Dighton, 1 Pr. Wms. 149;
 <i>Liefe v. Salingstone</i>, 1 Mod. 189; s.c. 1 Freem. 149, 163;
 <i>Reid v. Shergold</i>, 10 Ves. 370;
 <i>Nannock v. Horton</i>, 7 Ves. 391;
 4 Kent Com. (13th ed.) 319;
 2 Story's Eq. Jur. (13th ed.) § 1393;
 1 Sugd. on Powers, 121.
 ² <i>Bradly v. Westcott</i>, 13 Ves. 445, 453; s.c. 9 Rev. Rep. 207;
 <i>Reid v. Shergold</i>, 10 Ves. 370.
 See: <i>Gilman v. Bell</i>, 99 Ill. 144, 150;
 Fairman <i>v.</i> Beal, 14 Ill. 244;
 Pulliam <i>v.</i> Byrd, 2 Strobb. (S. C.) Eq. 134, 142.
 ³ <i>Burwell v. Anderson</i>, 3 Leigh (Va.) 348, 357.
 See: <i>Denson v. Mitchell</i>, 26 Ala. 360.</p> |
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however, in all those cases where the general words in the devise, implying a life estate, if limited to such an estate, would manifestly defeat the intention of the testator, when under the rule heretofore referred to¹ the intention of the testator must be permitted to control and enlarge the estate to a fee.²

SEC. 362. **Same—Devise with limitation over—Contingent fee.**—The general rule respecting limitations over in case of failure to designate heirs, which has obtained in England since the case of *Pells v. Brown*,³ decided during the reign of King James I., in the year 1620, is that where an estate is devised by a person generally, without words of limitation, it is not enlarged to a fee-simple by the mere fact that it is a devise after a life estate;⁴ and if the devise over be contingent on the death of the devisee without heirs, or a specified line of heirs, with the limitation over to the collateral line of the devisee, such devise vests in the devisee a determinable fee-simple,⁵

¹ See: *Ante*, § 345.

² See: *Benesch v. Clark*, 49 Md. 497; *Burleigh v. Clough*, 52 N. H. 267, 274; s.c. 13 Am. Rep. 23; *Second Reformed Pres. Church v. Disbrow*, 52 Pa. St. 219; 4 Kent Com. (13th ed.) 319. *Cro. Jac.* 590.

Pells v. Brown "the magna charta of this branch of the law."—It is said in *Abbott v. The Essex Co.*, 59 U. S. (18 How.) 202; bk. 15 L. ed. 352, 355; s. c. 2 Curt. C. C. 126, that notwithstanding the expressions in *Plunket v. Homes*, Sid. 47, derogatory of the case of *Pells v. Brown*, it has always been considered "a leading case, and the foundation of this branch of the law." In *Porter v. Bradley*, 3 T. R. 143; s.c. 1 Rev. Rep. 675, where lands were devised to A and his heirs, and if he die leaving no issue behind him, then over, it was decided that the limitation over was good by way of executory devise; and Lord Kenyon acknowledges the case of *Pells v. Brown* to be "the foundation and magna charta of this branch of the law."

⁴ In *Wheaton v. Andress*, 23 Wend. (N. Y.) 452, Judge COWAN, in delivering his opinion, said: "No case holds that the introductory clause manifesting an intent to dispose of the entire estate of the testator, simply connected with the words freely to be enjoyed, etc., the whole will carry a fee. To do this where there are no words of express limitation, all the cases agree that the will should contain some provision in respect to the land, necessarily inconsistent with the estate being for life. Freely to be enjoyed, etc., may come much short of this." His honor pointed out that in *Denn ex d. Gaskin v. Gaskin*, Cowp. 657, and *Wright ex d. Shaw v. Russell*, Id. (cited by counsel), a disinheriting legacy had been given to the heir at law, and that the authority of the cases had been weakened by the opinions and comments of Lord ELLENBOROUGH and LE BLANC and DREURY, JJ., in *Goodright ex d. Drewry v. Barron*, 11 East 220.

⁵ See: *Post*, chapter IX., "Determinable Fees."

and not a fee-tail ;¹ and on the happening of the contingency on which the fee is to be determined, the estate passes over, not as a remainder, but by way of executory devise.² Under a general devise with remainder over, upon a limited contingency, as upon the devisee's dying under twenty-one years of age, the first devisee takes a fee-simple, for if the intent were to give only a life estate, with remainder over, there could be no reason for limiting to the death under age.³

SEC. 363. **Same—Same—Limitation over void for uncertainty—Fee in first taker.**—A limitation over in case the legatee die “without lawful issue” must be interpreted as one to take effect upon the death of the party, without leaving issue at the death, unless the contrary be

¹ *Morris v. Potter*, 10 R. I. 58.

² *Niles v. Gray*, 12 Ohio St. 320, 330.
See : *Jordan v. Roache*, 32 Miss. 481 ;

Abbott v. The Essex Co., 59 U. S. (18 How.) 202 ; bk. 15 L. ed. 352 ; s.c. 2 Curt. C. C. 126 ;

Doxey d. King v. Frost, 3 Barn. & Ald. 546 ; s.c. 5 Eng. C. L. 316 ;

Ex parte Davies, 21 L. J. (N. S.) Ch. 135 ; s.c. 9 Eng. L. & Eq. 88.

Estate limited to a man and his heirs — Construction of devise.—

It is said by KENYON, C. J., in *Porter v. Bradley*, 3 T. R. 143 ; s.c. 1 Rev. Rep. 675, that the general rules respecting limitations of this sort have been for many years well settled. The first question that arises in this case is, whether this is an estate-tail, or in fee ? The first part of the devise to Philip, *prima facie*, carries a fee, for it is to him, his heirs, and assigns forever ; but it is clear that these words may be restrained by subsequent ones so as to carry only an estate-tail. And a long string of cases may be cited, in order to show that where an estate is limited to a man and his heirs forever, and if he die without leaving heirs, then to his brother, or to any person who may be his heir ; those words shall not have their full legal operation, but shall be restrained to heirs of a

particular kind, namely, heirs of the body. If the subsequent part of this devise had been, “and in case he shall die without issue, then over,” it would have given to Philip an estate-tail, which he might have barred by the recovery. And so it would, under the construction of the words “die without issue,” then prevalent in England, but since changed by act of Parliament there, and never adopted here.

But here the words were, “but in case he shall happen to die, leaving no issue behind him ;” which makes a material difference, and brings it within the case of *Pells v. Brown*, which is the foundation and, as it were, the *magna charta* of this branch of the law. This question arose soon after executory devises were first taken notice of, which was in the reign of Queen Elizabeth. And that doctrine has never been since doubted by the court of law.

³ *Williams v. Dickerson*, 2 Root (Conn.) 191 ; s.c. 1 Am. Dec. 66 ; *Lippett v. Hopkins*, 1 Gall. C. C. 454, 455.

See : *Gray v. Winkler*, 4 Jones (N. C.) Eq. 308 ;

Carter v. Reddish, 32 Ohio St. 1 ; *Cassell v. Cooke*, 8 Serg. & R. (Pa.) 268 ; s.c. 11 Am. Dec. 610 ;

Scanlan v. Porter, 1 Bail. (S. C.) L. 427.

plainly declared in the will.¹ Such limitation over upon the indefinite failure of issue of the first taker is void as an executory devise, because too remote,² unless there is

¹ *Spruill v. Moore*, 5 Ired. (N. C.)

Eq. 284; s.c. 49 Am. Dec. 428.

See: *Williams v. Dickerson*, 2 Root (Conn.) 191; s.c. 1 Am. Dec. 66.

Dying without issue is to be understood to relate to the time of the devisee's death, unless a different intent appears.

Williams v. Dickerson, 2 Root (Conn.) 191; s.c. 1 Am. Dec. 66;

Spruill v. Moore, 5 Ired. (N. C.) Eq. 284; s.c. 49 Am. Dec. 478.

Distinction between devise of lands and of personalty.—In the case of *Downing v. Wherrin*, 19 N. H. 9; s.c. 49 Am. Dec. 139, 144–145, it is said that a distinction has been made between a devise of lands and a devise of personalty upon a person dying without issue. In the former case the words are always taken to mean whenever there is a failure of issue, and the limitation over is void. In the latter case they are construed in the ordinary sense, and mean dying without leaving issue at the time of the death. This distinction was first taken in *Forth v. Chapman*, 1 Pr. Wms. 663, and the decision has given rise to much litigation. Its soundness has been affirmed and denied by many eminent lawyers, some adhering to it, and others holding that there is no difference between a limitation of real and personal property. Among those who do not recognize the distinction are Lord LOUGHBOROUGH, in *Chandless v. Price*, 3 Ves. 99; Lord ALVANLY, in *Rawlins v. Goldfrap*, 5 Ves. 440; Lord KENYON, in *Porter v. Bradley*, 3 T. R. 146; s.c. 1 Rev. Rep. 675, and in *Roe v. Jeffery*, 7 T. R. 595; Sir WM. GRANT, in *Barlow v. Salter*, 17 Ves. 479, and in the case of *Dansey v. Griffiths*, 4 Maul. & Sel. 62. On the other side are *Denn v. Shenton*, 1 Cowp. 410, and *Crooke v. De Vandes*, 9 Ves. 197, and *Doe d. Cadogan*

v. Ewart, 7 Ad. & El. 636; s.c. 34 Eng. C. L. 337.

² *Bell v. Scammon*, 15 N. H. 381; s.c. 41 Am. Dec. 706.

See: *Proprietors of Battle Square Church v. Grant*, 69 Mass. (3 Gray) 142, 157; s.c. 63 Am. Dec. 725, 736;

Ide v. Ide, 5 Mass. 500;

Downing v. Wherrin, 19 N. H. 9; s.c. 49 Am. Dec. 139;

Hall v. Chaffee, 14 N. H. 215, 220;

Tator v. Tator, 4 Barb. (N. Y.) 431;

Ferris v. Gibson, 4 Edw. Ch. (N. Y.) 707;

Conklin v. Conklin, 3 Sandf. Ch. (N. Y.) 64;

Miller v. Macomb, 26 Wend. (N. Y.) 229;

Paterson v. Ellis, 11 Wend. (N. Y.) 259;

Shepard v. Shepard, 2 Rich. (S. C.) Eq. 142; s.c. 46 Am. Dec. 41;

Ring v. Hardwick, 2 Beav. 352;

Tenny v. Agar, 12 East 253;

Doe v. Ellis, 9 East 382;

Kampf v. Jones, 2 Keen 756;

Massey v. Hudson, 2 Meriv. 135;

Nicholls v. Skinner, Prec. Ch. 528;

Busby v. Saulter, 2 Prest. Abs. 164;

Attorney-General v. Gill, 2 Pr. Wms. 369;

Nottingham v. Jennings, 1 Pr. Wms. 23, 25;

Purefoy v. Rogers, 2 Saund. 388a, 388b;

Purefoy v. Rogers, 2 Saund. 388;

Romilly v. James, 6 Taunt. 263; s.c. 1 Eng. C. L. 606;

Doe v. Morgan, 3 T. R. 765;

1 Fearne Cont. Rem. 467;

1 Powell on Dev. 178, 179.

Devise over—Includes real estate as well as personalty.—In the case of *Jackson v. Staats*, 11 John. (N. Y.) 337; s.c. 6 Am. Dec. 376, where, after sundry devises in fee and bequests to his children, exhausting the estate, the testator added, “if any one or more happens to die without heirs, then his or their parts or shares shall be equally

something in the will to restrict the term "death without issue" to lives in being and twenty-one years thereafter;¹ but if the limitation is made to take effect at the death of the devisee, in case there is no issue living at that time, it is a good executory devise.² Yet a limitation by way of executory devise, which may possibly not take effect within a term within the life or lives in being at the death of the testator and twenty-one years thereafter, or in case of a child *en ventre sa mere* twenty-one years and nine months, is void as being too remote, and tending to create perpetuities.³

SEC. 364. **Same—Same—Same—Fee in first taker.**—Where a limitation over is void for remoteness and uncertainty, it vests in the first taker an absolute fee,⁴ even though

divided among the rest of the children," it was held that the devise over applied to real as well as personal property, and was not confined to the bequests of the personal estate, immediately preceding this clause. It was also held that the devise over was good as an executory devise, and carried a fee, this limitation over necessarily referring to the estate before devised.

Contingent limitation—Remoteness—Virginia doctrine.—In *Shultz v. Shultz*, 10 Gratt. (Va.) 358; s.c. 60 Am. Dec. 335, it is said that a contingent limitation in a will made to depend upon a person dying unmarried and without children, is not too remote under the Virginia statute, and cannot be regarded as a contingent limitation, made to depend on an indefinite failure of issue of children, but must be regarded as confined to the time of the death of the person or the statutory period of ten months thereafter.

¹ *Presley v. Davis*, 7 Rich. (S. C.) Eq. 105; s.c. 62 Am. Dec. 396. See: *Bell v. Scammon*, 15 N. H. 381; s.c. 41 Am. Dec. 706.

² *Downing v. Wherrin*, 19 N. H. 9; s.c. 49 Am. Dec. 139; *Bell v. Scammon*, 15 N. H. 381; s.c. 41 Am. Dec. 706;

Shepard v. Shepard, 2 Rich. (S. C.) Eq. 142; s.c. 46 Am. Dec. 41.

³ *Proprietors of Battle Square Church v. Grant*, 69 Mass. (3 Gray) 142; s.c. 63 Am. Dec. 725. See: *Locke v. Barbour*, 62 Ind. 577, 586; *Lovering v. Worthington*, 106 Mass. 86, 88; *Fosdick v. Fosdick*, 88 Mass. (6 Allen) 41, 43; *Smith v. Harrington*, 86 Mass. (4 Allen) 566, 567; *Sears v. Russell*, 74 Mass. (8 Gray) 86, 94; *Nightingale v. Burrell*, 32 Mass. (15 Pick.) 111; *Den ex d. Trumbull v. Gibbons*, 22 N. J. L. (2 Zab.) 117; s.c. 51 Am. Dec. 253; *Shepard v. Shepard*, 2 Rich. (S. C.) Eq. 142; s.c. 46 Am. Dec. 41; *Cadell v. Palmer*, 1 Cl. & Find. 372, 421-423; 4 Kent Com. (13th ed.) 267.

⁴ *Battle Square Church v. Grant*, 69 Mass. (3 Gray) 142; s.c. 63 Am. Dec. 725. See: *Tator v. Tator*, 4 Barb. (N. Y.) 431; *Ferris v. Gibson*, 4 Edw. Ch. (N. Y.) 707; *Conklin v. Conklin*, 3 Sandf. Ch. (N. Y.) 64; *Miller v. Macomb*, 26 Wend. (N. Y.) 229; *Ring v. Hardwick*, 2 Beav. 352;

such a construction of the will defeats the manifest intention of the testator ; for no principle is better settled than that the intention of the testator, however clear, must not be permitted to govern where it cannot be carried out without a violation of the well-known rules of law.¹

SEC. 365. **Same — Devise to a person and his children.**—At common law, where lands were devised to a person and his children, and he had no children at the time of the devise, the devisee took an estate-tail ;² if he had chil-

Kampf v. Jones, 2 Keen 756 ;
Busby v. Saulter, 2 Prest. Abs.
164 ;

Attorney-General v. Gill, 2 Pr.
Wms. 369 ;

Nottingham v. Jennings, 1 Pr.
Wms. 23, 25 ;

Purefoy v. Rogers, 2 Saund. 388a,
388b.

¹ Seers v. Russell, 74 Mass. (8 Gray)
94, 97 ;

Battle Square Church v. Grant,
69 Mass. (3 Gray) 142 ; s.c. 63
Am. Dec. 725, 737.

² *Coursey v. Davis*, 46 Pa. St. 25 ;
s.c. 84 Am. Dec. 519 ;

Broadhurst v. Morris, 2 Barn. &
Ad. 1 ; s.c. 20 Eng. C. L. 1, over-
ruling *Jeffrey v. Honeywood*, 4
Madd. 398 ; affirmed *sub nom.*
Byng v. Byng, 31 L. J. Ch. 470 ;

Wild's Case, 6 Co. 16b.

See : Carr v. Estill, 16 B. Mon.
(Ky.) 309.

Jeffrey v. Honeywood overruled.—

Mr. Jarman says, in his work on wills, vol. 2, page 271, that “the case of *Jeffrey v. Honeywood*, 4 Madd. 398, seems to be inconsistent with, and must therefore be construed as overruled by, the case of *Broadhurst v. Morris*, 2 Barn. & Ald. 1.” And in the case of *Webb v. Byng*, 2 Kay & J. 669, Vice-Chancellor WOOD says that the contention in that case was, “that the devise was to the mother for life with remainder to her children as joint tenants in fee. The only authority for such a construction is the case of *Jeffrey v. Honeywood*, 4 Madd. 398, and even that has been overruled by *Broadhurst v. Morris*, 2 Barn. & Ald. 1.”

Same — Distinguished.—In *Coursey v. Davis*, 46 Pa. St. 25 ; s.c.

84 Am. Rep. 519, 523, it is said that “it is clear that *Webb v. Byng*, 2 Kay & J. 673, was decided upon the intention of the testatrix, which required the devise to be held to create an estate-tail, and it in no manner conflicts with the case of *Jeffrey v. Honeywood*, 4 Madd. 398 ; nor does *Broadhurst v. Morris*, 2 Barn. & Adol. 1, which was a case where the father was not married until after the death of the testator.” In arguing this case, Cowling said : “If the devise stopped at the words ‘lawfully begotten forever,’ the case would be governed by the rule in *Wild's Case*, 6 Coke 16b, viz., that where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate-tail ;” and so little was it supposed to interfere with *Jeffrey v. Honeywood*, 4 Madd. 398, that it was neither cited nor referred to by either Mr. Cowling or Mr. Preston, both gentlemen of great learning and research. In *Bowen v. Scowcroft*, 2 Younge & C. 640, Mr. Campbell, in argument (p. 656), said : “There is a total distinction between this and *Wild's Case*, 6 Coke 16b. In that case the devise was to A and his children ; in the present the words are, ‘to the children and their heirs.’ This distinction was taken in *Ives v. Legge*, cited in 1 Fearn on Rem. 377 ; and the principle was acted upon in *Jeffrey v. Honeywood*, 4 Madd. 398.” Baron ALDERSON (p. 661) adopted this construction, and said : “Lastly, as to

dren at the time, he took a life estate and the children were vested with the fee in remainder. The effect of such a bequest in this country depends entirely upon the local statutory regulations. In the absence of any statutory regulations, the rules of the common law will apply. It has been held in Georgia that a bequest in that state to a woman, and to the children of her body, creates a joint estate in them, and not an estate-tail.¹ In Kentucky it has been said that on a devise to a woman "and her children," she being unmarried and having no children at the time, where she afterwards marries and has children, confers upon her, under the statutes of that state, an estate for life with remainder to her children, and not an estate-tail, as in England.² In New York, a devise to one for and during his natural life, and to the children of his body, lawfully begotten, to have and to hold unto the said devisee, for and during his natural life, and after his decease to the heirs of his body lawfully begotten, and to their heirs and assigns forever, gives a life-estate to the devisee with a remainder in fee to his children.³

SEC. 366. **Same—Same—What children included.**—A devise to one for life, and then to his children, will include all his children up to the time of his decease, whether born after the decease of the testator or not. Whenever the distribution among children is postponed to any particular period by a will, all the children will be included who are in existence when such period arrives.⁴

Lucy Bowen's share. It was contended as to this that she took an estate-tail, having no children at the time of the testator's death. But I think that is not so, and that it is distinguishable from Wild's Case, 6 Co. 16b, on the same grounds as were taken by Sir John Leach, in *Jeffrey v. Honeywood*, 4 Madd. 398. Indeed, on this point of the case, *Jeffrey v. Honeywood* seems precisely in point."

¹ *Hoyle v. Jones*, 35 Ga. 40; s.c. 89 Am. Dec. 273.

² *Carr v. Estill*, 16 B. Mon. (Ky.) 309; s.c. 63 Am. Dec. 548.

³ *Rogers v. Rogers*, 3 Wend. (N. Y.) 503; s.c. 20 Am. Dec. 716.

⁴ *Thompson v. Garwood*, 3 Whart. (Pa.) 287; s.c. 31 Am. Dec. 502. The court in this case say that when the devise or gift to the children is general, and not limited to a particular period, it is then confined to the death of the testator.

Northey v. Burbage, Prec. Ch. 470;

Heathe v. Heathe, 2 Atk. 121; *Horsley v. Chaloner*, 2 Ves. Sr. 83; *Hodges v. Isaac*, Amb. 348.

But when such devise or gift is to one for life, or when the distribution is postponed to a fut-

SEC. 367. **Same—Residuary clause carries fee when.**—The residuary clause in a will must be given such a construction as will effectuate the intention of the testator,¹ and a devise in general terms in this clause will carry the fee to real estate.² The absence of a residuary clause in a will in which it was manifestly the intention of the testator to dispose of his whole estate has been allowed the effect of enlarging the devise into an estate in fee.³

ure time, then, children born during the life, or before the time of distribution, are let in. *Harding v. Glynn*, 1 Atk. 468, 470; *Graves v. Boyle*, 1 Atk. 509; *Haughton v. Harrison*, 2 Atk. 329; *Ellison v. Airey*, 1 Ves. Sr. 111.

¹ See: *Harper v. Blean*, 3 Watts (Pa.) 471; s.c. 27 Am. Dec. 267.

² See: *Harper v. Blean*, 3 Watts (Pa.) 471; s.c. 27 Am. Dec. 267;

Ridout v. Paine, 3 Atk. 486, 488;

Terrel v. Page, 1 Ch. Cas. 262;

Hogan v. Jackson, 1 Cowp. 299;

Chester v. Chester, 3 Pr. Wms. 56;

Tilley v. Simpson, 2 T. R. 659; s.c. 1 Rev. Rep. 577;

Grayson v. Atkinson, 1 Wils. 333.

This rule is not restricted to wills alone, having been applied to deeds in *McWilliams v. Martin*, 12 Serg. & R. (Pa.) 269; s.c. 14 Am. Dec. 688.

³ *Shinn v. Holmes*, 25 Pa. St. 142; *Doe ex d. Harrington v. Dill*, 1

Houst. (Del.) 398.

CHAPTER VII.

CREATION OF FEE-SIMPLE BY DEVISE—*continued*.

- SEC. 368. Enlargement of devise.
- SEC. 369. Same—When estate not enlarged.
- SEC. 370. Same—Intent of testator—Construction by comparison.
- SEC. 371. Same—Same—Reference to other devises in will.
- SEC. 372. Same—Introductory clause.
- SEC. 373. Same—Same—Words in introductory clause enlarging estate to fee.
- SEC. 374. Same—Conclusion of will—Intention of testator declared by.
- SEC. 375. Same—Where fee necessary to carry out intention of testator.
- SEC. 376. Same—Estates in trust.
- SEC. 377. Same—Use devisee is to make of lands.
- SEC. 378. Same—By implication—Control over lands.
- SEC. 379. Same—Same—Exceptions to the rule.
- SEC. 380. Same—Charge on devisee.
- SEC. 381. Same—Same—Nature of charge on devisee.
- SEC. 382. Same—Same—Reason for the rule.
- SEC. 383. Same—Same—Failure or refusal to perform
- SEC. 384. Same—Where charge on the estate.
- SEC. 385. Cutting down fee.
- SEC. 386. Same—Fee not cut down when.
- SEC. 387. Same—Doctrine of the American courts—*Jackson v. Bull*.
- SEC. 388. Same—Same—Doctrine of *Smith v. Bell*.
- SEC. 389. Statutory regulations.
- SEC. 390. Construction of devises since the statutes.

SECTION 368. **Enlargement of devise.**—In the construction of a will the intention of the testator is the object of inquiry, and must govern where not contrary to the established rules of law,¹ and this intention is not to be

¹ *Wright v. Hicks*, 12 Ga. 155; s.c. 56 Am. Dec. 451;
Wynne v. Wynne, 23 Miss. 251;
 s.c. 57 Am. Dec. 139;
Armorer v. Case, 9 La. An. 288;
 s.c. 61 Am. Dec. 209;
Proprietors of Battle Square

Church v. Grant, 69 Mass. (3 Gray) 142; s.c. 63 Am. Dec. 725;
Montgomery v. Millikin, 5 Smed. & M. (13 Miss.) 151; s.c. 43 Am. Dec. 507;
German v. German, 27 Pa. St. 116; s.c. 67 Am. Dec. 451;

defeated simply because the testator fails to clothe his ideas in technical language.¹ A devise without words of limitation may be enlarged to a fee-simple by the use of words which have been held to be equivalent to a devise in fee, which we have heretofore referred to specifically.² The rules of the common law which govern in respect to the quantity of interest conveyed by a will do not apply in these states where by statutory provision an estate in lands, created by will, is deemed to be an estate in fee-simple, unless a less estate is limited by express words.³

SEC. 369. **Same—When estate not enlarged.**—We have already seen⁴ that a limitation to heirs on failure to appoint has the effect of enlarging a life estate into a fee-simple;⁵ but where a life estate only is given, followed by a general power of appointment; and on failure to appoint, the children, or specified donees in remainder, take by purchase, and not by way of limitation as heirs of the *cestui que trust*;⁶ and where an express estate for

Baskin's Appeal, 3 Pa. St. 304;
s.c. 45 Am. Dec. 604;

Stoner's Appeal, 2 Pa. St. 428;
s.c. 45 Am. Dec. 608.

See: *Ante*, § 345.

¹ Bell Co. v. Alexander, 22 Tex.
350; s.c. 73 Am. Dec. 268.

Inartistic language—"Give and because."—In the case of Johnson v. Johnson's Widow, 1 Munf. (Va.) 549, the will of the testator was expressed in most inartistic language, reading "I give and because . . . And 120 acres, . . . one cow, one calf," etc.; and the court held that the testator evidently being an illiterate person and using the same words to designate the desire to bequeath his real as well as his personal property, that his evident intention was to give an absolute interest in both, and that a fee-simple would be taken in the land.

Same—"Land in the county I am buried in."—In the case of Bell Co. v. Alexander, 22 Tex. 350; s.c. 73 Am. Dec. 268, it was held that in a will, by employing the words "I wish the

county in which I die and am buried to have and enjoy, for the benefit of public schools, two-thirds of the land in the county I am buried in," taken in connection with the words "my land" and "the land I own," used in other parts of the will, show an intention on the part of the testator to devise an estate in lands, and there being no words limiting its quantity, will be held to convey an estate in fee-simple.

² See: *Ante*, §§ 351-353.

³ Bell Co. v. Alexander, 22 Tex. 350;
s.c. 73 Am. Dec. 268.

See: Schriver v. Meyer, 19 Pa.
St. 87; s.c. 57 Am. Dec. 634;
1 Am. L. Reg. 227;

McClure v. Douthitt, 3 Pa. St. 446.

⁴ See: *Ante*, § 359.

⁵ See: Ralston v. Waln, 44 Pa. St.
279;

Nice's Appeal, 50 Pa. St. 143;

Physick's Appeal, 50 Pa. St. 128.

⁶ Dodson v. Ball, 60 Pa. St. 492;
s.c. 100 Am. Dec. 586.

See: Gerard Life Ins. & Trust
Co. v. Chambers, 46 Pa. St.
490; s.c. 86 Am. Dec. 513;

life is given in trust and the remainder is not to heirs or issue generally, a power of appointment will not enlarge the estate to a fee.¹

SEC. 370. Same — Intention of testator — Construction by comparison.—It is a well-established rule of law that devises and legacies in a will may receive a character by construction and comparison with other legacies and devises in the same will, different from the literal and direct effect of the words made use of in such devise;² and this is true because the sole duty of the court, in giving a construction, is to ascertain the real intent and meaning of the testator;³ which can better be gathered by adverting to the whole scope of the provisions made by him for the objects of his bounty, than by confining attention to one isolated paragraph, probably drawn up without a knowledge of technical words, or without recollecting the advantage of using them.⁴ Where a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mold the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared.⁵ Thus when a devise made to a son without words of inheritance, and a legacy is left to the children of a deceased son, “which (legacy) is his proportion of the estate,” and from the preamble of the will there is a manifest intention on the part of the testator to make a disposal of the entire estate, the devise to the son will be construed

Smith v. Starr, 3 Whart. (Pa.) 62,
66; s.c. 31 Am. Dec. 498;

Anderson v. Dawson, 15 Ves.
532;

⁴ Kent Com. (13th ed.) 663.

¹ See: Springer v. Arundel, 64 Pa
St. 223;

Dodson v. Ball, 60 Pa. St. 492;
s.c. 100 Am. Dec. 586;

Williams's Appeal, 83 Pa. St. 388.

² Cook v. Holmes, 11 Mass. 528,
531;

Hawley v. Northampton, 8 Mass.
334; s.c. 5 Am. Dec. 66.

³ See: Phelps v. Phelps, 143 Mass.
570, 574; s.c. 10 N. E. Rep.

452;

Metcalf v. Farmingham Parish,
128 Mass. 370;

Cook v. Holmes, 11 Mass. 528,
531.

⁴ Cook v. Holmes, 11 Mass. 528,
531.

⁵ Phelps v. Phelps, 143 Mass. 570,
574;

Metcalf v. Farmingham Parish,
128 Mass. 370, 374.

to be a fee-simple, because otherwise the children of the deceased son would receive more than their father's proportion, which was all the testator intended to give them, as such intention is discovered from the will.¹

SEC. 371. Same—Same—Reference to other devises in will.—In a case where the devise under consideration refers to another devise in the same will, and expresses an intent that the devisees should be equally benefited, if the legal construction of the other devise carries a fee, as in the case of *Cook v. Holmes*,² the law will supply the omitted words of inheritance.³ The Supreme Judicial Court of Massachusetts say, in the case of *Baker v. Bridge*,⁴ that, “by the general terms of this will, all the property given to each son or daughter and their children, taken together, was to be estimated in the division among the four branches. For this purpose the life estate to Nathan Bridge, together with a remainder to his children, being estimated and charged in the division at the value of the whole estate in fee, it follows conclusively that it was the intent of the testator that such remainder to the children should be a remainder in fee.”⁵

SEC. 372. Same—Introductory clause.—Where the intention of the testator is ambiguous and does not manifest what that purpose was as to the intent regarding the extent of the estate in a devise, the introductory words or preamble are to be considered in order to ascertain the intention of the testator.⁶ If this clause of itself be sufficient to give a fee, the intention expressed therein is always carried down to the devising clauses to show the interest, and may have the effect of enlarging the estate

¹ See: *Butler v. Little*, 3 Me. (3 Greenl.) 239;

Clayton v. Clayton, 3 Binn. (Pa.) 476;

Hall v. Dickinson, 1 Grant Cas. (Pa.) 240.

² 11 Mass. 528.

³ *Farrar v. Ayres*, 22 Mass. (5 Pick.) 404, 408.

See: *Butler v. Little*, 3 Me. (3 Greenl.) 239;

Baker v. Bridge, 29 Mass. (12 Pick.) 33.

⁴ 29 Mass. (12 Pick.) 27, 33.

⁵ If this view of the apportionment and valuation be correct, the case is brought clearly within the authority of *Cook v. Holmes*, 11 Mass. 528, which was recognized in the late case of *Farrar v. Ayres*, 22 Mass. (5 Pick.) 404.

⁶ *Schrivver v. Meyer*, 19 Pa. St. 87; s.c. 57 Am. Dec. 634; 1 Am. L. Reg. 227.

to a fee.¹ The introductory clause, where one is inserted in a will, does not so far attach itself to a subsequent devising clause as *per se* to enlarge the latter to a fee, where the words would not ordinarily import it.² The most that can be said is, that where the words of a devise admit of passing a greater interest than for life, courts will lay hold of the introductory clause, to assist them in ascertaining the intention of the testator.³ The intention

¹ *Cassell v. Cooke*, 8 Serg. & R. (Pa.) 286; s.c. 11 Am. Dec. 610.

See: *Franklin v. Harter*, 7 Blackf. (Ind.) 488;

Butler v. Little, 3 Me. (3 Greenl.) 239;

Winchester v. Tilghman, 1 Harr. & McH. (Md.) 452;

Fogg v. Clark, 1 N. H. 163;

Jackson v. Merrill, 6 John. (N. Y.) 185, 191; s.c. 5 Am. Dec. 213;

Fox v. Phelps, 17 Wend. (N. Y.) 393; s.c. 20 Id. 437;

Schrivver v. Meyer, 19 Pa. St. 87; s.c. 57 Am. Dec. 634; 1 Am. L. Reg. 227;

McCullough v. Gilmore, 11 Pa. St. 370;

Johnson v. Morton, 10 Pa. St. 245;

Harden v. Hays, 9 Pa. St. 151;

Peppard v. Deal, 9 Pa. St. 140;

Miller v. Douthitt, 3 Pa. St. 443;

French v. McIlhenny, 2 Binn. (Pa.) 13;

Campbell v. Carson, 12 Serg. & R. (Pa.) 54;

Doughty v. Browne, 4 Yeates (Pa.) 179;

Caldwell v. Ferguson, 2 Yeates (Pa.) 250, 280;

Watson v. Powell, 3 Call (Va.) 265, 306;

Wyatt v. Sadler's Heirs, 2 Munf. (Va.) 537;

Kennon v. McRoberts, 1 Wash. (Va.) 96;

Busby v. Busby, 1 U. S. (1 Dal.) 226; bk. 1 L. ed. 111;

Frogmorton v. Holday, 3 Burr. 1, 618; s.c. 2 W. Bl. 889;

Denn v. Gaskin, 1 Cowp. 660;

Loveacres v. Blight, 1 Cowp. 532.

Introductory clause—Judge Cowen's comments.—In speaking of the introductory clause, manifesting an intention to dispose of the entire estate of the testator, Judge COWEN says

in this case that “no case holds that simply connected with the words freely to be enjoyed, etc., the whole will carry a fee. To do this where there are no words of express limitation, all the cases agree that the will should contain some provision in respect to the land, necessarily inconsistent with the estate being for life. Freely to be enjoyed, etc., may come much short of this.” His honor pointed out that in *Denn ex d. Gaskin v. Gaskin*, Cowp. 657, and *Wright ex d. Shaw v. Russell*, Cowp. 660, a disinheriting legacy had been given to the heir at law, and that the authority of the cases had been weakened by the opinions and comments of Lord ELLENBOROUGH and LE BLANC and DREURY, JJ., in *Goodright ex d. Drewry v. Barron*, 11 East 220.

² Such a doctrine would be repugnant to the modern as well as ancient authorities.

See: *Wright v. Denn*, 23 U. S. (10 Wheat.) 204, 228; bk. 6 L. ed. 303, 310;

Merson v. Blackmore, 2 Atk. 341;

Denn v. Gaskin, 2 Cowp. 660;

Doe v. Allen, 8 Durnf. & E. 497;

Doe v. Wright, 8 Durnf. & E. 64;

Right v. Sidebotham, 2 Dougl. 759;

Frogmorton v. Wright, 2 W. Bl. 889; s.c. 3 Burr. 618.

³ *Wright v. Denn ex d. Page*, 23 U. S. (10 Wheat.) 204, 228, 233; bk. 6 L. ed. 303, 310, 319.

Introductory clause—When resorted to.—It is said by Chancellor DESSAUSURE, in *Waring v. Middleton*, 3 Des. (S. C.) Eq. 249, in speaking of the introductory clause that “one of the

to dispose of the entire estate being shown in the introductory clause, it will determine the court to decide an estate to be enlarged to a fee, in a case where there exists in the devise expressions which, taken in connection with the words in such introductory clause, tend to show an intent on the part of the testator to devise a fee, but which, taken by themselves, would not be considered as showing with sufficient clearness an intention to give such an estate. Particularly is this the case where, if the doubtful devise were construed as giving a life estate only, the testator would have died intestate as to part of his property.¹

SEC. 373. Same—Same—Words in introductory clause enlarging estate to fee.—Where there are no words of limitation in the instrument, courts resort to other parts of the will in order to ascertain from them the intention of the testator, and the fee is frequently held to be conveyed by implication ; but this is done only to supply defects of expression.² Among those words or phrases which, when

scales must have been inclining downward, or no use can effectively be made of it." And in the case of *Steele v. Thompson*, 14 Serg. & R. (Pa.) 84, Chief Justice TILGHMAN says regarding introductory clauses : "There have been various opinions concerning the inferences which may be drawn from the introduction of a will, where it expresses an intent to dispose of the whole estate. In connection with other circumstances, such an introduction may be worthy of consideration, but the better opinion seems to be, that there is not much in it, because it is generally considered by the drawer of the will as matter of form, and put down before he begins to express the will of the testator ; and because it cannot be doubted that most men, when they make their wills, do intend to dispose of their whole estate, whether they say so or not."

Steele v. Thompson criticised.—The latter case is criticised in *Schrivver v. Meyer*, 19 Pa. St. 87 ; s.c. 57 Am. Dec. 634 ; 1

Am. L. Reg. 227, in which it is said that "the case of *Steele v. Thompson* is an exceptional case, in opposition to prior ones, attempting to overrule one of them."

¹ *Beall v. Holmes*, 6 Harr. & J. (Md.) 205, 210 ;
Butler v. Little, 3 Me. (3 Greenl.) 239 ;
Harvey v. Olmsted, 1 N. Y. 483 ; s.c. 1 Barb. (N. Y.) 102 ;
Van Derzee v. Van Derzee, 36 N. Y. 231 ; s.c. 30 Barb. (N. Y.) 331 ; affirming *Jackson v. Harris*, 8 John. (N. Y.) 141 ;
Hogan v. Andrews, 23 Wend. (N. Y.) 452 ;
Barheydt v. Barheydt, 20 Wend. (N. Y.) 576 ;
Fox v. Phelps, 17 Wend. (N. Y.) 393 ;
Rupp v. Eberly, 79 Pa. St. 141 ;
McIntyre v. Ramsey, 23 Pa. St. 317 ;
Cassell v. Cooke, 8 Serg. & R. (Pa.) 268 ; s.c. 11 Am. Dec. 610 ;
Lippett v. Hopkins, 1 Gall. C. C. 454, 455 ;
Lessee of Ferguson v. Zepp, 4 Wash. C. C. 645.

² *Bell v. Scammon*, 15 N. H. 381 ; s.c. 41 Am. Dec. 706, 708.

used in the introductory clause or preamble of a will, in connection with words in doubtful devising clauses, have been held to manifest an intention to dispose of the testator's entire estate, and have been construed to enlarge the estate given to the devisee into a fee-simple, are the following: "all my temporary estate;"¹ "all my worldly substance and property shall be disposed of in the following manner;"² "as for such estate . . . I give the same in the following manner;"³ "as to such worldly estate wherewith it hath pleased God to bless me in this life, I give and dispose of the same in the following manner;"⁴ "as to my worldly estate,⁵ I dispose of it as follows;"⁶

See: *Stevens v. Winthrop*, 18 Mass. (1 Pick.) 326; s.c. Am. Dec. 178;

Lithgow v. Kavenagh, 9 Mass. 175;

Tanner v. Livingston, 12 Wend. (N. Y.) 83, 95;

Doe v. Fyldes, Cowp. 841.

¹ *Watson v. Powell*, 3 Call (Va.) 265, 306.

² *McCullough v. Gilmore*, 11 Pa. St. 370.

See: *Shinn v. Holmes*, 25 Pa. St. 144;

Wood v. Hills, 19 Pa. St. 515;

Hall v. Dickinson, 1 Grant Cas. (Pa.) 241; s.c. 2 Phila. (Pa.) 123;

Smith v. Schriver, 3 Wall. Jr. C. C. 219, 226.

Carrying words down to corpus.—

The court say in the case of *McCullough v. Gilmore*, 11 Pa. St. 370, that "these words, and the like of them, are generally carried down into the corpus of the will to show that the testator meant to dispose of his whole interest and in a particular devise, unless words are used which plainly indicate an intent to limit."

See: *Schrive v. Meyer*, 19 Pa. St. 87; s.c. 57 Am. Dec. 634, 637; 1 Am. L. Reg. 227, 232.

³ *French v. McIlhenny*, 2 Binn. (Pa.) 13.

See: *Johnson v. Morton*, 10 Pa. St. 245;

Campbell v. Carson, 12 Serg. & R. (Pa.) 54;

Cassell v. Cooke, 8 Serg. & R. (Pa.) 289; s.c. 11 Am. Dec. 610.

⁴ *Schrive v. Meyer*, 19 Pa. St. 87; s.c. 57 Am. Dec. 634; 1 Am. L. Reg. 227.

Peppard v. Deal, 9 Pa. St. 140.

"As to my worldly estate."—In *Peppard v. Deal*, *supra*, in speaking of the devise of a house and the words "as to my worldly estate," the court say: "The language in the introduction is carried down to the devising clause, to explain the intent." In *Harden v. Hays*, 9 Pa. St. 151, the court say: "It is very evident, from the introductory clause, that the testator had no intention to die intestate, but that in this case, as in almost all others, he supposed he was devising his whole estate." Where a testator proposed to make a will "as touching such worldly estate" and then devised to his wife all his lands by her "freely to be possessed and enjoyed," the court held that she took his life estate only.

Wheaton v. Address, 23 Wend. (N. Y.) 452.

⁶ *McClure v. Douthitt*, 3 Pa. St. 446.

In this case the court say "that we should have done at first in regard to words of inheritance what our Legislature has done at last by declaring every devise to be a fee which is not specially to be restricted."

Words in preamble — Brought down to show intent.—In *Miller v. Lynn*, 7 Pa. St. 443, the court, in speaking of similar words, say: "The

"estate;"¹ "my estate;"² "my worldly affairs;"³ "my worldly estate;"⁴ "temporal case;"⁵ "touching my worldly effects, real and personal, I dispose thereof in the following manner;"⁶ "touching such worldly estate, I give the same in the following manner;"⁷ "worldly effects, both real and personal;"⁸ "worldly goods,"⁹ and the like.

SEC. 374. Same—Conclusion of will—Intention of testator declared by.—The courts will not only go to the introductory clause for *indicia* of intent on the part of the testator to dispose of his entire property, to enlarge the estate given to a fee, but will look to the conclusion also, where a doubtful devise, without words of limitation, is followed by a clause which unmistakably shows that the testator thought he had disposed of all his property. Thus, in *Davies v. Miller*,¹⁰ where the testator, at the conclusion of the instrument, said: "This is my will, and the way I desire my estate to be disposed of," the court held that a fee passed.

SEC. 375. Same—Where fee necessary to carry out intention of testator.—Where the words of a devise, according to their natural and fair import, construed in connection with all other parts of the will, manifestly show that it

words in the preamble make it apparent that he intended to dispose of his whole estate. Although, therefore, there are no words of limitation or perpetuity added to the devise to the children, yet as there is no limitation over, we bring down the word 'estate' in the preamble and connect it with the devise in order to effectuate the intent."

See: *Schrivver v. Meyer*, 19 Pa. St. 87; s.c. 57 Am. Dec. 634, 636; 1 Am. L. Reg. 227, 231.

¹ See: *Schrivver v. Meyer*, 19 Pa. St. 87; s.c. 57 Am. Dec. 634; 1 Am. L. Reg. 227.

² *Davis v. Miller*, 1 Call (Va.) 127.

"Estate"—Coupled with devise carries fee.—In this case the court say that when the word estate is coupled with a devise of real estate, it is uniformly

held to be a fee-simple; and this is carrying out the intention of the testator ninety-nine cases out of one hundred. Here the word estate in the introduction was coupled with the devising clause exactly as in this case—"I give and dispose the same as follows."

³ *Walker v. Walker*, 28 Pa. St. 40.

⁴ *Peppard v. Deal*, 9 Pa. St. 140.

⁵ *Goodrich v. Harding*, 3 Rand. (Va.) 280.

⁶ *Dougherty v. Browne*, 4 Yeates (Pa.) 179.

⁷ *Calwell v. Ferguson*, 2 Yeates (Pa.) 250, 280.

⁸ *Doughty v. Browne*, 4 Yeates (Pa.) 179.

⁹ *Wyatt v. Saddler's Heirs*, 1 Munf. (Va.) 537;

Kennon v. McRoberts, 1 Wahs. (Va.) 96; s.c. 1 Am. Dec. 428.

¹⁰ 1 Call (Va.) 127.

was the intention of the testator to give an estate in fee ; and where the general purpose to the particular intent of the testator, as expressed in or gathered by fair or plain implication from the will itself, cannot be carried into effect without such construction, whatever may be the words in which the devise is expressed, the law holds that it passes an estate in fee.¹ Thus, where a testator gives his whole estate, interest, or property, in such words as go not merely to describe the land itself, but the extent of his interest therein ; or where a devise is made on condition that the devisee pay a sum of money, or an annuity or other charge,² and where the devise might be onerous and not beneficial unless the devisee should take the whole interest, that is an estate in fee ; or where the devise is of the remainder or reversion subject to a prior life estate, under such circumstances that, without the devisee take a fee, the devise might not be beneficial.³

SEC. 376. **Same—Estates in trust.**—At common law an estate in lands created by devise will be enlarged to and held to be an estate in fee-simple, where the land is charged with a trust which cannot be performed, or where the will directs an act to be done which cannot be accomplished, unless a greater estate than one for life be taken.⁴ Trustees take exactly that quantity of interest

¹ Kellogg v. Blair, 47 Mass. (6 Met.) 322, 325 ;

Godfrey v. Humphrey, 35 Mass. (18 Pick.) 537, 539 ; s.c. 29 Am. Dec. 621 ;

Baker v. Bridge, 29 Mass. (12 Pick.) 27, 30, 31 ;

Jackson v. Merrill, 6 John. (N. Y.) 192.

See : Lindsay v. McCormack, 2 A. K. Marsh. (Ky.) 229 ; s.c. 12 Am. Dec. 387 ;

Crossman v. Field, 119 Mass. 172 ; Spooner v. Lovejoy, 108 Mass. 532 ; Bacon v. Woodward, 78 Mass. (12 Gray) 379 ;

Putnam v. Emerson, 48 Mass. (7 Met.) 333 ;

Parker v. Parker, 46 Mass. (5 Met.) 138 ;

Jenkins v. Clement, 1 Harp. (S. C.) Eq. 72 ; s.c. 14 Am. Dec. 698 ;

Abbott v. Essex Co., 2 Curt. C. C. 126, 132 ; s.c. 59 U. S. (18 How.) 202 ; bk. 15 L. ed. 352.

² See : Post, § 380.

³ Baker v. Bridge, 29 Mass. (12 Pick.) 27, 31 ;

Norton v. Ladd, 1 Lutw. 762 ;

Bailis v. Gale, 2 Ves. Sr. 48.

See : Kellogg v. Blair, 47 Mass. (6 Met.) 322, 326 ;

Wait v. Belding, 41 Mass. (24 Pick.) 129, 138, 139.

⁴ Kirkland v. Cox, 94 Ill. 400 ;

Pearce v. Savage, 45 Me. 90 ;

Deering v. Adams, 37 Me. 264 ;

Inman v. Jackson, 4 Me. 237 ;

Bell Co. v. Alexander, 22 Tex. 350 ; s.c. 73 Am. Dec. 268 ;

Hardy v. Redman's Adm'r, 3 Cr. C. C. 635 ;

Gibson v. Montfort, 1 Ves. Sr. 485 ;

Poad v. Watson, 37 Eng. L. & Eq. 112.

in the estate devised which the purposes of the trust require;¹ and in the absence of any express limitation, sufficient to carry the legal inheritance, the estate of the trustee may be enlarged and extended into such an interest as the nature of the trust may require.² Whether trustees take a legal estate or not depends chiefly on the fact whether the testator has imposed on the trustees a trust or duty, the performance of which requires that the legal estate should be vested in them.³ But where an express estate for life is given in trust, and the remainder is to heirs or issue generally, a power of appointment will not enlarge the estate to a fee.⁴

SEC. 377. **Same—Use devisee is to make of lands.**—An estate created by will may be enlarged to an estate in fee-simple by the use to which the lands are to be put, or the necessities of the case. Thus at common law an estate in lands will be enlarged to and held to be an estate in fee-simple where the will directs an act to be done which cannot be accomplished unless a greater estate than a life estate be taken.⁵ Hence where the words used in a will imply a life estate only, and limiting the quantity of interest devised to such an estate would manifestly defeat the intention of the testator, the estate will be enlarged to a fee.⁶ Thus a fee-simple passes without words of inheritance in a devise if the testator, not having perfected his title, evinces an intention that the devisee shall take the same in his own name from the government;⁷ and a devise of wild uncultivated lands,

¹ *Murdock v. Johnson*, 7 Coldw. (Tenn.) 611;

Williamson v. Wickersham, 3

Coldw. (Tenn.) 55;

Harding v. St. Louis Life Ins. Co.,

2 Coop. Ch. (Tenn.) 468;

Hooberry v. Harding, 10 Lea

(Tenn.) 397;

Henderson v. Hill, 9 Lea (Tenn.)

32;

Turley v. Massengill, 7 Lea

(Tenn.) 356;

Ellis v. Fisher, 3 Sneed (Tenn.)

231; s.c. 65 Am. Dec. 52.

² *Ellis v. Fisher*, 3 Sneed (Tenn.)

231; s.c. 65 Am. Dec. 52.

³ *Hooberry v. Harding*, 3 Coop.

Ch. (Tenn.) 680;

Ellis v. Fisher, 3 Sneed (Tenn.)

231; s.c. 65 Am. Dec. 52.

⁴ *Williams's Appeal*, 83 Pa. St. 388;

Springer v. Arundel, 64 Pa. St.

223;

Dodson v. Ball, 60 Pa. St. 492;

s.c. 100 Am. Dec. 586.

⁵ *Bell Co. v. Alexander*, 22 Tex.

350; s.c. 73 Am. Dec. 268.

⁶ *Benesch v. Clark*, 49 Md. 497;

Burleigh v. Clough, 52 N. H. 267,

274; s.c. 13 Am. Rep. 23;

Second Pres. Church v. Disbrow,

52 Pa. St. 219;

4 Kent Com. (13th ed.) 319.

⁷ *Lindsay v. McCormack*, 2 A. K.

Marsh. (Ky.) 299; s.c. 12 Am.

Dec. 387.

covered with woods, carries a fee-simple without words of inheritance,¹ on the principle that the devise is always intended by the devisor to be for the benefit of the devisee,² and a life estate in wild lands cannot be considered of any value, because the devisee would not receive, nor could he obtain, any benefit whatever from the land. He cannot cut down the trees, from the sale of which the chief, if not the only, value of wild lands arises, because he would be liable to the remainderman for waste. No one would undertake to bring into a state of cultivation wild lands, where his estate might be terminated before he should be reimbursed his labor and expenses.³

SEC. 378. Same—By implication—Control over land.—A devise for life without words of limitation may be enlarged into an estate in fee-simple by implication (1) by the use of words equivalent to a devise in fee,⁴ or (2) from the control given over the land. A devise with power of absolute disposition, unless a life estate is expressly limited to the devisee, passes a fee by implication.⁵ An estate given by a general devise, without words of limitation, will not be enlarged to a fee-simple by the addition of the power of disposal; but a devise for life expressly, with a power of disposition, gives to the devisee simply a life estate with a power annexed.⁶ Thus a general devise,

¹ *Russell v. Elden*, 15 Me. 193;
Sargent v. Towne, 10 Mass. 303
Holmes v. Pattison, 25 Pa. St.
484.

² *Sargent v. Towne*, 10 Mass. 303.
See: *Farrar v. Ayres*, 22 Mass. (5
Pick.) 404, 409.

³ See: *Russell v. Elden*, 15 Me. 193;
Ridgway v. Parker, 10 Mass. 305;
Sargent v. Towne, 10 Mass. 303;
Caldwell v. Ferguson, 2 Yeates
(Pa.) 380.

⁴ See: *Ante*, § 351.

⁵ *Taggart v. Murray*, 53 N. Y. 233,
238.

Power of disposition limited on event.
—But where a power of dis-
position by will is given and
limited upon the event of the
devisee "leaving no heirs,"
and also no disposition by will,
22

the estate of the devisee is not
enlarged.

Terry v. Wiggins, 47 N. Y. 512;
Doe v. Howland, 8 Cow. (N. Y.)
277;

Jackson v. Robins, 16 John. (N.
Y.) 588;

Doe ex d. Thorley v. Thorley, 10
East 438; s.c. 10 Rev. Rep. 352;
distinguished in *Humble v.*
Bowman, 47 L. J. Ch. 62, 64;
Tomlinson v. Dighton, 1 Pr. Wms.
149;

Bradly v. Westcott, 13 Ves. 445;
s.c. 9 Rev. Rep. 207.

⁶ *Funk v. Eggleston*, 92 Ill. 515; s.c.
34 Am. Rep. 136.

See: *Fairman v. Beal*, 14 Ill. 244;
Benesch v. Clark, 49 Md. 497;
Andrews v. Brumfield, 44 Miss.
49, 57;

to use and dispose of as the devisee may please, will be enlarged into a fee-simple, notwithstanding a devise over on the first devisee's death;¹ also a devise to be "at her entire disposal," even though there be a devise over after the death of the first taker;² or "for her sole and absolute use and disposal," without anything to qualify the words;³ or to be disposed of at the pleasure of the devisee;⁴ or "to be fully possessed and enjoyed;"⁵ or "to give and sell at his pleasure;"⁶ "to give away at her death to whom she pleases;"⁷ "to use and dispose of at her pleasure,"⁸ all pass a fee. A devise of lands with power to the devisee to dispose of while she survives, and any disposition she may make at her death to be duly and strictly attended to, and stand good in law, gives a fee.⁹ A devise to a person "so long as she continues my widow; but if she marry no more than the law allows; but if she continues my widow, she is to hold, enjoy, or dispose of at her discretion as I do at present," gives a fee determinable on marriage.¹⁰ But a bequest of real estate to a devisee to have and to hold during life, and "to do with as the devisee sees proper before death," gives but a life estate in the land.¹¹

Dean v. Nunnally, 36 Miss. 358;

Rail v. Dotson, 22 Miss. (14 Smed. & M.) 183;

Bryant v. Christian, 58 Mo. 98;

Rubey v. Barnett, 12 Mo. 3; s.c. 49 Am. Dec. 112;

Downey v. Borden, 36 N. J. L. (7 Vr.) 74, 460;

Jackson v. Robins, 16 John. (N. Y.) 588;

Smith v. Fulkinson, 25 Pa. St. 109;

Flinthan's Appeal, 11 Serg. & R. (Pa.) 18.

¹ Benkert v. Jacoby, 36 Iowa 273.

² McLean v. MacDonald, 2 Barb. (N. Y.) 534;

Jackson v. Babcock, 12 John. (N. Y.) 389, 393;

McDonald v. Walgrove, 1 Sandf. Ch. (N. Y.) 274.

³ Terry v. Wiggins, 47 N. Y. 512.

Or "to be at the absolute disposal" of the devisee.

Jackson v. Babcock, 12 John. (N. Y.) 389, 393.

⁴ Jackson ex d. Bush v. Coleman, 2

John. (N. Y.) 391.

⁵ Campbell v. Carson, 12 Serg. & R. (Pa.) 54.

"Freely possessed and enjoyed" — Construction of phrase. — In this case the Supreme Court of Pennsylvania adopted the meaning given to every enjoyment by Lord MANSFIELD, in *Loveaces v. Blight*, 1 Cowp. 352, where he held that the absolute estate passed free from impeachment every waste from incumbrances, rejecting the meaning given in later English cases.

⁶ Whiskon v. Cleyton, 1 Leon. 156.

⁷ Timewell v. Perkins, 2 Atk. 102.

⁸ Jackson ex d. Bush v. Coleman, 2 John. (N. Y.) 391;

Sutton v. Robertson, F. Moore 56;

Goodtitle v. Otway, 2 Wils. 6.

⁹ Moore v. Webb, 2 B. Mon. (Ky.) 282.

¹⁰ Swope v. Swope, 5 Gill (Md.) 225.

See: *Ante*, § 306.

¹¹ Brant v. The Virginia Coal & Iron

SEC. 379. ~~Same—Same—Exceptions to the rule.~~—An express devise for life will not be enlarged to a fee by the mere addition of the power of sale;¹ and the addition of the power of disposition of the power to re-invest the proceeds without accountability will not enlarge a plain life estate into a fee-simple.² Where the testator gives property to his wife “to and for her own use and disposal absolutely,” with remainder after her decease to his son, the wife took a life estate only;³ in a devise of lands “to be at her own disposal and for her own proper use and benefit during her natural life,” the words “during her natural life” restrict the power of disposal to such a disposition as a tenant for life could make.⁴

SEC. 380. ~~Same—Where charge on devisee.~~—A testator may devise lands with a view to legacies, or the payment of debts, and make them a charge on the land, or on the person of the devisee, or on both.⁵ Where the charge is on the person of the devisee in respect to the estate in his

Co., 93 U. S. 326; bk. 23 L. ed. 927; s.c. 16 Am. L. Reg. 403.

See: *Boyd v. Strahan*, 36 Ill. 355; *Giles v. Little*, 104 U. S. 291; bk. 76 L. ed. 745;

Bradly v. Westcott, 13 Ves. 449. To widow for life, with power of disposition.—In *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326; bk. 23 L. ed. 927; s.c. 16 Am. L. Reg. 403, the words of the will were: “I give and bequeath to my beloved wife, Nancy Sinclair, all my estate, both real and personal, that is to say, all my lands, cattle, horses, sheep, farming utensils, household and kitchen furniture, with everything that I possess, to have and to hold during her life, and to do with as she sees proper before her death.” By virtue of this power, the widow undertook to convey the fee of the land. But this court, speaking by Mr. Justice FIELD, said: “The interest conveyed by the devise to the widow was only a life estate. The language admits of no other conclusion; and the accompanying words, ‘to do with as she sees proper before

her death,’ only conferred power to deal with the property in such manner as she might choose, consistently with that estate and perhaps without liability for waste committed. The words used in connection with a conveyance of a leasehold estate would never be understood as conferring a power to sell the property so as to pass a greater estate. Whatever power of disposal the words confer is limited by the estate with which they are connected.”

¹ *Maltby's Appeal*, 47 Conn. 349; *Lewis v. Palmer*, 46 Conn. 454; *Dean v. Nunnally*, 36 Miss. 358; *Sawyer v. Dozier*, 7 Jones (N. C.) L. 7.

² *Cockrill v. Morrey*, 2 Tenn. Ch. 49.

³ *Smith v. Bell*, 31 U. S. (6 Pet.) 68; bk. 8 L. ed. 232. See criticism of this case: *Post*, § 336.

⁴ *Boyd v. Strahan*, 36 Ill. 355.

⁵ *Wright v. Denn ex d. Page*, 23 U. S. (10 Wheat.) 204, 206; bk. 6 L. ed. 303, 309.

See: *Roe ex d. Peter v. Day*, 3 Maul. & S. 518.

hands, he takes a fee-simple, even where there are no words of inheritance or perpetuity;¹ as where the devisee is to pay debts,² or certain specified legacies,³ or a gross sum out of the estate,⁴ and the like. And it has been said that a charge upon a devisee in respect to the whole of a piece of land, of which he receives a portion and another person another portion, may have the effect of

¹ *Jackson v. Bull*, 10 John. (N. Y.) 148; s.c. 6 Am. Dec. 321.

See: *Lindsay v. McCormack*, 2 A. K. Marsh. (Ky.) 229; s.c. 12 Am. Dec. 381;

Parker v. Parker, 47 Mass. (6 Met.) 134, 138;

Baker v. Bridge, 29 Mass. (12 Pick.) 27, 31;

Lummas v. Mitchell, 34 N. H. 39, 47;

Bell v. Scammon, 15 N. H. 381; s.c. 41 Am. Dec. 706;

Leavitt v. Wooster, 14 N. H. 550;

Olmstead v. Olmstead, 4 N. Y. 56, 58;

Heard v. Horton, 1 Denn. (N. Y.) 165; s.c. 43 Am. Dec. 569;

Jackson v. Staats, 11 John. (N. Y.) 337; s.c. 6 Am. Dec. 376;

Jackson v. Merrill, 6 John. (N. Y.) 185; s.c. 5 Am. Dec. 213;

Spraker v. Van Alstyne, 18 Wend. (N. Y.) 200;

Fox v. Phelps, 17 Wend. (N. Y.) 393;

Van Alstyne v. Spraker, 13 Wend. (N. Y.) 578;

Findlay v. Smith, 6 Munf. (Va.) 134; s.c. 8 Am. Dec. 733;

Doe v. Clarke, 2 Bos. & P. (N. R.) 343;

Moor v. Denn, 2 Bos. & P. 247

Doe v. Snelling, 5 East 87;

Goodtitle v. Maddern, 4 East 496;

Doe v. Holmes, 8 T. R. 1;

Collier's Case, 6 Co. 16.

² See: *Bell v. Scammon*, 15 N. H. 381; s.c. 41 Am. Dec. 706;

Heard v. Horton, 1 Denn. (N. Y.) 165; s.c. 43 Am. Dec. 659;

Jackson v. Martin, 18 John. (N. Y.) 31;

Jackson v. Merrill, 6 John. (N. Y.) 185; s.c. 5 Am. Dec. 213;

Goodtitle v. Maddern, 4 East 496;

Philips v. Hele, 1 Rep. Ch. 101;

Doe v. Holmes, 8 T. R. 1;

Collier's Case, 6 Co. 16.

³ See: *Lithgow v. Kavenagh*, 9 Mass. 161, 175;

Bell v. Scammon, 15 N. H. 381; s.c. 41 Am. Dec. 706;

Jones' Ex'rs v. Jones, 13 N. J. Eq. (3 Beas.) 236;

Olmstead v. Olmstead, 4 N. Y. 56, 58;

Jackson v. Harris, 8 John. (N. Y.) 141;

Spraker v. Van Alstyne, 18 Wend. (N. Y.) 200;

Coane v. Parmentier, 10 Pa. St. 72;

Doe ex d. Thorn v. Phillips, 3 Barn. & Ad. 753; s.c. 23 Eng. C. L. 330;

Doe v. Richards, 3 T. R. 356;

Ackland v. Ackland, 2 Vern. 687.

Nature of estate devised.—When a testator devised his lands as follows: "To my grandson, William Wheeler, his heirs and assigns, forever, on condition that he pay to my granddaughter, Hannah Wheeler, two hundred pounds old tenor bills, when he arrives at lawful age; but in case said William dies without issue lawfully begotten of his body, then I give said lands and house to my six sons-in-law and my granddaughter, Hannah Wheeler, to be equally divided between them," it was held that the devise over was an absolute estate.

Holmes v. Williams, 1 Root (Conn.) 335; s.c. 1 Am. Dec. 49.

⁴ See: *Jackson v. Merrill*, 6 John. (N. Y.) 185; s.c. 5 Am. Dec. 213;

Willis v. Bucher, 2 Binn. (Pa.) 455;

Doe v. Fyldes, Cowp. 841;

Collier's Case, 6 Co. 16.

A general devise to pay a gross sum out of the estate devised does not carry a fee.

Funk v. Eggleston, 92 Ill. 517; s.c. 34 Am. Rep. 136.

enlarging the estates of both devisees to fees, as in the case of *Barheydt v. Barheydt*,¹ where the devise of the "upper half" of certain land to A and the "lower half" to A's minor son, on condition that A paid certain legacies, was held to give an estate in fee to both A and his son.

SEC. 381. Same—Same—Nature of charge on devisee.—Where there is a devise of lands with directions that the devisee shall pay a gross sum out of it, the devisee takes an estate in fee, without any other words, notwithstanding the fact that the sum to be paid may not amount to a year's rent.² The charge upon the devisee may not be a direct money charge, but the imposition in obligation or duty, such as to provide firewood or grain for the support of the person designated,³ educate a minor,⁴ allow the use of a room in a house devised to the testator's widow,⁵ surrender a claim to an expectancy,⁶ and the like.

SEC. 382. Same—Same—Reason for the doctrine.—This rule is founded on the well-known principle that the devise is intended for the benefit of the devisee,⁷ and if

¹ 20 Wend. (N. Y.) 500, 576.

² *Jackson v. Merrill*, 6 John. (N. Y.) 185; s.c. 5 Am. Dec. 213.

Amount of charge—Time of payment—Contingency.—The effect upon the estate of the charge upon the devisee will not be interfered with by the fact that such charge is a very small amount (*Jackson v. Merrill*, 6 John. (N. Y.) 185; s.c. 5 Am. Dec. 213; *Gibson v. Horton*, 5 Harr. & J. (Md.) 177; *King v. Cole*, 6 R. I. 584); or that the time of its payment is postponed (*Doe d. Harrington v. Dill*, 1 Houst. (Del.) 398; *Harden v. Hays*, 9 Pa. St. 151); or that it is contingent on the arrival at a certain age of the person to whom the payment is to be made (*Doe d. Harrington v. Dill*, 1 Houst. (Del.) 398).

³ *Jackson ex d. Ruggles v. Martin*, 18 John. (N. Y.) 31.

⁴ *Dumond v. Strungham*, 26 Barb. (N. Y.) 104.

Education and support of a child—No trust or charge.—A residuary devise and bequest to the testator's wife, "to her own use, and to be disposed of at her decease according to the terms of any will that she may leave," vests the whole of the residue in her absolutely; and a subsequent clause, that "she is of course to charge herself with the education and support of our daughters, so long as they shall remain unmarried," raises no trust or charge upon the property.

Spooner v. Lovejoy, 108 Mass. 529.

⁵ *Jackson ex d. Ruggles v. Martin*, 18 John. (N. Y.) 31.

⁶ Such as a devise to a person "provided he give up his right to all my land in C."

Gibson v. Horton, 5 Harr. & J. (Md.) 177.

⁷ *Jackson v. Merrill*, 6 John. (N. Y.) 185; s.c. 5 Am. Dec. 213.

the devisee did not take a fee, he might be a loser by taking under the will and paying the debts, the specified legacies, or the gross sum, if the estate were limited to a life estate, for it might expire before he had been able to reimburse himself, from the land, the amount of the charge put upon him by his acceptance of the devise under the will.¹ But the charge must be upon the person of the devisee in respect to the land, and must be absolute and certain,² to create a fee by implication, because a charge upon the estate is not within the reason of the rule.³

SEC. 383. Same—Same—Failure or refusal to perform.—Where the charge is on the person, the devisee takes the estate on condition of paying the charge. If he die in the lifetime of the testator the charge ceases; and if he refuses to perform, the devise is void, and the heir may

¹ *Lindsay v. McCormack*, 2 A. K. Marsh. (Ky.) 229; s.c. 12 Am. Dec. 387;

Wait v. Belding, 41 Mass. (24 Pick.) 129;

Farrar v. Ayres, 22 Mass. (5 Pick.) 404;

Cook v. Holmes, 11 Mass. 528;

Lightgow v. Cavenagh, 9 Mass. 161;

Bell v. Scammon, 15 N. H. 381; s.c. 41 Am. Dec. 706;

Leavitt v. Wooster, 14 N. H. 550;

Jackson v. Merrill, 6 John. (N. Y.) 185; s.c. 5 Am. Dec. 213;

Fox v. Phelps, 17 Wend. (N. Y.) 393, 402;

Harden v. Hays, 9 Pa. St. 151;

King v. Cole, 6 R. I. 584;

Doe v. Richards, 3 T. R. 356.

Death of devisees or refusal to perform.—When the charge is on the person, the devisee takes the estate on condition of paying the charge, and if he die in the lifetime of the testator, the charge ceases; and if he refuse to accept and perform, the devise is void, and the heir may enter.

Jackson v. Bull, 10 John. (N. Y.) 148; s.c. 6 Am. Dec. 321.

² *Jackson v. Martin*, 18 John. (N. Y.) 31.

See: *Parker v. Parker*, 46 Mass. (5 Met.) 138;

Wait v. Belding, 41 Mass. (24 Pick.) 129, 139;

Cook v. Holmes, 11 Mass. 528;

Bell v. Scammon, 15 N. H. 381; s.c. 41 Am. Dec. 706;

Heard v. Horton, 1 Den. (N. Y.) 165; s.c. 43 Am. Dec. 659;

Jackson v. Martin, 18 John. (N. Y.) 31;

Jackson v. Harris, 8 John. (N. Y.) 142;

Jackson v. Merrill, 6 John. (N. Y.) 185; s.c. 5 Am. Dec. 213;

Barheydt v. Barheydt, 20 Wend. (N. Y.) 576;

Spraker v. Van Alstyne, 18 Wend. (N. Y.) 200;

Schoonmaker v. Stockton, 37 Pa. St. 261.

Compare: Doe ex d. Thorn v. Phillips, 3 Barn. & Ad. 753;

s.c. 23 Eng. C. L. 330;

Abrams v. Winshup, 3 Russ. 350.

³ See: *Mesick v. New*, 7 N. Y. 163;

Olmstead v. Olmstead, 4 N. Y. 56, 58;

Harvey v. Olmsted, 1 N. Y. 483;

Vanderwerker v. Vanderwerker, 7 Barb. (N. Y.) 221;

Jackson v. Bull, 10 John. (N. Y.) 148; s.c. 6 Am. Dec. 321;

Spraker v. Van Alstyne, 18 Wend. (N. Y.) 200.

enter.¹ But a fee will not be implied from a general charge on the testator's real estate,² with a direction to pay debts³ or funeral expenses, out of proceeds of the estate devised.⁴ And where the devisee has received advancements from the testator to an amount exceeding the sum of the latter's debts, and the fact is adverted to in the will, and a bequest of the surplus of advancements is made to the devisee, then a devise will not be enlarged to a fee by a direction that the devisee shall pay the debts, for there is really no charge upon the devisee at all, but the direction is a mere application of the testator's own funds to the payment of his debts.⁵

SEC. 384. **Same—Where charge on the estate.**—Where the charge is upon the estate and not upon the devisee personally, and there are no words of limitation, a life estate only passes.⁶ The distinction which runs through the cases is that where the charge is upon the estate, and there are no words of limitation, the devisee takes only an estate for life, because the reason for the rule enlarging the estate granted to a fee fails.⁷ Justice STORY says that “the clearly established doctrine on this subject is, that if the charge be merely on the land, and not on the person of the devisee, then the devisee upon a general devise takes an estate for life only. The reason is obvious: If the charge be merely on the estate, then the devisee (to whom the testator is always presumed to intend a benefit) can sustain no loss or detriment in case the estate is construed but a life estate, since the estate is taken subject to the incumbrance. But if the charge be personal on the devisee, then if his estate be but for life, it may determine before he is reimbursed for his

¹ *Jackson v. Bull*, 10 John. (N. Y.) 148; s.c. 6 Am. Dec. 321.

² *Jackson v. Bull*, 10 John. (N. Y.) 148; s.c. 6 Am. Dec. 321.

³ *Mooberry v. Marye*, 2 Munf. (Va.) 453.

⁴ *Doe v. Harter*, 7 Blackf. (Ind.) 488;

Jackson v. Harris, 8 John. (N. Y.) 141.

⁵ *Tanner v. Livingston*, 13 Wend. (N. Y.) 83.

⁶ *Jackson v. Bull*, 10 John. (N. Y.) 148; s.c. 6 Am. Dec. 321.

⁷ See: *Doe v. Clarke*, 5 Bos. & P. N. R. 343;

Moore v. Dean, 2 Bos. & P. 247; *Collier's Case*, 6 Co. 16;

Doe v. Snelling, 5 East 87; *Goodtitle v. Maddern*, 4 East 496.

payments, and thus he may sustain a serious loss.”¹ It is said in the case of *Jackson v. Staats*² that the charge of the estate with a payment of money in the hands of the devisee does not prevent its limitation over by way of executory devise.

SEC. 385. *Cutting down fee.*—An estate given to a person generally, or indefinitely, with an absolute power of disposition in the first taker, carries a fee;³ nothing that follows can affect the estate devised,⁴ therefore words granting a fee will not be restricted unless by necessary implication.⁵ But when, by limiting the character of the first estate, the second may be preserved, it is the duty of the court to do so, unless such construction is subversive of the general scheme of the will, or forbidden by some inflexible rule of law.⁶ A subsequent repugnant limitation is void.⁷ But if the *jus disponendi* is conditional, a provision as to a remainder is not repugnant.⁸ The Court of Appeals of New York, in the case of *Byrnes*

¹ *Wright v. Denn* ex d. Page, 23 U. S. (10 Wheat.) 204, 231, 233; bk. 6 L. ed. 303, 310, 319.

See: *Loveacres v. Blight*, 1 Cowp. 352;

Doe v. Holmes, 8 Durnf. & E. 1; *Denn* ex d. *Moor v. Meller*, 5 Durnf. & E. 558; s.c. 2 Bos. & P. 247;

Doe v. Richards, 3 Durnf. & E. 356;

Goodtitle v. Maddern, 4 East 496;

Canning v. Canning, Mor. Ch. 240.

² 11 John. (N. Y.) 337; s.c. 6 Am. Dec. 376.

³ *Stewart v. Walker*, 72 Me. 146; s.c. 39 Am. Rep. 311, 316; *Shaw v. Hussey*, 41 Me. 495; 4 Kent Com. (13th ed.) 535.

⁴ See: *Ward v. Amory*, 1 Curt. C. C. 425.

⁵ *Gifford v. Choate*, 100 Mass. 343, 345.

Interest of trustee—Cutting down by implication.—The case of *Curtis v. Price*, 12 Ves. 89; s.c. 8 Rev. Rep. 303, has been said to be a solitary instance of a limitation in fee by deed to trustees being cut down by

implication to an estate *par autre vie*.

See: *Cooper v. Kynoch*, L. R. 7 Ch. 403; s.c. 41 L. J. Ch. 296; 26 L. T. N. S. 566.

⁶ *Wager v. Wager*, 96 N. Y. 164, 174.

See: *Smith v. Van Ostrand*, 64 N. Y. 278;

Norris v. Beyea, 13 N. Y. 273.

⁷ *Gifford v. Choate*, 100 Mass. 343, 346.

See: *Stuart v. Walker*, 72 Me. 146; s.c. 39 Am. Rep. 311, 316;

Campbell v. Beaumont, 91 N. Y. 465, 468;

Smith v. Van Ostrand, 64 N. Y. 278;

Tyson v. Blake, 22 N. Y. 558;

Norris v. Beyea, 13 N. Y. 273;

Paterson v. Ellis, 11 Wend. (N. Y.) 259, 260;

Attorney-General v. Hall, Fitz-Gib. 314;

Ross v. Ross, 1 Jac. & W. 154;

Bull v. Kingston, 1 Meriv. 314.

⁸ *Van Horne v. Campbell*, 100 N. Y. 287, 300.

See: *Campbell v. Beaumont*, 91 N. Y. 465;

Smith v. Van Ostrand, 64 N. Y. 278.

v. Stilwell,¹ have held that an estate in fee created by a will cannot be cut down or limited by a subsequent clause, unless it is as clear and decisive as the language of the clause which devises the estate.² If the property may, under the terms of the will, be used and spent by the primary legatee at his pleasure, further limitation is clearly hostile to the nature and intention of the gift, and will not be presumed.³ Thus a devise and bequest of all the property of a testator to his wife, to be enjoyed by her for her sole use and benefit, will vest in her the absolute title and power of disposition, unaffected by the expression in the will of a wish or desire of the testator that on her decease the property, or such portion of it as might remain, should be received and enjoyed by her son.⁴

SEC. 386. **Same—Fee not cut down when.**—A fee will not be cut down by the addition of the words “for life,” so as to read a devise in fee-simple for life;⁵ or the ad-

¹ 103 N. Y. 453, 460.

See: *Campbell v. Beaumont*, 91 N. Y. 464.

² See: *Freeman v. Coit*, 96 N. Y. 63, 68;

Campbell v. Beaumont, 91 N. Y. 467;

Roseboom v. Roseboom, 81 N. Y. 356, 359;

Thornhill v. Hall, 2 Cl. & Fin. 22.

³ *Campbell v. Beaumont*, 91 N. Y. 464.

See: *Byrnes v. Stilwell*, 103 N. Y. 453, 460; s.c. 51 Am. Rep. 760; 9 N. E. Rep. 241;

Van Horne v. Campbell, 100 N. Y. 30;

Wager v. Wager, 96 N. Y. 173;

Jones v. Jones, 66 Wis. 310, 317; s.c. 57 Am. Rep. 266; 28 N. W. Rep. 177.

⁴ *Campbell v. Beaumont*, 91 N. Y. 464.

⁵ Because the words “for life” are repugnant to the estate already granted, and therefore of no effect.

McAllister v. Tate, 11 Rich. (S. C.) L. 509; s.c. 73 Am. Dec. 119.

See: *Giles v. Little*, 104 U. S. 291; bk. 26 L. ed. 748;

Smith v. Bell, 31 U. S. (6 Pet.) 68; bk. 8 L. ed. 322.

Bradly v. Westcott, 13 Ves. 445; s.c. 9 Rev. Rep. 207.

“During their lives” after grant of fee-simple.—In the case of *Doe ex d. Cotton v. Stenlake*, 12 East 515; s.c. 11 Rev. Rep. —, the devise was, “I give unto my daughter, Phillis Cotton, and her heirs, Moorhead meadow, during their lives.” Lord ELLENBOROUGH, C. J., said: “The words ‘during their lives,’ after the devise to the daughter and her heirs, are merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit should enjoy the property; for whatever estate of inheritance the heirs of his daughter might take, they could in fact only enjoy the benefit of it for their lives.”

“During her natural life” limits estate.—In *Boyd v. Strahan*, 36 Ill. 355, there was a bequest to the wife of all the personal property not otherwise disposed of, “to be at her own disposal, and for her own proper use and benefit during her natural life,” and the court held that the

dition of "for her sole and separate use during her life ;"¹ or by a devise over on the death of the first taker without a son,² or in case the devisee "shall die without heirs of his body ;"³ or by a provision that "should any of my children die without heirs, his bequeathed share shall revert ;"⁴ or that the profits of the land shall be applied to a particular purpose ;⁵ or by precatory words to the effect that the devisee will leave the land to certain persons, or to certain uses, should he die without issue, or in any other contingency,⁶ because mere words of desire or recommendation do not create a trust in an absolute devisee or legatee,⁷ unless by express words of the testator it ap-

words "during her natural life" so qualified the power of disposal as to make it mean such disposal as a tenant for life could make.

- ¹ The only effect of such a clause, where a fee has previously been given to the woman, will be to exclude the marital rights of the husband, but will leave the estate still a fee-simple.

Skillen v. Loyd, 6 Cold. (Tenn.) 563.

- ² *Molson v. Doe ex d. Cooper*, 4 Leigh (Va.) 408.

- ³ *Roser v. Slade*, 3 Md. Ch. 91.

- ⁴ *Shutt v. Rambo*, 57 Pa. St. 149.

- ⁵ *Thompson v. Swoope*, 24 Pa. St. 474.

- ⁶ *Batchelor v. Macon*, 69 N. C. 545 ;

Second Reformed Pres. Church v. Disbrow, 25 Pa. St. 219 ;

Pennock's Estate, 20 Pa. St. 268 ; s.c. 59 Am. Dec. 718.

- ⁷ **Ancient rule as to precatory words.**—

It is said by the Supreme Judicial Court of Massachusetts, in the case of *Hess v. Singler*, 114 Mass. 56, 59, that "it is a settled doctrine of courts of chancery that a devise or bequest to one person, accompanied by words expressing a wish, entreaty, or recommendation that he will apply it to the benefit of others, may be held to create a trust, if the subject and the objects are sufficiently certain. Some of the earlier English decisions had a tendency to give to this doctrine the weight of an arbitrary rule of construction.

But by the later cases, in this, as in all other questions of the interpretation of wills, the intention of the testator, as gathered from the whole will, controls the court. In order to create a trust, it must appear that the words were intended by the testator to be imperative ; and when property is given absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence."

See : *Van Duyne v. Van Duyne*, 14 N. J. Eq. (1 McCar.) 397 ;

Spooner v. Lovejoy, 108 Mass. 529 ;

Warner v. Bates, 98 Mass. 274, 277 ;

Pennock's Estate, 20 Pa. St. 268 ; s.c. 59 Am. Dec. 718 ;

Knight v. Knight, 3 Beav. 148, 172 ; s.c. *sub nom.* *Knight v.*

Boughton, 11 Cl. & Fin. 513 ;

Lambe v. Eames, L. R. 10 Eq. 267 ; s.c. L. R. 6 Ch. 597.

Modern rule as to precatory words.

— It is said in the case of *Pennock's Estate*, 20 Pa. St. 268 ; s.c. 59 Am. Dec. 718, 723, 724, that the ancient rule is fading away even in England ; that the disrelish with which it is received by the legal and judicial minds of that country may be seen in the doctrine of extreme certainty required as to the subject and object of the recommendation.

Harland v. Trigg, 1 Bro. C. C. 142 ;

pears that the recommendation was intended to be obligatory, as where there are words expressive of desire as to the direct disposition of the estate;¹ or by words re-

Tibbits v. Tibbits, 19 Ves. 664 ;

Wright v. Atkyns, 1 Ves. & B. 313 ; s.c. Turn. & R. 157 ;

Ex parte Payne, 2 You. & C. 636.

Another reason for this falling away is found in the fact that it is degraded into the class of implied or constructive, and not express, trusts.

Hill v. Bishop of London, 1 Atk. 618 ;

Jeremy's Eq. Jur. 99 ;

Lewin on Trusts, 66 ;

2 Roper on Legacies, 380, etc. ;

2 Story's Eq. Jur., § 1074.

is everywhere regarded as frustrating the will of the testator.

Meredith v. Heneage, 1 Sim. 551 ;

Sale v. Moore, 1 Sim. 540 ;

Wright v. Atkyns, 1 Ves. & B. 315 ;

2 Story's Eq. Jur., §§ 1069-1074.

Words of entreaty or recommendation are not now regarded in England as creating a trust, unless on the whole they ought to be construed as imperative.

Macnamara v. Jones, 1 Bro. C. C. 481 ;

Meggison v. Moore, 2 Ves. Jr. 632 ;

2 Spence's Eq. Jur. 65.

The rule is a mere artificial one, that is to be strictly limited to the demands of authority. It looks upon the words as *prima facie* words of trust.

Podmore v. Gunning, 7 Sim. 665 ;

Berkley v. Ryder, 2 Ves. Sr. 533 ;

Worsley v. Granville, 2 Ves. Sr. 335.

et any words or expressions are eagerly seized hold of as indications of a contrary intent.

Knight v. Knight, 3 Beav. 172 ;

Harland v. Trigg, 1 Bro. C. C. 143 ;

Shaw v. Lawless, 5 Cl. & Fin. 147, 153 ;

Foley v. Parry, 2 Myl. & K. 144 ;

White v. Briggs, 15 Sim. 33, 300 ;

Meredith v. Heneage, 1 Sim. 550, 552.

Trust not raised when.—Where it is apparent that the kindness or justice or discretion of the

devisee is relied on, no trust arises.

Knight v. Knight, 3 Beav. 148, 172, 176 ;

Curtis v. Rippon, 5 Madd. 434 ;

Pope v. Pope, 10 Sim. 1 ;

Bardswell v. Bardswell, 9 Sim. 319 ;

Young v. Martin, 2 You. & C. (N. S.) 482, 590 ;

Malim v. Keighley, 2 Ves. Jr. 530, 533 ; s.c. 2 Rev. Rep. 229.

And if it can be implied from the words that a discretion is left to withdraw any part of the subject of the devise from the object of the wish or bequest, or to apply it to the use of the devisee, no trust is created.

Flint v. Hughes, 6 Beav. 342 ;

Knight v. Knight, 3 Beav. 173, 174 ;

Sprange v. Barnhard, 2 Bro. C. C. 585 ;

Wynne v. Hawkins, 1 Bro. C. C. 179 ;

Bland v. Bland, 2 Cox 354 ;

Eade v. Eade, 5 Madd. 121 ;

Lechmere v. Lavie, 2 Myl. & K. 201 ;

Pope v. Pope, 10 Sim. 5 ;

Horwood v. West, 1 Sim. & S. 389 ;

Pushman v. Filliter, 3 Ves. Jr. 7.

Ancient English rule not adopted in this country.—The court say in Coates' Appeal, 2 Pa. St. 129, 131, that there is no American case wherein the antiquated English rule has been adopted. As to that rule,

See: Flint v. Hughes, 6 Beav. 342 ;

Sprange v. Barnard, 2 Bro. C. C. 585 ;

Wynne v. Hawkins, 1 Bro. C. C. 179 ;

Bland v. Bland, 2 Cox Eq. 354 ;

Williams v. Williams, 20 L. J. (N. S.) Ch. 280 ; s.c. 5 Eng. L. & Eq. 49 ;

Eade v. Eade, 5 Madd. 118 ;

White v. Briggs, 15 Sim. 33 ;

Meredith v. Heneage, 1 Sim. 542 ;

Pushman v. Filliter, 3 Ves. Jr. 7 ;

Ex parte Payne, 2 You. & C. 636.

Burt v. Herron, 66 Pa. St. 402.

stricting or forbidding the sale of the land by the devisee, even where followed by a devise over on the death of the first taker;¹ or after giving an estate in fee providing that under certain circumstances the devisee may sell the estate;² or by provision that the devisee may dispose of the estate by will,³ or by a provision that the land devised shall not be left to a certain person;⁴ or by providing that if the devisee "shall die seized of the estate

¹ *Kepple's Appeal*, 53 Pa. St. 211; *Walker v. Vincent*, 19 Pa. St. 369;

Reifsnnyder v. Hunter, 19 Pa. St. 41;

McCullough's Heirs v. Gilmore, 11 Pa. St. 370.

² *Grant v. Carpenter*, 8 R. I. 36.

That an estate for life has been limited to a person is not a sufficient indication of intent that the devisee shall have a life estate only, to prevent a fee-simple in the same land being given to him by subsequent words.

Geyer v. Wentzel, 68 Pa. St. 85.

³ Provision for disposal by will not reduce estate.—In *Spooner v. Lovejoy*, 108 Mass. 529, 533, the testator provided as follows: "I give, bequeath, and devise all the rest, residue, and remainder of my property and estate, whether real, personal, or mixed, to my beloved wife, Elizabeth Elliot Spooner, principal and income, to her own use, and to be disposed of at her decease according to the terms of any will or testamentary document that she may leave," the court held that the provision allowing her to dispose of the property by her last will would not reduce her estate under the general bequest to a mere life estate.

Citing: *Doe d. Herbert v. Thomas*, 3 Ad. & E. 123; s.c. 30 Eng. C. L. 77.

In the latter case a tenant in fee-simple devised land to his wife, her heirs and assigns, forever, "with the intention that she may enjoy the same during her life, and by her will dispose of the same as she thinks proper." The court held that the wife took a fee; though, in a later

part of the will, the deviser limited lands in fee by using the words "heirs and assigns forever," without any additional words.

"To her sole use, benefit, and disposal" carry fee.—In *Davis v. Mailey*, 134 Mass. 588, a testator gave to his wife all his real and personal estate "to her sole use, benefit, and disposal;" and provided that "whatever may be left of my estate, if any, she may by will or otherwise give to those of my heirs that she may think best, she knowing my mind upon that subject. I am willing to leave the matter entirely with her, feeling satisfied that she will do as I have requested her to in the matter." The court held that the wife took all the estate which the testator could devise, with the absolute right of disposing of it as she saw fit.

"Unfettered and unlimited" preclude trust.—In *Meredith v. Heneage*, 1 Sim. 542, a devise of a testator's estate to his wife "unfettered and unlimited, in full confidence and with the firmest persuasion that, in her future disposition and distribution thereof, she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserve her preference," was held by the House of Lords, upon the advice of Lord ELDON and Lord REDESDALE, not to create a trust, because the words "unfettered and unlimited" precluded the inference of such an intention.

⁴ *Barnard v. Bailey*, 2 Harr. (Del.) 56.

herein bequeathed, or any part thereof, without lawful issue, then the estate of him so dying seized is hereby bequeathed, and shall descend," to other heirs;¹ or the provision, after a devise of the fee, that the devisee shall pay certain designated legacies, and, on his failure to do so, that the executor of the will may sell a part or all of the land devised for that purpose, where there is no devise over;² and where an estate has been devised in trust, the addition of the words "for her and her heirs' sole use and benefit" will not affect the equitable fee devised.³

SEC. 387. Same—Doctrine of the American courts—*Jackson v. Bull*.—It was early laid down in New York, in the case of *Jackson v. Bull*,⁴ that where in a devise a charge is imposed upon the estate devised, and there are no words of limitation, the devisee takes only an estate for life, but that when the charge is on the person of the devisee, in respect to the estate in his hands, he takes a fee. This case has been uniformly followed in New York, and the cases outside of New York are thought to be equally uniform.

The case of *Ide v. Ide*,⁵ decided in 1809, by Chief Justice PARSONS, is perhaps the earliest case in this country upon the subject. In that case the action was ejectment. The testator devised real estate to his son P, his heirs and assigns, forever, and also bequeathed to him personal estate in words denoting an absolute interest, and in a subsequent clause declared: "And further, it is my will, that if my son P. shall die and leave no lawful issue, what estate he shall leave, to be divided between my son J. and my grandson N.," etc. P. conveyed the land in his lifetime and died leaving no issue. The court held that the limitation over was void for repugnancy to the disposing power, and on that ground decided the case for the plaintiff, making no reference to

¹ *Van Horne v. Campbell*, 100 N. Y. 287. ⁴ 10 John. (N. Y.) 148; s.c. 6 Am. Dec. 321.

² *Hanna's Appeal*, 31 Pa. St. 53.

⁵ 5 Mass. 500.

³ *Korn v. Cutler*, 26 Conn. 4.

the fact that P. had exercised the power by a conveyance. The power of disposition was held to be implied from the words, "what estate he shall leave." The next case in interest, if not in point of time of decision, is that of *Melson v. Doe*,¹ decided by the Supreme Court of Virginia in the year 1833. This was a case where a testator devised land to his son W. and his heirs, and if he should die without a son, and not sell the land, then to the testator's son G. It was held that the devise gave W. absolute power to sell a fee-simple, and therefore, whether he sold or not, he took a fee-simple and the devise over was void. The same principle was declared in a prior case in the same state,² where the power of disposition was held to be implied from the words, "so much of the estate as may remain undisposed of."

The case of *Cook v. Walker*³ involved the construction of a marriage settlement of real and personal property, which provided for the devolution of the property if the wife "should die intestate, without making any disposition," etc. LUMPKIN, J., in delivering the opinion of the court, said: "We hold it to be an incontrovertible rule that whenever an estate is given in Georgia, either by deed or will, to a person generally or indefinitely, with an unlimited power of disposition annexed, it invariably vests an absolute fee in the first taker, and that neither a remainder nor an executory devise can be limited on such an estate."

The cases of *Flinn v. Davis*⁴ and *McRee's Administrators v. Means*⁵ declare the same rule. In *Pickering v. Langdon*,⁶ it was held that a gift over of real and personal estate, of "what remains" on the death of the first taker, was void; and in *Ramsdell v. Ramsdell*,⁷ it was declared that the doctrine of *Jackson v. Bull*⁸ was the settled law. The doctrine that an absolute power of disposition in the first taker was fatal to a limitation

¹ 4 Leigh (Va.) 350.

² *Riddick v. Cohoon*, 4 Rand. (Va.) 547.

³ 15 Ga. 459.

⁴ 18 Ala. 132.

⁵ 34 Ala. 350.

⁶ 22 Me. 413.

⁷ 21 Me. 288.

⁸ 10 John. (N. Y.) 19; s.c. 6 Am. Dec. 321.

over has been declared by the court of North Carolina,¹ and also by the court of Tennessee in two cases.²

In the case of *Van Horne v. Campbell*,³ Mr. Justice ANDREWS, in delivering the opinion of the court, says: "After a somewhat diligent examination I have been unable to find any decision in any court in this country, adverse to the doctrine declared in *Jackson v. Bull*, and I think it may safely be affirmed that the doctrine of that case is the settled law of the American courts."

SEC. 388. **Same—Same—Doctrine of Smith v. Bell.**—In the case of *Smith v. Bell*,⁴ a testator gave a legacy to his wife "to and for her own use and benefit and disposal absolutely, and the remainder of said estate, after her decease, to be for the use of" the testator's son; the court held that the latter clause qualified the former, and showed the wife took a life estate only. In construing the language of the devise, Chief Justice MARSHALL, after observing that the operation of the words "to and for her own use and benefit and disposal absolutely," annexed to the bequest, standing alone, could not be questioned, said: "But suppose the testator had added the words 'during her natural life,' these words would have restrained those which preceded them, and have limited the use and benefit, and the absolute disposal given by the prior words, to the use and benefit and to a disposal for the life of the wife. The words then are susceptible of such limitation. It may be imposed on them by other words. Even the words, disposal absolutely, may have their character qualified by restraining words connected with and explaining them, to mean such absolute disposal as a tenant for life may make."

The doctrine of *Smith v. Bell* has not met with the approval of the courts, being doubted in Massachusetts,⁵

¹ See: *Newland v. Newland*, 1 Jones (N. C.) L. 463.

² *Williams v. Jones*, 2 Swan (Tenn.) 260;

Davis v. Richardson, 10 Yerg. (Tenn.) 290; s.c. 31 Am. Dec. 581.

³ 100 N. Y. 287, 301-303.

⁴ 31 U. S. (6 Pet.) 68; bk. 8 L. ed. 322, followed in *Brant v. Vir-*

ginia Coal & Iron Co., 93 U. S. 326, 333; bk. 23 L. ed. 927, 928; s.c. 16 Am. L. Reg. 403.

⁵ See: *Gifford v. Choate*, 100 Mass. 343, 346;

Albee v. Carpenter, 66 Mass. (12 Cush.) 382, 383;

Homer v. Shelton, 43 Mass. (2 Met.) 194, 199, 201.

questioned in New York,¹ and denied in Maine.² The Supreme Judicial Court of Massachusetts say that the authority of this decision is somewhat impaired by the circumstance that no counsel were heard on behalf of the party against whom it was made, and that the attention of the court does not seem to have been drawn to the authorities in favor of the opposite conclusion ; that the decision is made to rest upon the fact that the remainder was the only special provision made by the will for the testator's only child, and that there were no words directly extending the wife's interest beyond her life. ³

SEC. 389. **Statutory regulations.**—Statutes have been passed in most if not all of the states, which have greatly modified if they have not entirely overthrown the common-law rules of construction of devises of realty. They have all been in the direction of giving greater scope to the intention of the devisor, and greater latitude to the courts, when engaged in the construction of wills, than was allowed by the rules of common law. It is inexpedient to refer to these various statutes in detail in this place. Any one desiring to inform himself accurately as to the statute law in any state, upon this or any other subject, must of necessity resort to the statutes themselves. It is impracticable, if not impossible, to collate the statutes of the various states and give briefly their substance with entire accuracy.⁴ If that feat were accomplished at the time a book went to press, “the restless love of change which seems to be inherent in American policy, both as to constitution and laws,”⁵ would of necessity soon render it inaccurate, if not misleading.

SEC. 390. **Construction of devises since the statutes.**—The interpretation of wills in any state is governed by the

¹ See : *Campbell v. Beaumont*, 91 N. Y. 465, 469.

² See : *Copeland v. Barron*, 72 Me. 206 ; s.c. 39 Am. Rep. 318, 319, note.

³ *Gifford v. Choate*, 100 Mass. 343, 346.

See : *Campbell v. Beaumont*, 91 N. Y. 464, 468.

⁴ “Stimson on Statutes” does this as nearly as is possible, and his work is commended to all who will be content with a careful analysis and conscientious summary of the statute law upon this or any other point.

⁵ See : 4 Kent Com. (13th ed.) 406, note.

statute upon the subject prevailing at the time the will was made.¹ Under many of these statutes the words "heirs and assigns" are not necessary to pass a fee, and their absence from a devise will not be evidence of an intention on the part of the testator to give a less estate than a fee-simple,² the presumption under the statute being in favor of a fee.³ In some of the states this presumption has been carried so far that a devise to an administrator, with power to sell real estate in the absence of sufficient personalty to pay just demands, has been construed as giving a fee,⁴ but this is thought to be carrying statutory construction to a dangerous extreme.

¹ Some of the early cases in South Carolina hold that the statute in that state enacting that no words of limitation shall "hereafter be necessary to devise a fee is simply" declaratory of the law as it existed, and therefore applies to the construction of wills made before its passage. See: *Peyton v. Smith*, 4 McC.

(S. C.) 476; s.c. 17 Am. Dec. 758;

Hall v. Goodwyn, 4 McC. (S. C.) L. 442.

Compare: *Boatwright v. Faust* 4 McC. (S. C.) 439.

² *Baldwin v. Bean*, 59 Me. 481.

³ See: *Shirey v. Postlethwaite*, 72 Pa. St. 39.

⁴ See: *McConnel v. Smith*, 23 Ill. 611

CHAPTER VIII.

DESCENT OF FEE-SIMPLE ESTATES.

- SEC. 391. Introductory.
- SEC. 392. Local or special customs—Control over descent.
- SEC. 393. Same—Gavelkind.
- SEC. 394. Same—Same—Where prevails.
- SEC. 395. Same—Borough-English.
- SEC. 396. Same—Effect on right to take as heir.
- SEC. 397. Same—Copyholds.
- SEC. 398. Descent as affected by domicile.
- SEC. 399. Descent at common law.
- SEC. 400. Same—Seisin in law.
- SEC. 401. Same—Same—Prevents abeyance of freehold.
- SEC. 402. Same—Seisin in deed.
- SEC. 403. Same—Same—How acquired.
- SEC. 404. Same—Distinction between seisin in law and in fact.
- SEC. 405. Same—When entry not necessary to convert seisin in law into actual seisin.
- SEC. 406. Common-law rules of descent.
- SEC. 407. Same—First rule.
- SEC. 408. Same—Same—Doctrine of *possessio fratris*.
- SEC. 409. Same—Same—Same—Effect on dower and curtesy.
- SEC. 410. Same—Second rule.
- SEC. 411. Same—Third rule.
- SEC. 412. Same—Fourth rule.
- SEC. 413. Same—Fifth rule.
- SEC. 414. Same—Sixth rule.
- SEC. 415. Same—Seventh rule.
- SEC. 416. Same—Eighth rule.
- SEC. 417. Same—Same—Feudal origin of primogeniture.
- SEC. 418. Rules of descent in the United States.

SECTION 391. *Introductory.*—By descent is understood the hereditary succession to an estate in realty, and is the title whereby a man on the death of his ancestors acquires his estate by right of representation as his heir at law,¹ as contra-distinguished from title by purchase, or

¹ *Mayer v. McLure*, 36 Miss. 395; s.c. 72 Am. Dec. 190.

Barclay v. Cameron, 25 Tex. 241; 2 Bl. Com. 201.

by the act or agreement of the parties.¹ The law itself casts the estate upon the heir immediately on the death of the ancestor,² and the party cannot disclaim the estate if he would.³ Title to real estate thus cast upon the party is not derived from natural law, but is owing to statutes regulating the subject which are positive, and to some degree arbitrary.⁴ The descent of real estate in the various states of the Union is governed by local statutes, which must be resorted to by the student and the practitioner to ascertain the rules of descent in any particular state. The laws regulating the descent of real property, like the laws governing many other subjects, are not constant but "exposed to the restless life of change which seems to be inherent in American policy, both as to statutes and laws."⁵

SEC. 392. Local or special customs—Control over descent.—The rules of the common law governing the devolution of lands in England frequently give way to local customs, as in the case of gavelkind and borough-English, which are not modes of tenure, but customary modes of devolution of lands in particular places, by virtue of which the inherent descents differ from the course of descent prescribed by the common law, although the tenure is in socage, and the words of limitation used to create the estate are those used to create common-law fees.

SEC. 393. Same—Gavelkind.—Gavelkind is a particular custom in vogue in Kent, which ordains that all sons alike should succeed to their father's estate.⁶ The word gavelkind is used, or confused rather, in three different senses : (1) To denote tenure, which is a species of socage having peculiar customs connected with it ; (2) to denote the several parts which together make up the customs of

¹ Donahue's Estate, 36 Cal. 329.

² 2 Bl. Com. 210.

³ See : Smith v. Smith, 23 Ind. 202 ;

Baxter v. Bradbury, 20 Me. 260 ;

s.c. 37 Am. Dec. 49 ;

Overturf v. Dugan, 29 Ohio St. 230 ;

Birney v. Wilson, 11 Ohio St. 426.

⁴ Davis v. Stinson, 53 Me. 493 ;

Haven v. Foster, 26 Mass. (9 Pick.)

127 ; s.c. 19 Am. Dec. 353 ;

Gannon v. Nowell, 6 Jones (N. C.) L. 436.

⁵ See : 4 Kent Com. (13th ed.) 405, note.

⁶ Anderson L. Dict. 486.

Kent; and (3) to denote only the custom of equal partition among males upon a descent.¹ But it is conceived that the word is not properly used to denote the tenure; for the custom "runs with the land and not with the tenure."²

SEC. 394. **Same—Same—Where prevails.**—Gavelkind is found as a custom most commonly, but not exclusively, in the county of Kent,³ where all lands are presumed to be gavelkind until the contrary is shown.⁴ It seems that the word gavelkind is not properly used as to lands affected by the customs outside of Kent.⁵ The custom of Kent must, at all events, from its importance, be regarded as a normal standard of gavelkind, and all variations from it as being separate and peculiar customs. By this custom the descent is among all the sons equally, and in default of sons to all the daughters equally, and in default of children to all the brothers equally. The issue of a deceased son, daughter, or brother, who, if living, would have been entitled to partake, being also entitled *per stirpes* to the share of their deceased parent.⁶

SEC. 395. **Same—Borough-English.**—What is known as borough-English is a custom prevalent in some parts of England, chiefly in the old boroughs, by which the youngest son inherits the father's estate, and was so called to distinguish it from the Norman rule of primogeniture.⁷ This custom is chiefly found in connection with lands held by burgage-tenure within certain boroughs,⁸ which species of socage does not seem to be affected by the statute of Charles II.⁹ Various kinds or

¹ Rob. Gav. 9.

² Rob. Gav. 80, 87, 90.

³ See: Litt., § 210;

1 Co. Litt. (19th ed.) 140a.

⁴ Rob. Gav. 54.

⁵ Rob. Gav. 8, note.

⁶ Rob. Gav. 112, 115.

Effect of gavelkind on dower.

—The customs of gavelkind affect lands subject to it in other respects than descent; namely, dower, curtesy, alienation by infants, and escheat,

together with other less important points, some of which are now obsolete in England and never had any force in this country.

See: Rob. Gav. 96.

⁷ Anderson L. Dict. 132.

⁸ See: Litt., § 165;

1 Co. Litt., (19th ed.) 110b.

⁹ 12 Chas. II., c. 24.

See: 1 Co. Litt. (19th ed.) 116a, Hargrave's note 1.

modifications of the custom, including its extension to females, also to collateral descents, are met with, and the custom is also found in some manors.¹

SEC. 396. **Same—Effect on right to take as heir.**—The prevalence of these local customs had a tendency to confuse the question as to who should take as heir at law, where the man held lands by purchase in boroughs where different customs prevailed. The phrase “heir at law” has no meaning except in reference to the estate to which the person so designated might possibly succeed by inheritance. The same man, if he should be seized as purchaser in fee-simple of lands subject to different customs of descent, might leave several distinct heirs at law. If he should die intestate leaving sons, his heir at law, as to lands which are subject to no special custom, is his eldest son; as to borough-English lands, is his youngest son; and his heir at law, as to gavelkind lands, will be composed of all his sons taking together as coparceners. And other special customs may lawfully exist affecting lands in particular manors or boroughs, which may multiply still further his capacity for leaving distinct heirs.

SEC. 397. **Same—Copyholds.**—Special customs affecting the descent of lands held for a fee-simple are much more commonly found in connection with copyholds held for the customary fee-simple, than in connection with lands held for the fee-simple by common-law tenure. The cause of this greater frequency is twofold. In the first place, custom is the life of copyhold tenure, and peculiarities of custom in connection therewith have always been much more common than in connection with common-law tenure. In the second place, customs affecting copyhold tenure have a much stronger tendency to be remembered and preserved in practice, because the manorial incidents of copyhold tenure are generally more valuable, and better worth insisting upon, than manorial incidents of freehold tenure. To this must be added the effect of the statute of *Quia Emptores*, which has been gradually to extinguish

¹ Rob. Gav. 391, 393.

the tenure of freehold lands held for a fee-simple of the mesne lords, and to concentrate all such tenure in the crown.¹

SEC. 398. *Descent as affected by domicile.*—At common law neither a bastard,² nor a monster,³ “which hath not the shape of mankind,” can be heir or inherit any land, even though it be brought forth within marriage;⁴ but a creature that has deformity in any part of his body, and yet has human shape, he may be heir, and inherit real estate.⁵ Rules of descent are not dependent solely upon the rules of personal status in respect to questions of legitimacy, and of consequent qualification to inherit. Thus, the law of a man’s domicile or origin is conclusive as to his legitimacy in respect to personal status, but such legitimacy is not conclusive in respect to his right to inherit under the law of descent. A person may, in respect to personal status, be legitimate though not born *ex justis nuptiis*; but in relation to the law of descent, birth *ex justis nuptiis* is an indispensable requisite to heirship.⁶

¹ See : Challis’ Real Prop. 178.

² See : 1 Co. Litt. (19th ed.) 8a.

³ See : 1 Co. Litt. (19th ed.) 7b, 29b (c);

Bract., lib. 5, 437–438;

Brit., ca. 66, 83;

Fleta, lib. 1, c. 5; Id., lib. 6, cap. 54.

Lord Coke says, 1 Co. Litt. (19th ed.) 29b: “If a wife be delivered of a monster, which hath not the shape of mankind, this is no issue in the law; but although the issue has some deformity in any part of his body, yet if he hath human shape this sufficeth. Hi, qui contra formam humani generis converse more procreantur (ut si mulier monstruosum vel prodigiosum fuerit enixa), inter liberos non computentur. Partus tamen cui natura aliquantulum ampliaverit vel diminuerit non tamen superbundanter, ut si sex digitos vel nisi quatuor habuerit, bene debet inter liberos commemorari. Si inutilia natura

reddidit membra, ut si curvus fuerit aut gibbesus vel membra tortuosa habuerit, non tamen est partus monstrosus. Item puerorum alii sunt masculi, alii fæminæ, alii hermaphroditæ. Hermaphrodita tam mascula quam fæminæ comparatur secundum prævalescentiam sexûs incalescentis.”

⁴ Bract., lib. 5, fol. 437, 438;

Brit., ca. 66, fol. 167;

Fleta, lib. 1, ca. 5.

⁵ 1 Co. Litt. (19th ed.) 7b.

“Every heir is either a male or a female, or an hermaphrodite, that is, both male or female. And an hermaphrodite (which is also called Androgynus) shall be heir, either as male or female, according to the kind of the sex which doth prevail. Hermaphrodita, tam masculino quam fæminæ comparatur, secundum prævalescentiam sexûs incalescentis.” 1 Co. Litt. (19th ed.) 8a.

⁶ *Re Don’s Estate*, 4 Drew 194;

1 Co. Litt. (19th ed.) 7b.

SEC. 399. **Descent at common law.**—By the common law, upon the death of a person entitled to an estate in fee-simple, the lands necessarily descended to the person next entitled as heir. The person from whom heirship was deduced was not the person last entitled, but the person who, under the title, had last had seisin in deed of the lands.¹ Such person was accordingly, at the time of descent cast, said to be the stock, or, more properly, the root of descent. Actual seisin in deed² was absolutely necessary to make any person the stock from which all future inheritance by right of blood must be derived.³

SEC. 400. **Same—Seisin in law.**—Under the common-law rule, seisin in law did not suffice to make the person so seized the stock of descent.⁴ It followed from this doctrine that where the heir to whom the inheritance had been cast died before acquiring the requisite seisin, the ancestor, not himself, being the person last seized, was the root of the stock.⁵ There was an exception to this rule where the ancestor acquired the estate by purchase, in which case he was sometimes allowed to transmit the estate to his heirs, notwithstanding the fact that he never had actual seisin in deed of it himself.⁶

SEC. 401. **Same—Same—Prevents abeyance of freehold.**—The existence of a seisin in law is sufficient to prevent the seisin, or immediate freehold, from being vacant. This is evident from the fact that the creation of successive estates necessarily contemplates the existence of a

¹ 1 Co. Litt. (19th ed.) 11b.

² See : *Vanderheyden v. Crandall*, 2 Den. (N. Y.) 9.

³ *Chirac v. Reinecker*, 27 U. S. (2 Pet.) 613, 625; bk. 7 L. ed. 538, 613.

See : *Jackson v. Hendricks*, 3 John. Cas. (N. Y.) 214;

Doe v. Keen, 7 T. R. 386.

⁴ 1 Co. Litt. (19th ed.) 11b.

Rule suspended in England by Descent Act.—This rule of descent was suspended in England by the Descent Act, 3 & 4 Will. IV., c. 106, § 2, which indicates that in every case descent shall be traced from the purchaser, that is, from the

person who last acquired the land otherwise than by descent; whereby it has now become superfluous to inquire who last had seisin in deed of the land. By this change in the law, the importance of the distinction between seisin in deed and seisin in law has been much diminished, but it is not even now without some practical interest, and the correct apprehension of it is very necessary in examining titles.

⁵ *Goodtitle v. Newman*, 13 Wils. 516.

⁶ See : *Shelley's Case*, 1 Co. 98a.

seisin in law only, upon the determination of the particular estate in possession. If a seisin in law were insufficient to prevent an abeyance of the immediate freehold, all creation of successive estates would, for that reason, be void by the common law.¹

SEC. 402. **Same—Seisin in deed.**—Seisin in deed is less properly, though conveniently, styled actual seisin, and denotes the seisin of the person having the immediate freehold as distinguished from the remainderman and reversioner, who are all said to be “in of the same seisin.” With regard to estates of freehold in corporeal hereditaments, that is, in lands, seisin in deed is obtained when the person entitled to possession by virtue of the estate enters actually and corporeally into possession of the land, either by himself or his agent. The possession of a person’s tenant for years, or from year to year, or at will, is in law counted to be his possession; and for that reason, if at the time of the descent cast the lands are held by a tenant for years, the heir acquires the seisin in deed at once by the descent without entry.² The possession of other persons having chattel interests only, such as a tenant by elegit, a tenant by statute merchant, or a tenant by statute staple, was, in contemplation of the common law, the possession of the person entitled to the freehold subject to such chattel interest, and was a sufficient possession in him to convert his seisin in law into a seisin in deed.³

SEC. 403. **Same—Same—How acquired.**—Seisin in law is

¹ Challis’ Real Prop. 182.

² 1 Co. Litt. (19th ed.) 15a;

Watk. Desc. 66.

³ Watk. Desc. 64, 65.

With regard to incorporeal hereditaments, which admit of estates in possession, such as a rent-charge, seisin in deed is evidenced by, and consists in, the doing of some appropriate act of ownership, such as receiving the rent-charge.

See : Challis’ Real Prop. 181.

With regard to estates in remainder or reversion, upon an estate of freehold, which are incorporeal hereditaments in

which *ex vi termini* no estate in possession is possible, and therefore no entry could be made, a seisin in deed, sufficient to make the person obtaining it the root of the descent, might be obtained by exercising certain acts of ownership, such as by granting a lease for life to take effect out of the remainder or reversion; by receiving the rent, if any, reserved at the creation of the precedent estate of freehold, and the like.

See : Watk. Desc. 108.

converted into seisin in deed by making an actual entry, or entry in deed, upon the land, such entry being expressed to be made with that intent and in that behalf. Such an entry made upon any part of the land will give seisin in deed of all lands situated in the same county of which the person making the entry has seisin in law. The actual entry is made so soon as the person desiring to make an entry has any part of his body upon the land, and is complete and effectual even though he should immediately afterwards be dragged off by force.¹ At common law seisin in deed of incorporeal hereditaments, such as a rent-charge, could be obtained only by exercising some appropriate act of ownership, such as receiving the rent; and if, by reason of the death of the heir before the rent became due, a seisin in deed could not be obtained, this impossibility did not supply the want of seisin in deed, and the heir failed to become the root of descent.²

SEC. 404. Same—Distinction between seisin in law and in fact.—Seisin in law is only a presumption of the law, which is incompatible with, and is rebutted by, the fact that the seisin in deed, or actual seisin, is, whether rightfully or wrongfully, in somebody else. If the person actually seized by lawful title is disseized by a disseisor, the person disseized has not a seisin in law, but only a right to enter; so that if, before the entry of the heir, a stranger should wrongfully enter in fact upon the lands,³

¹ Watk. Desc. 61.

Entry in deed.—Watkins cites the case that has been so often made to do duty, when actual entry had been made by getting through the window: *Et pur ceo qu'il ne purra entrer per le huis, il entra per le fenestre, et quant l'un moitie de son corps fuit deins la meason et l'autre de hors, il fuit treit hors; per q. il port cest assies, for which seisin in deed was necessary, et fuit agarde q. le pl. recovra.* 8 Ass., pl. 25, f. 17b.

Entry in law.—If the person entitled be hindered from making an effectual entry by fear of

violence, he may make an entry in law by approaching as near as he safely may, and there making his claim; which under such circumstances will take effect as an actual entry. Watk. Desc. 62.

“If one dare not enter, but approach and is disturbed, this is sufficient seisin.” 11 Ass., pl. 11.

Same.—Proof must be given that an entry in deed could not be safely made. Booth, Real Actions, 285.

² 1 Co. Litt. (19th ed.) 15b.

³ Such a wrongful entry is technically styled an abatement, and the stranger so entering an abator.

the heir no longer has a seisin in law, but only a right to enter. And if, before the entry of the remainderman or reversioner, a stranger should in like manner enter,¹ the remainderman or reversioner no longer has a seisin in law, but only a right to enter. The distinction between a right of entry and a seisin in law is that the right to enter implies *ex vi termini* that the actual seisin is wrongfully in somebody else, while a seisin in law implies that there is no actual seisin in anybody. But an actual entry, which would suffice to turn a seisin in law into a seisin in deed, is also sufficient to turn a right of entry into a seisin in deed. But seisin in law suffices, at common law, to make the estate assets in the hands of the heir to answer the ancestor's bond specifying the heirs.² Seisin in deed during coverture is still necessary in order to entitle a husband to curtesy in his wife's lands ; but seisin in law during coverture was always sufficient to entitle the wife to dower out of her husband's lands.³ This distinction was due to the fact that the husband had power at any time during the coverture to turn his wife's seisin in law, which was also his own seisin, into a seisin in deed by his own sole act ; so that if he had lost his curtesy for want of seisin in deed, the loss would have been due to his own laches. On the other hand, the wife, being disabled at common law by her coverture, had no corresponding power to convert her husband's seisin in law into seisin in deed.⁴

SEC. 405. **Same—When entry not necessary to convert seisin in law into actual seisin.**—Where lands are in the possession, or rather the occupation, of a tenant for years, or from year to year, entry is not necessary in order to convert a seisin in law into a seisin in deed, or actual seisin. In such a case, seisin in deed is *ipso facto* acquired by the heir immediately upon the descent cast.⁵ The same is

¹ Such an entry is technically styled an intrusion, and the stranger an intruder.

² Watk. Desc. 55.

³ See : Challis' Real Prop. 184, 279.

⁴ See : Challis' Real Prop. 184.

⁵ *Bushby v. Dixon*, 3 Barn. & C. 298; s.c. 10 Eng. C. L. 142 ;

2 Co. Litt. (19th ed.) 277a.

Lord Hardwicke's confusion. — In *De Grey v. Richardson*, 3 Atk. 469, Lord HARDWICKE seems, *obiter*, to have confused the reversion upon a lease for years with the reversion upon a lease for lives only, of which

true in regard to the occupation of other persons having chattel interests,¹ such as tenants by elegit, and the like.

SEC. 406. **Common-law rules of descent.**—Under the common law there are certain rules or canons of inheritance which have been established for ages, according to which estates are transmitted from ancestor to heir, in so clear and decided a manner as to preclude all uncertainty as to the course which the descent is to take.² These English rules or canons of inheritance are of feudal origin and growth, and most of their essential features have been rejected in this country;³ yet a knowledge of these rules or canons, and of their application, is essential to a mastery of the law of real property as it exists in this country to-day.

SEC. 407. **Same—First rule.**—By the common law the descent of hereditaments is traced from the person who, under the title in fee-simple, last obtained seisin in deed thereof.⁴ This rule is often summarized by the maxim, *seisina facit stipitem*, seisin makes the root or stock;⁵ and the person referred to is styled the stock of descent, or, more properly, the root of descent.⁶

SEC. 408. **Same — Same — Doctrine of *possessio fratris*.**—Under this rule of the common law, making seisin in deed the root of descent, taken in connection with another rule,⁷ which forbade collaterals of the half-blood

the latter needed receipt of rent in order to give seisin indeed.

See: *Doe v. Whichelo*, 8 T. R. 211, 213;

Doe v. Keen, 7 T. R. 386, 390.

¹ *Watk. Desc.* 65.

² See: 2 Bl. Com. 208, *et seq.*;

4 Kent Com. (13th ed.) 374.

³ See: *Bogert v. Furman*, 10 Paige Ch. (N. Y.) 496;

Sweezy v. Willis, 1 Bradf. (N. Y.) 495;

4 Kent Com. (13th ed.) 335, 342.

⁴ 1 Co. Litt. (19th ed.) 11b.

⁵ 2 Bl. Com. 209;

Broom Max. 527, 528;

4 Kent Com. (13th ed.) 388, 389.

⁶ This rule is suspended by the Descent Act, 3 and 4 Will. IV.,

c. 106, § 2.

This rule and maxim, relics of the troublesome times when right without possession was worth but little, sometimes gave occasion to difficulties, owing to the uncertainty of the question, whether possession had or had not been taken by any person entitled as heir. Thus, where a man was entering a house by a window, and when half out and half in, was pulled out again by the heels, it was made a question whether this entry was sufficient, and it was adjudged that it was. *Watk. Desc.* 45 (4th ed.) 53.

⁷ See: *Post*, § 412.

to inherit, it followed that, if a brother had taken as heir by descent, and had acquired seisin in deed, his sister, if any, of the whole-blood, on his death intestate and without issue, would inherit as heir to him, to the complete exclusion of his or her brothers, if any, of the half-blood.¹ This result of an actual seisin obtained by the brother is often referred to as the doctrine of *possessio fratris*, and was applied to the descent of all hereditaments, whether legal or equitable, of which seisin in deed, or such a possession as in equity was equivalent thereto, could be had.²

SEC. 409. **Same—Same—Same—Effect on dower and curtesy.**—The seisin of a widow, to whom land had been assigned as dower, by that express title, was a continuation of the seisin of her deceased husband. The heir, therefore, could not, by entry, obtain seisin in deed of such land, so long as it remained in dower; and even though he had entered into the whole lands before assignment of dower, yet the assignment, when made, would have defeated his seisin acquired by the entry. For this reason there could be no *possessio fratris* of land actually in dower, unless the very unusual step had been taken, of granting an estate for life, or in tail, to take effect out of the heir's estate; and under ordinary circumstances, the two-thirds retained by the heir might, on his death, pass to his sister of the whole-blood, while the one-third assigned as dower, on the death of the dowress, passed to the younger brother of the half-blood, as being the heir to the common father, the person who has last had seisin in deed of that one-third.³ The acquisition of a seisin in deed, sufficient to change the course of descent, by a remainderman or reversioner, was practically so rare, that some

¹ 1 Co. Litt. (19th ed.) 14b.

² Watk. Desc. 106, 107.

This doctrine was not favored, and the claim of the brother to have obtained seisin in deed was weighed very rigorously. A seisin which was a good foundation for a writ of right did not necessarily suffice to support a *possessio fratris*.

See: 2 Co. Litt. (19th ed.) 281a.

Descents in England being now traced from a specified root of descent, the mere acquisition of a *possessio fratris* cannot have any practical influence upon the course of descent. Challis' Real Prop. 187.

³ Watk. Desc. 84, 85.

writers¹ seem to imply that it did not happen at all; but the possibility of such an acquisition is admitted by all.² In cases where a tenancy by the curtesy existed, since the sole actual seisin was vested in the husband immediately on the death of the wife, without any interval or any need for entry, there was a similar obstacle in the way of any *possessio fratris* during the curtesy.³

SEC. 410. **Same—Second rule.**—By the common law, hereditaments descended lineally to the issue of the root of descent *in infinitum*, but they could never lineally ascend.⁴

SEC. 411. **Same—Third rule.**—At common law, for defects of issue, hereditaments descended to the collateral relations, being of the blood of the first purchaser.⁵

SEC. 412. **Same—Fourth rule.**—By the common law, the collateral heir, in order to take by a descent, was required to be the next collateral kinsman of the whole-blood.⁶ From this canon sprang the doctrine of *possessio fratris* heretofore adverted to.⁷

SEC. 413. **Same—Fifth rule.**—According to the common law, the male issue were admitted before the female.⁸ In this country, without exception, it is believed, all the children, both male and female, inherit equally together, subject in some of the states to the right of the eldest to

¹ Watk. Desc. 84, 85.

² See: Watk. Desc. 108.

³ Watk. Desc. 104.

⁴ 2 Bl. Com. 208;
1 Co. Litt. (19th ed.) 11b;
Litt., § 3.

This rule of descent has also been altered in England by the Descent Act, 3 & 4 Will. IV., c. 106, § 2.

In this country the rule is greatly changed by local statutes, so as to admit at least father and mother as heirs in the event of the failure of lineal descendants.

See: 1 Stimson's Statutes, *passim*.

⁵ 2 Bl. Com. 220.

⁶ 2 Bl. Com. 224;

1 Co. Litt. (19th ed.) 14a.

⁷ See: *Ante*, § 408.

This canon was firmly established in the reign of Edward II.

5 Edw. II., Mayn 148;

2 Reeves' Hist. Eng. L. (2d ed.) 317.

See: *Hawkins v. Shewen*, 1 Sim. & S. 257.

Relations of the half-blood are rendered capable of inheriting by the Descent Act.

See 3 & 4 Will. IV., c. 106, § 9.

⁸ 2 Bl. Com. 212, 213.

See: English Descent Act, 3 & 4 Will. IV., c. 106, § 7.

the homestead, by paying to the others their respective shares of its value.¹

SEC. 414. **Same—Sixth rule.**—At common law, in collateral inheritances, the male stock was preferred to the female; that is, kindred derived from the blood of the male ancestors, however remote, were admitted before those from the blood of the female, however near; except in those cases where the lands were in fact descended from the female.² Under this rule the relations of the father's side were admitted *in infinitum*, before those of the mother's side were admitted at all.³

SEC. 415. **Same—Seventh rule.**—By the common law the lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor, and thus stand in the same place as the person himself would have done had he been living.⁴ This rule is not universally adopted in this country, but in many of the states descendants take *per stirpes* only, when they stand in different degrees of relationship to the common ancestor.⁵

SEC. 416. **Same—Eighth rule.**—At common law, where there were two or more males in equal degree, the eldest son inherited, but the females altogether.⁶ This canon of descent fixed firmly the doctrine of primogeniture, or the descent of the land to the eldest son. It is said that, with the introduction of tenures, primogeniture began to prevail; yet it is found that, as late as the reign of Henry I.,⁷ the right of primogeniture was so feeble, that, if there was more than one son, the succession was divided, and the eldest son took only the *primum patris*

¹ See: Stimson's Stats., *passim*.

² 2 Bl. Com. 234.

³ *Clerc v. Brook*, 2 Plow. 442.

⁴ 2 Bl. Com. 216.

Taking per stirpes and per capita.—This canon of descent gave rise to the succession *per stirpes*, or according to the roots, in distinction from the taking *per capita*, that is, where each takes in his own degree of the ancestor in his own direct right.

2 Bl. Com. 217;

4 Kent Com. (13th ed.) 391, 392.

See: *Davis v. Stinson*, 53 Me. 493;

Kelly v. Kelly, 5 Lans. (N. Y.) 443.

⁵ 1 Cooley's Bl. Com. 454, note 8.

⁶ 2 Bl. Com. 214.

Daughters take the inheritance as coparceners under this rule, and are said to make but one heir. *Burt. Real Prop.*, § 316.

⁷ *Leges*, 17.

foedum,¹ the rest of the property being left to descend to the younger son or sons. This custom, however, soon went out of use, or was altered by some statute now lost. In the reign of Henry II. the eldest son was considered as sole heir; and so fixed was his right of succession to the inheritance held by his ancestors that it could not be disappointed by alienation.²

SEC. 417. *Same—Same—Feudal origin of primogeniture.*—While the feudal origin of primogeniture is undisputed, it appears to have taken a deeper root in England than elsewhere; the total exclusion of the younger sons under this doctrine being peculiar in England alone. In the other countries that come under feudal laws and customs a portion of the inheritance, or some charge upon it, was secured by law to the younger sons.³ From this ancient right arose the modern English custom of settling family estates on the eldest son. The doctrine of primogeniture, and the practice of settling family estates on the eldest son, never were recognized in this country.

SEC. 418. *Rules of descent in the United States.*—The English rules and canons of inheritance, being of feudal origin and growth, and adapted to the peculiar institutions of that country, are not adapted to the wants of this country, and have been almost universally rejected by the various states of the Union. In this country⁴ and

¹ Hale's Hist. Com. L. 255.

² See: 1 Reeves' Hist. Eng. L. (2d ed.) 40, 41.

³ 2 Co. Litt. (19th ed.) 191a, note 1.

⁴ See: Augusta Ins. Co. v. Morton, 3 La. An. 417, 418;

Harper v. Hampton, 1 Har. & J. (Md.) 622, 687;

Blake v. Williams, 23 Mass. (6 Pick.) 286; s.c. 17 Am. Dec. 372;

Cutter v. Davenport, 18 Mass. (1 Pick.) 81, 86; s.c. 11 Am. Dec. 149;

Goodwin v. Jones, 3 Mass. 514, 518; s.c. 3 Am. Dec. 173;

Andrews v. Herriot, 4 Cow. (N. Y.) 508, 527, note;

Holmes v. Remsen, 4 John. Ch.

(N. Y.) 460; s.c. 20 Johns. (N. Y.) 254;

Chapman v. Robertson, 6 Paige Ch. (N. Y.) 627; s.c. 31 Am. Dec. 264;

Hosford v. Nichols, 1 Paige, Ch. (N. Y.) 220;

Wills v. Cowper, 2 Ohio 124;

Milne v. Moreton, 6 Binn. (Pa.) 353; s.c. 6 Am. Dec. 466;

Christian Union v. Yount, 101 U. S. 352; 25 L. ed. 888;

Oakey v. Bennett, 52 U. S. (11 How.) 33; bk. 13 L. ed. 593;

Darby's Lessee v. Mayer, 23 U. S. (10 Wheat.) 465; bk. 6 L. ed. 367;

McCormick v. Sullivant, 23 U. S. (10 Wheat.) 192; bk. 6 L. ed. 300;

England,¹ as well as on the continent of Europe,² all real and personal property is exclusively subject to the laws of the government or state within whose territory the land is situated; and a title thereto can be acquired and lost and devise thereof made only in the manner prescribed by the law of the place where the land is situated.³ The

- Kerr v. Moon's Devisees, 22 U. S. (9 Wheat.) 565, 566; bk. 6 L. ed. 161;
 Clark v. Graham, 19 U. S. (6 Wheat.) 577; bk. 5 L. ed. 344;
 United States v. Crosby, 11 U. S. (7 Cr.) 115; bk. 3 L. ed. 287.
¹ Birtwhistle v. Vardill, 5 Barn. & C. 438; s.c. 9 Bligh 32-88; 11 Eng. C. L. 531;
 Phillips v. Hunter, 2 H. Bl. 402; s.c. 2 Rev. Rep. 353;
 Sill v. Worswick, 1 H. Bl. 665; s.c. 1 Rev. Rep. 816;
 Elliott v. Minto, 6 Madd. 16;
 Cockerell v. Dickens, 3 Moore P. C. 98, 131, 132;
 Coppin v. Coppin, 2 Pr. Wms. 290, 293;
 Selkrig v. Davies, 2 Rose 97; s.c. 2 Dow. 230;
 Hunter v. Potts, 4 T. R. 182; s.c. *sub nom.* Phillips v. Hunter, 2 H. Bl. 403; 2 Rev. Rep. 353;
 Curtis v. Hutton, 14 Ves. 537, 541;
 Brodie v. Barry, 2 Ves. & B. 130;
 Tulloch v. Hartley, 1 Younge & C. (N. R.) 114.
² See: 2 Burge, Comm. on Col. & For. Law, pt. 2, c. 9, pp. 840-870;
 4 Ib., pt. 2, c. 4, § 5, p. 150;
 Ib., c. 5, n. 11, pp. 71, 217;
 Ib., c. 12, p. 576;
 Foelix, Conflict des Lois, Revue, Etrang. et Franc., tom. I., §§ 27-37, pp. 216-250, 307-312 (ed. 1740);
 Vattel, b. 2, c. 8, §§ 100, 103;
 Pothier, Coutume d'Orleans, c. 1, §§ 22-24;
 Id., c. 3, n. 51;
 Hertii Opera, tom. I. de Collis. Leg., § 4, n. 9, p. 125 (ed. 1737);
 Bouthier, Cout. de Bourg., c. 23, §§ 36-63;
 Le Burn, de la Communaute, lib. I., c. 5, pp. 9, 10;
 D'Agnesseau, Œuvres, tom. IV., p. 660 (4to ed.);
 Cochin Œuvres, tom. I., p. 545 (4to ed.);
 1 Froland, Mem., c. 4, p. 49;
 Id., c. 7, p. 155;
 Liverm. Dissert., §§ 9-162, pp. 28-106;
 Ersk. Inst., b. 3, tit. 2, § 40, p. 515;
 2 Bell Com. (4th ed.), § 1266, p. 690;
 Henry on Foreign Law, 12, 14, 15; Id., Appx. 169.
³ See: Lingen v. Lingen, 45 Ala. 410, 412;
 Potter v. Titcomb, 22 Me. 300;
 White v. Howard, 46 N. Y. 144;
 Gettings v. Eastman, 1 Clarke Ch. (N. Y.) 19;
 Abell v. Douglass, 4 Den. (N. Y.) 305;
 Mills v. Fogal, 4 Edw. Ch. (N. Y.) 559;
 Ex parte Perkins, 2 Johns. Ch. (N. Y.) 124;
 Halley v. James, 7 Paige Ch. (N. Y.) 213;
 Chapman v. Robertson, 6 Paige Ch. (N. Y.) 627, 630; s.c. 31 Am. Dec. 264;
 Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126; s.c. 5 N. Y. 447;
 Pittsburg & St. Line R. Co. v. Rothschild (Pa.), 4 Atl. Rep. 385; s.c. 4 Cent. Rep. 107, 109;
 Jeter v. Fellowes, 32 Pa. St. 465;
 Donaldson v. Phillips, 18 Pa. St. 170; s.c. 55 Am. Dec. 614;
 White v. Howard, 46 N. Y. 444;
 Watkins v. Holman's Lessee, 41 U. S. (16 Pet.) 25; bk. 10 L. ed. 873;
 Watts v. Waddle, 31 U. S. (6 Pet.) 389; bk. 8 L. ed. 437;
 Darby's Lessee v. Mayer, 23 U. S. (10 Wheat.) 465; bk. 6 L. ed. 367;
 McCormick v. Sullivant, 23 U. S. (10 Wheat.) 192; bk. 6 L. ed. 300;
 Kerr v. Moon's Devisees, 22 U. S. (9 Wheat.) 365; bk. 6 L. ed. 161;
 Clark v. Graham, 19 U. S. (6 Wheat.) 577; bk. 5 L. ed. 334;
 United States v. Crosby, 11 U. S. (7 Cr.) 115; bk. 3 L. ed. 287;

various states have passed statutes regulating the descent of real property and formulated their own rules of inheritance, which, while they differ materially as to details, are in the main the converse of those which obtain in England. These rules will be fully set forth in a succeeding chapter, when we come to treat of Title by Descent.¹

Root *v.* Brotherson, 4 McL. C. C. 230 ;

Perry Mfg Co. *v.* Brown, 2 Woodb. & M. C. C. 450 ;

Birtwhistle *v.* Vardill, 5 Barn. & C. 438 ; s.c. 9 Bligh 32-88 ; 11

Eng. Com. L. 531 ;

Elliott *v.* Minto, 6 Madd. 16 ;

Curtis *v.* Hutton, 14 Ves. 537, 541.

¹ See : *Post*, Book V., chapter on "Descent."

CHAPTER IX.

DETERMINABLE FEES.

- SEC. 419. Definition of determinable fee.
SEC. 420. Distinguished from fee-simple.
SEC. 421. Mode of limitation.
SEC. 422. Limitations creating a determinable fee.
SEC. 423. Kinds of determinable fees.
SEC. 424. Same—Direct limitation.
SEC. 425. Same—Collateral limitation.
SEC. 426. Converted into a fee-simple how.
SEC. 427. Determinable limitations and limitations upon condition—
Distinction between.
SEC. 428. Alienation and devise of.
SEC. 429. Waste an incident of such estates.

SECTION 419. **Definition of determinable fee.**—The phrase “determinable fee” is a generic term embracing all fees which are liable to be determined by some act or event specified in a qualification subjoined to their creation, or inferred by law as bounding their extent, but which may continue forever.¹ It is said in an early case that a determinable fee is “such perpetuity of an estate which may continue forever, though at the same time there is a contingency which, when it happens, will determine the estate, which contingency cannot properly be called an addition but a limitation;”² but this is rather a de-

¹ *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 94 Ill. 93;
People v. White, 11 Barb. (N. Y.) 28;
Lott v. Wyckoff, 1 Barb. (N. Y.) 575;
Union Canal Co. v. Young, 1 Whart. (Pa.) 427;
McLean v. Borce, 35 Wis. 36;
United States v. Reese, 5 Dill. C. 411;
Letheullier v. Tracey, Amb. 204;
Car v. Ellison, 3 Atk. 74;
Seymour's Case, 10 Co. 97;
Davies v. Warner, Cro. Jac. 593;
Spencer v. Chase, 9 Mod. 29;
Walsingham's Case, 1 Plowd. 557;
2 Bl. Com. 109;
Fearne Cont. Rem. 187;
1 Prest. Est. 431, 466;
Shep. Touch. 97;
10 Viner's Abr. 133.
² *Walsingham's Case*, 1 Plowd. 557.

scription of what is now known as a conditional limitation.¹

SEC. 420. Distinguished from fee-simple.—These modified fees differ from a fee-simple in their limitation, which is to the grantee and his heirs, not simply, but subject to some qualification of a kind permitted by the law, which gives to the inheritance a more restricted character. In the case of base fees, the restriction is implied in the circumstances of their origin; but in the case of other modified fees, it is expressed in their limitation. Such lawful qualification may be of three kinds, to wit:

1. Succession of the heirs, instead of enduring forever, liable to be cut short by the happening of a future event, which limitation gives rise to a determinable fee;

2. The heirs to whom the inheritance can descend may be restricted to the heirs of the body of a specified person or persons, which limitation gives rise to a conditional fee at common law, and to a fee-tail under the statute *De Donis*; and

3. The heirs to whom the inheritance can descend may be restricted to a particular class, where the class is to be taken in a peculiar sense, which limitation gives rise to a peculiar estate sometimes styled a qualified fee-simple.

SEC. 421. Mode of limitation.—In the limitation of a determinable fee, the limitation is expressed to be made to the grantee and his heirs until the happening of some future event, which must be of such a character that it may by possibility never happen at all. For it is an essential character of all fees of this kind, that they may by possibility endure forever.² A limitation to a grantee and his heirs until the happening of some event, which must in the nature of things happen sooner or later, passes no fee. If the happening of the event, though certain, is not fixed in point of time,—that is, if it depends upon the dropping of a life or lives,—the limitation

¹ See: *Battle Square Church v. Grant*, 69 Mass. (3 Gray) 142, 146, 147; s.c. 63 Am. Dec. 725, 727, 728.

² 1 Prest. Est. 479.

will give rise to an estate *par autre vie*.¹ If the happening of the event is fixed in point of time, the limitation gives rise to a term of years, which, notwithstanding the naming of the heir, passes to the executor on the death of the tenant.² A limitation to a grantee and his heirs, at the will of the grantor, passes only a tenancy at will.³

SEC. 422. **Limitations creating a determinable fee.**—Limitations creating a determinable fee are partly limitations at common law, and partly limitations by the way of use and by way of devise. But in all limitations contained in a deed, however they may take effect, the words “and his heirs,” and also in a valid clause operating by way of determinable or collateral limitation, have, so far as respects the duration of the estate limited, the same operation; and this is true also of devises which contain words of strict limitation. Devises with the following limitations have been held to be determinable fees, to wit: As long as a certain tree shall grow;⁴ as long as a certain tree stands;⁵ as long as the Church of St. Paul shall stand;⁶ as long as the devisee shall pay a stipulated sum annually to a designated party;⁷ as long as a designated person has heirs of his body;⁸ until the marriage of a designated person shall take place;⁹ until a designated person returns from Rome;¹⁰ until the grantee go to Rome,¹¹ or until he be promoted to a benefice;¹² until such time as the grantee, his heirs, executors, or administrators, make default in payment of any of certain stipulated sums;¹³ until the grantee pay to

¹ See: *Post*, chapter XVI., “Estates Par Autre Vie.”

² 2 Co. Litt. (19th ed.) 388a.

³ 1 Co. Litt. (19th ed.) 62b.

See: *Post*, chapter XII., “Estates at Will.”

⁴ *Bowles' Case*, 11 Co. 79a.

⁵ *Idle v. Cook*, 1 Pr. Wms. 70, 75; s.c. 2 Ld. Raym. 1144, 1148; *Shep. Touch.* 101.

⁶ *Walsingham's Case*, 1 Plowd. 557.

⁷ *Id.*

⁸ *Idle v. Cook*, 1 Pr. Wms. 70; s.c. 2 Ld. Raym. 1144; *Walsingham's Case*, 1 Plowd. 557; *Seymour's Case*, 10 Co. 97b;

Davis v. Warner, Cro. Jac. 593; 1 Co. Litt. (19th ed.) 18a;

10 Vin. Abr. 223.

⁹ 1 Prest. Est. 432, 442.

Marriage that of grantee.—It is not necessary that the marriage should be the marriage of the grantee himself.

See: *Howard v. Norfolk*, 2 Swanst. 454, 461.

¹⁰ *Fearne Cont. Rem.* 12.

See: *Duke of Norfolk's Case*, 3 Ch. Cas. 1, 46.

¹¹ *Shep. Touch.* 125.

¹² *Id.*

¹³ *Anonymous*, 1 Leon. 33.

the grantor a specified sum of money ;¹ for, during, and till any son that the feoffor shall beget of the body of his said wife shall accomplish the age of twenty-one years.² So also is a conveyance conditioned that the grantees or the survivor of them, or the heirs of the survivor or survivors, should, out of the lands by the rents, issues, and profits, or by the sale of the whole or so much as should be necessary, raise so much as should be sufficient for the payment of debts, legacies, funeral expenses, and then the property to become theirs ;³ in trust to pay to a designated person a specified sum until his debts and legacies were paid ;⁴ in trust till the rents and profits of the lands shall raise and pay the several legacies and bequests mentioned in the testator's will ;⁵ to the use of certain persons until they make a good and sufficient lease of the lands by indenture for a term of forty years,⁶ and the like.

SEC. 423. **Kinds of determinable fees.**—This kind of limitation, where words of an express limitation are used to mark out an estate, which is, by subsequent words,—being part of the limitation itself,—made liable to determination upon the happening of a wholly disconnected future event, may conveniently be styled a determinable limitation.⁷ These limitations are of two kinds,⁸ to wit :

1. Direct limitations, and
2. Collateral limitations.

SEC. 424. **Same—Direct limitation.**—A direct limitation marks the duration of an estate by the life of a person, by the continuance of heirs, by a space of precise and measured time ; making the death of the person in the

¹ Shep. Touch. 125.

See : Portington's Case, 10 Co. 41b ;

Thomson v. Mackworth, Carter 75 ;

Burges v. Curwin, 2 Vern. 576 ;

2 Co. Litt. (19th ed.) 248a.

² Cocket v. Sheldon, F. Moore 15.

See : Letheullier v. Tracy, 3 Atk. 774 : s.c. Ambl. 204 ;

Spencer v. Chase, 10 Vin. Abr. 203 ; s.c. 9 Mod. 28.

³ Bagshaw v. Spencer, 1 Ves. 142, 144.

⁴ Wellington v. Wellington, 1 W. Bl. 645, 647.

See : Murthwaite v. Jenkinson. 2 Barn. & C. 359 ; s.c. 9 Eng. C. L. 162.

⁵ Shields v. Atkins, 3 Atk. 560.

⁶ Lusher v. Banbong, Dyer 290a.

⁷ Preston sometimes uses the phrase " collateral limitation " in this sense.

⁸ Challis' Real Prop. 198.

first case, the continuance of heirs in the second, and the length of the given space in the third, the boundary of the estate, or the period of its duration.¹

SEC. 425. **Same—Collateral limitation.**—A collateral limitation, at the same time that it gives an interest which may by possibility have continuance for one of the times marked out in a direct limitation, may, on the happening of some event which it describes, put an end to the right of enlargement during the continuance of that time.² A determinable or collateral limitation is not confined to a limitation of determinable fees. Any estate including an estate for life, and a term of years, may be made liable to determine in like manner. In the latter case, the future event which is to determine the estate is not necessarily an event which by possibility may never happen at all; which rule, as to fees, arises only from the necessity that the collateral clause shall not be simply incompatible with the direct laws, but shall admit by possibility of the endurance of the estate limited in the direct clause to its full extent. When such a collateral is annexed to the limitation of any other fee than a fee-simple, as, for instance, to a fee-tail, it is, of course, equally necessary that the determining event may be such as by possibility may never happen.³

SEC. 426. **Converted into a fee-simple how.**—Determinable fees may be divided into two classes, according as the future event which may determine them, being (1) an event which admits of becoming impossible to happen, such as a limitation upon the marriage of a designated person, which becomes impossible by his death; or (2) an event which must forever, if it does not actually happen, remain liable to happen, such as the death of a designated tree or the fall of a particular building. In the former case, if the designated party is not married before the death, the determinable fee is by such death *ipso facto*

¹ See : Challis' Real Prop. 198.

² 1 Prest. Est. 42.

³ Littleton styles such limitations
“conditions in law.”

See : 2 Co. Litt. (19th ed.) 234b ;

Also : Willion v. Berkley, 1
Plowd. 242.

enlarged into a fee-simple. In the latter case the determinable fee can never be enlarged into a fee-simple, except by rules of the possibility of reverter.¹ The future event can admit of becoming impossible to happen, only when it is something to be done or suffered by a living person. In such case the event, if it happen at all, must happen within the time prescribed by the rule against perpetuities. Therefore determinable fees of this type admit of executory limitations to take effect upon their determination. If any such executory limitation should exist, the determinable fee cannot, pending the possibility of its determination, be enlarged into a fee-simple without a release of such executory limitation.²

SEC. 427. **Determinable limitations and limitations upon condition—Distinction between.**—When the future event which, if it should happen, will determine the estate,—as an act to be done by the grantee, or depending upon the will of the grantee, as his marriage,—the doing of the act under such circumstances bears a close resemblance to a breach of a condition that the grantee shall not do the act. These cases of determinable limitation are therefore liable to be confused with limitations upon or subject to a condition, giving a right of entry upon a breach by the grantee; from which they nevertheless differ very widely, in the following particulars:

1. Where the limitation of a determinable fee is the doing by the grantee of the act which is to determine the estate, is made a part of the limitation itself, the doing of the act will, *ipso facto*, determine the estate, without any entry or claim on the part of the person entitled to the possibility of reverter;³ but where an estate is limited in fee-simple, and the limitation contains no qualification, but, externally to the limitation, though in the same deed, or in another deed delivered at the same time, is contained a condition by a breach of which the fee-simple is liable to be defeated, a breach does not, *ipso facto*, avoid the estate, but only renders

¹ Challis' Real Prop. 201.

³ Willion v. Berkley, 1 Plowd. 242.

² 1 Prest. Est. 443, 444.

it liable to be avoided by the entry of the person entitled to a possibility of reverter. No estate of freehold can be made to cease, without entry, upon the breach of a condition.¹

2. The conditions which are annexed to or are in defeasance of a fee-simple are subject to the common law, and are governed by the learning of common-law conditions ; because the statutes by which common-law learning applicable to conditions annexed to estates has been modified, are restricted to conditions annexed to estates which are less than a fee.² It being true that the rule against perpetuities forms no part of the common law, it is thought that the contention of some, that such conditions are within the rule, is not well founded.

SEC. 428. **Alienation and devise of.**—The power of the tenant of a determinable fee to alienate or devise it cannot, properly speaking, be said to be in any way restricted ; but his alienation will not create a greater estate than he himself has. He may alien at pleasure, and the assignee or devisee takes a like estate of inheritance, determinable upon the happening of the event which would have determined the estate in the hands of the grantee or donee, or his heirs.³

SEC. 429. **Waste an incident of such estates.**—All life fees confer upon the tenant thereof the same absolute right of user, and the same right to commit unrestrained and unlimited waste, as a fee-simple.⁴

¹ 2 Co. Litt. (19th ed.) 214b.

² See : Stats. 32 Hen. VIII., c. 34,

§ 1 ; 22 & 23 Vict., c. 35, § 3.

³ See : Challis' Real Prop. 207.

⁴ Id.

CHAPTER X.

CONDITIONAL FEES.

- SEC. 430. Introductory.
- SEC. 431. Definition of conditional fee.
- SEC. 432. Early history of conditional fees.
- SEC. 433. Mode of limitation of conditional fees.
- SEC. 434. Nature of heirs special.
- SEC. 435. Statute *De Donis*.
- SEC. 436. In what sense limitation conditional.
- SEC. 437. Descent of conditional fees.
- SEC. 438. Executory devise after fee conditional.

SECTION 430. **Introductory.**—The law relating to conditional fees, which can now subsist even in England only in hereditaments other than in tenements, and, by analogy, in copyholds of manors in which there is no custom of entail, is a very obscure subject of research. The most eminent authorities are sometimes at variance, and the living tradition of modern practice is almost entirely wanting. Of the questions which have been raised, some, even before the statute *De Donis*, were probably matters of more curiosity than practical importance; and others rather illustrate the difficulty of reconciling the rules governing these estates with general principles, than throw any doubt on the rules themselves.¹

SEC. 431. **Definition of conditional fee.**—At common law, a conditional fee may be defined *in limine* as a species of estate limited upon or subject to a condition; that is, an estate defeasible upon the breach of, or enlarged upon performance of, a stipulated condition. This definition, however, is subject to the observation that the rules gov-

¹ See: Bract. 17, *et seq.*;

3 Reeves' Hist. Eng. L. (2d ed.)
337.

erning these fees rest upon a special basis of their own, and are not in accordance with the general rule applicable to estates upon condition.¹

SEC. 432. **Early history of conditional fees.**—Estates of this kind were called conditional fees, from the condition expressed or implied in the condition that if the donee died without fulfilling the condition, the land should revert to the owner. Such fees were strictly agreeable to the nature of feuds when they ceased to be estates for life and had not yet become absolute estates in fee-simple. These estates were usually created by limiting the inheritance to particular heirs, exclusive of others; as to the heirs of the donee's or grantee's body, and the like. Under such limitation, as soon as the grantee had issue born his estate was supposed to become absolute, and the grantee could alien it. The practice early sprang up of aliening the conditional fees as soon as issue was born and afterwards repurchasing the lands, which gave a fee-simple absolute that would descend to the heirs in general, according to the course of the common law. The courts favored this subtle finesse of construction, and the nobility, to perpetuate possession in their own families, and fetter such alienations, procured the passage of the statute *De Donis Conditionalibus*,² which revived some of the feudal restraints placed upon alienations, and enacted that from thenceforth the "will of the donor be observed, and that the tenements so given (to a man and the heirs of his body) should, at all events, go to the issue, if there were any, or, if none, should revert to the donor." Under this statute it was held that the donor was invested with ultimate fee-simple of the land expectant on the failure of issue, and the grantee became tenant in fee-tail, without the power of alienation upon the birth of specified heirs, who inherited the estate.³

SEC. 433. **Mode of limitation of conditional fees.**—The conditions admissible for the purpose of creating a condi-

¹ See : Anderson's L. Dict. 451.

s.c. 14 N. W. Rep. 90 ;

² Stat. 13 Edw., c. 1.

2 Bl. Com. 110-113.

³ See : *Pierson v. Lane*, 60 Iowa 60;

4 Kent Com. (13th ed.) 11-15.

tional fee are restricted to a single type, which always takes the form of a limitation expressed to be to the heirs of the body of the donee or donees, either generally or to a special class of such heirs. The word heirs limits a fee, or estate of inheritance, while the imposed restriction prevents the fee from being a fee-simple in the proper sense of the term. The different forms assumed by this kind of limitation are as follows: (1) To the heirs of the body; (2) to the heirs male of the body; (3) to the heirs female of the body; (4) to the heirs of the body of the donee by a particular spouse;¹ (5) to the heirs male of the body of the donee by a particular spouse; (6) to the heirs female of the body of the donee by a particular spouse; (7) to the heirs of the bodies of two persons lawfully married, or by possibility capable of lawful marriage, the two persons being both named as donees in the gift; (8) the heirs male of the bodies of two such persons; and (9) the heirs female of the bodies of two such persons.²

SEC. 434. **Nature of heirs special.**—Special heirs mentioned in a limitation creating a conditional fee import not only that the heir must be a male or female, according to the class specified, but also that he must be able to deduce his descent solely through the specified class. Thus it is said by Littleton that “if lands be given to a man and his heirs males of his body, and he hath issue a daughter, who hath issue a son, and dieth, and after the donee dieth; in this case the son of the daughter shall not inherit by the force of the entail; because whoever shall inherit by the force of a gift in tail made to the heirs males, ought to convey his descent whole by the heirs males.”³ In similar restriction to a single sex, if attempted in a deed or feoffment to be imposed upon the heirs, as by the limitation to the heirs male, is void, and the grantee takes a fee-simple.⁴ This construction

¹ The particular person designated as such spouse need not necessarily be married to the donee at the time of the gift, but must by possibility be capable of such marriage.

² See: Challis' Real Prop. 210.

³ Litt., § 24.

See: 1 Co. Litt. (19th ed.) 25a.

⁴ Litt., § 31.

See: 1 Co. Litt. (19th ed.) 27a.

is arrived at by rejecting the word male upon the principle *ut res magis valeat quam pereat*, it may rather have effect than be destroyed.¹ Upon the same principle, if gavelkind lands be limited to a man and his eldest heirs, or if common-law lands be limited in a deed, or on a feoffment, to the person and the eldest heirs female of his body, the word eldest will be rejected to give effect to the limitation. In a will, however, a limitation to such person and his heirs male will, at common law, create an estate-tail male; the words "of his body" being supplied by construction of law.²

SEC. 435. **Statute De Donis.**—We have before seen that the principles of the common law have been adopted in this country only so far as they are applicable to the habits and conditions of our society, and are in harmony with the genius, spirit, and objects of our institutions.³ The direct object of the statute *De Donis* was to place restraints upon alienation and create perpetuities for the purpose of maintaining a landed aristocracy.⁴ Such a purpose is entirely foreign to the genius and policy of our institutions. The general policy of this country does not encourage restraints upon the power of alienation of land.⁵ For this reason the statute *De Donis* is not applicable to the habits and condition of our society, nor in harmony with the spirit and genius of our institutions, and consequently is not in force as a part of the common law of this country.⁶

SEC. 436. **In what sense limitation conditional.**—The restricted nature of this limitation was, at a period so early as to be almost beyond the reach of history, construed by the courts as being in the nature of a condition,⁷ and the limitation as being therefore in the nature of a limitation upon condition. And the courts seem to have re-

¹ 1 Co. Litt. (19th ed.) 27a, 27b.

See: Kerr's *Adjudicated Words and Phrases and Applied Maxims*, § .

² 1 Co. Litt. (19th ed.) 27a.

See: *Baker v. Wall*, 1 Ld. Raym. 185.

³ *Pierson v. Lane*, 60 Iowa 60; s.c.

14 N. W. Rep. 90-92.

⁴ 3 Reeves' Hist. Eng. L. (2d ed.) 337.

⁵ 4 Kent Com. (13th ed.) 17.

Pierson v. Lane, 60 Iowa 60; s.c. 14 N. W. Rep. 90.

⁷ See: 4 Reeves' Hist. Eng. L. (2d ed.) 510, *et seq.*

garded the condition as to some extent uniting in itself contradictory characteristics ; being partly in the nature of a condition which, by its performance, would confirm, or enlarge, the estate; and partly in the nature of a condition always remaining liable, by a breach, to defeat the estate.¹ For as soon as an heir of the designated class was born, *post prolem suscitata*, this was held to be for some purposes a performance of the condition, and for some purposes to enlarge the conditional fee into a fee-simple. Thus it was held to enable the donee (1) to alien the lands as an estate of fee-simple absolute ; (2) to forfeit the estate, including under that word *escheat* by attainder of felony besides forfeiture for treason ; (3) to charge the estate with incumbrances, which were as indefeasible as if created by a tenant in fee-simple ;² and, (4) in the case of a gift either to a donee and his or her issue by a particular wife or husband, or to two donees and their joint issue, birth of the prescribed issue had the effect of enlarging the possible course of descent, so as to make it include issue of the donee, or of the survivor of two donees, by another wife or husband. If the donee of the conditional fee aliened before such issue was born, his alienation would bar his own issue, if born afterwards, giving the alienee an estate which endured so long as such issue should exist ; but such alienation would not bar the donor of his possibility of reverter on failure of such issue.³

SEC. 437. *Descent of conditional fees.*—The fulfillment of the condition specified in the limitation, by having issue of the prescribed class, was not an absolute fulfillment once and for all ; the estate was not thereby converted into a fee-simple for all purposes, and the condition for some purposes still remained on foot ; for if the donee after birth of the prescribed heir did not alien, but suffered the estate to descend, it followed the prescribed course of descent, and none but heirs of the prescribed class could take ; and these would take to the exclusion of the heir general, in case such heir happened not to be

¹ Challis' Real Prop. 210, 211.

³ 1 Co. Litt. (19th ed.) 19a.

² 1 Co. Litt. (19th ed.) 19a.

of the prescribed class.¹ That is to say, the special heir, *per formam doni*, is not necessarily identical with the heir general. This proposition involves an anomaly, seeing that by this means the course of descent by common law could be diverted into a different channel. For example, if a man should die leaving two sons, and afterwards the elder son should die leaving only a daughter; in this case the daughter is the heir general of the first-mentioned person; but the heir male is the younger son, and after his death his male issue. Under a limitation to the first-mentioned person and the heirs of his body, the younger son and his male issue would inherit, to the exclusion of the heir general. Similarly, if a man should die leaving a son and a daughter, the son, whether older or younger than the daughter, is the heir general; but, under a limitation to the first-mentioned person and the heirs female of his body, the daughter, whether older or younger than the son, would inherit; in this case also to the exclusion of the heir general. This doctrine of descent probably admits of no dispute in regard to conditional fees; and it undoubtedly admits of no dispute so far as fees-tail are concerned.² The heir of the prescribed class, coming in by descent, had, whether he had issue or not, exactly the same power or capacity to alienate, forfeit, and charge the estate, as the original donee had after birth of the prescribed issue. If the succession of the special heirs came to an end without any alienation having been made, the donor's possibility of reverter became an interest in possession.

SEC. 438. **Executory devise after fee conditional.**—This species of estate, though still popular in England, never found favor in this country. It is now rarely met with in practice, and the learning on the subject is largely archaic. The local statutes of the various states of the Union have replaced largely, if not entirely, the common-law classes of estates. The prevailing estate is a fee-simple, and the most common estate upon condition is the

¹ 1 Co. Litt. (19th ed.) 19a; and Harg. note 4.

² Litt., §§ 21-25.

See: 1 Co. Litt. (19th ed.) 24a-26a.

one created by mortgage. In some states, however, conditional fees formerly prevailed to a large extent, and a body of decision sprang up. Thus in the state of South Carolina it has been laid down by the courts that there can be no devise after a fee conditional.¹ One reason for this is because such a limitation would be after an indefinite failure of issue;² another reason for the rule is the fact that the statute *De Donis* was never in force in South Carolina, and for that reason as soon as issue is born the absolute fee, with power of disposition, becomes vested in the tenant in possession.

¹ *Bedon v. Bedon*, 2 Bail. (S. C.) L. 231; *Adams v. Chaplin*, 1 Hill (S. C.) Ch. 265, 268;
Mazyck v. Vanderhorst, 1 Bail. (S. C.) Eq. 48; *Buist v. Dawes*, 4 Strobb. (S. C.) Eq. 37.
Deas v. Horrey, 2 Hill (S. C.) Eq. 244; ² *Bedon v. Bedon*, 2 Bail. (S. C.) L. 231.

CHAPTER XI.

BASE FEES.

- SEC. 439. Definition of base fee.
SEC. 440. Creation of base fees.
SEC. 441. Determinable conterminous with base fee.
SEC. 442. Merger of base fees.
SEC. 443. Descent of base fees.

SECTION 439. **Definition of base fee.**—A base fee may be defined as one which has a qualification annexed to it, and which must be determined whenever such annexed qualification requires.¹ The proprietor of a base fee has all the rights of the owner of an estate in fee-simple until his estate is determined by the qualification subjoined thereto.² The earliest attempt to define a base fee is that given by Plowden, who says that “a third estate may be called a base fee, that is, where A has a good and absolute estate of fee-simple in land, and B has another estate of fee in the same land, which shall descend from heir to heir, but which is base in respect of the fee of A, as being younger than the fee of A, and not of absolute perpetuity, as the fee of A is.”³ The conditions laid down in this definition can only be fulfilled by the conversion of a fee-tail into a fee descendible to the heirs general, by some method which does not destroy the remainder or reversion previously subsisting upon the fee-tail; for no fee descendible to the heirs general which arises by mere limitation can have subsisting upon it any remainder or reversion.⁴

¹ Anderson's L. Dict. 451;
1 Bouv. L. Dict. (15th ed.) 232.

² 1 Co. Litt. (19th ed.) 1b;
1 Prest. Est. 431.

See: *Paterson v. Ellis*, 11 Wend.
(N. Y.) 259, 577;

Walsingham's Case, 2 Plowd.
557.

³ *Walsingham's Case*, 2 Plowd. 547,
557.

⁴ 1 Co. Litt. (19th ed.) 18a.

SEC. 440. **Creation of base fees.**—A base fee is either (1) the estate taken by the grantee under an assurance by a tenant in tail which is effectual to bar the issue in tail,¹ but is ineffectual to bar the remainder, or reversion, expectant upon the estate-tail; or (2) when an estate-tail is barred to the same extent, but by the mere operation of law without the execution of an assurance, a base fee is the estate taken by a person entitled to the benefit of such a legal bar. The various base fees, and the methods by which they might arise at common law, are as follows :

1. At common law a base fee in lands might arise by the operation of a fine levied by a tenant in tail, who was not also entitled to the remainder, or reversion, in fee-simple expectant on the estate-tail. The operation of such a fine barred not only the issue of the person by whom it was levied, but all issue inheritable under the estate-tail.²

2. In England, since the passage of the Fines and Recoveries Act, a base fee may arise by the operation of the assurance made by a tenant in tail, which is insufficient to bar the remainder, or reversion, upon the estate-tail, but is sufficient to bar the issue in tail.³

3. A rent-charge already *in esse*, under a limitation in fee-simple, admits of being entailed within the statute

¹ Or at least it has the effect to put the issue in tail, even after his right has accrued to any possession, to the right of entry.

² See : 1 Prest. Est. 437, 438.

³ By the Fines and Recoveries Act, every tenant in tail, whether in possession, remainder, contingency, or otherwise, after December 31, 1833, by any assurance, other than a will, by which he could have made the disposition, if his estate were an estate at law in fee-simple absolute, to dispose of for an estate in fee-simple absolute, or for any less estate, the lands entailed as against all persons claiming the lands entailed by force of any estate-tail vested in the person making the disposition, and also, with the consent of the person, if any, who under the act is protector of the settlement, as against

all persons, including the crown, whose estates are to take effect after or in defeasance of any such tail.

See : Fines and Recoveries Act, §§ 15, 34, 40.

Such consent is not needed, if the tenant in tail is also entitled to an immediate remainder or reversion in fee.

Id., § 34.

Here the word "fee" means fee-simple. The estate-tail will not be barred, except in so far as the disposition effectually passes an estate to the grantee. In cases where the grantee has power to disclaim his estate, his subsequent disclaimer will prevent the disposition from having any effect under the act.

See : *Peacock v. Eastland*, L. R. 10 Eq. 17.

De Donis. A tenant in tail of a rent-charge under such an entail might at common law, by suffering a common recovery, have obtained a fee-simple of the rent-charge, in all cases in which, if he had been a tenant in tail of lands, he might have obtained a fee-simple of the lands. But a tenant in tail of a rent-charge may also be made *de novo* upon the limitation of the rent itself, and without the creation of any remainder over in fee-simple. Such a tenant in tail stands in a different position from that of a tenant in tail subsisting under an entail of a rent-charge which was *in esse* as a fee-simple before the making of the entail. By suffering a common recovery, he did not acquire a fee-simple, but only barred the issue inheritable under the entail. That is to say, he acquired a base fee; and upon a failure of issue so inheritable, the rent became extinguished in the land.¹

4. At common law, before the passing of the statutes of Henry VIII.,² a base fee in lands could have arisen by the operation of a common recovery suffered by a tenant in tail, when the remainder, or reversion, in fee-simple expectant upon the estate-tail was vested in the crown. Under such circumstances the recovery would have barred the issue in tail, but not the crown, by reason of the crown's prerogative.³ The statute of Henry VIII. enacted that such a recovery should not bind the heirs in tail.

5. During the interval which elapsed between the statute of 26 Henry VIII.,⁴ whereby fees-tail were made liable to forfeiture for high treason, and the passage of the statute 33 & 34 Victoria,⁵ whereby forfeiture was abolished, under the law in England a base fee in lands would have arisen in favor of the crown, upon the attainder of a tenant in tail for high treason, which endured so long as there was in existence either the donee in tail or any issue capable of having inherited under the entail.⁶

¹ Challis' Real Prop. 265, 266;
2 Co. Litt. (19th ed.) 298a, Butler's
note 2:

1 Prest. Conv. 3.

² 34 & 35 Hen. VIII., c. 29.

³ Dyer, 32a, pl. 1.

⁴ 26 Hen. VIII., c. 13.

⁵ 33 & 34 Vict., c. 23.

⁶ See: *Stone v. Newman*, Cro. Car.
427;

Walsingham's Case, 2 Plowd.
547, 557.

6. Before the extinction of villeinage, if lands had been given in fee-tail to a villein, the lord of the villein would have acquired, by entry upon the lands, a base fee conterminous with what would have been the duration of the fee-tail if it had remained in the villein and his heirs inheritable under the entail.¹

7. According to Plowden, under certain circumstances a base fee might arise when the issue in tail was outlawed for felony, and in the lifetime of his ancestor obtained a pardon. The result would of course be the same upon an attainder by judgment. In such a case it has been suggested that the heir of the donor could not enter, because there was still living issue of the donee; and the issue could not lawfully enter under the entail, for the want of inheritable blood, which was not restored by the pardon. In the case referred to by Plowden, the issue entered; and some contended that he had gained by his entry a base fee conterminous with the entail, but others thought he had gained only an estate for his own life.²

8. Another species of base fee, which is not only determinable upon the happening of the event which would have determined the estate-tail in which it had its origin, but liable to be determined, in the proper sense of the phrase, is where any assurance is made by a tenant in tail which purports to convey his whole estate, but is not effectual to bar the issue in tail of their right, and there is an entry of the issue in tail after the death of the tenant in tail who made the assurance.³

SEC. 441. **Determinable conterminous with base fee.**—An estate of the like duration with a base fee may arise as a determinable fee by an express limitation to a man and his heirs so long as a third person shall have heirs of his body; ⁴ but it may be well doubted whether if such third

¹ 1 Co. Litt. (19th ed.) 18a.

If the lord subsequently enfranchised the villein the enfranchisement would not affect the duration of the base fee. 1 Co. Litt. (19th ed.) 117a.

² Walsingham's Case, 2 Plowd. 547, 557.

³ See: *Machil v. Clark*, 2 Salk. 619;

s.c. 2 Ld. Raym. 778; 7 Mod. 18, overruling *Took v. Glasscock*, 1 Saund. 260;

Goodright v. Mead, 3 Burr. 1703; *Doe v. Whichelo*, 8 T. R. 211; *Doe v. Rivers*, 7 T. R. 276.

⁴ See: *Walsingham's Case*, 2 Plowd. 547, 557.

person be living at the date of the limitation it can take effect in possession until after his death, because of the well-known maxim that *nemo est hæres viventis*, no man is heir to the living.¹ If this view is correct, such a limitation during the life of said third person must be by the way either of executory limitation or a contingent remainder. This occurs where a tenant in tail, not being seized of the immediate reversion in fee, has levied a fine with proclamations to a stranger in fee. The issue under the entail are barred by the fine of their ancestor from claiming the estate ; and the stranger has a fee so long as there are issue under the entail ; by this process the character of the estate-tail is changed and becomes a qualified or base fee, determinable on failure of the issue under the entail.

SEC. 442. **Merger of base fees.**—At common law, a base fee would merge in the remainder or reversion in fee-simple, both estates being vested in the same person without the existence of any intermediate estate.² Hence, if a tenant in tail, having also an immediate remainder or reversion in fee-simple, by a fine vested in himself a base fee, the latter estate was destroyed by merger, and all incumbrances affecting the remainder or reversion were let in. They were technically said to be accelerated. But a purchaser could not rely upon this as a valid objection against a title in fee-simple depending upon a fine levied by a tenant in tail, without showing that the reversion was in fact affected by some incumbrance.³

SEC. 443. **Descent of base fees.**—According to the theory of base fees as outlined in Plowden's definition, heretofore given,⁴ when a base fee and a reversion in fee-simple thereupon subsist at the same time in the same land, the base fee descends "from heir to heir." There being nothing limiting the descent to special heirs, it must be taken to be the general heirs. Preston says that when an estate-tail was turned to a base fee by fine, the descent of the base fee followed the common-

¹ See : *Post*, § 494.

² 3 *Prest. Conv.* 240.

³ 1 *Prest. Abst.* 7.

⁴ See : *Ante*, § 439.

law course, going to the general and not the special heir.¹ It follows, as a fundamental rule, that the common-law heir can be displaced only by means of special limitation referring to the heirs of the body;² because no limitation existed. The same doctrine applies to all base fees which arise without express limitation; but it does not necessarily apply to a base fee arising by express limitation, including base fees created by the alienation of a tenant in tail in remainder. It has been said that "it is remarkable that this question has been little noticed. Though it of course applies to estates in tail male and tail female, as well as to estates in tail general, yet it does not refer to the distinction between the heir male or female and the heir general, but to the distinction between the heir of the body—whether general, male, or female—and the heir general. It seems to have been always tacitly assumed, without the necessity of explicit mention, that when the law, whether mediately or immediately, divests a fee-tail by barring the issue in tail, the novel fee thus created will, in the hands of the person entitled to the benefit of the bar, follow the ordinary course of descent prescribed by the common law; that is, will go to the heir general."³

¹ 1 Prest. Abstr. 342, 344.

Citing: Beaumont's Case, 9 Co. 138;

Baker v. Willis, Cro. Car. 476.

² "The rule of the common law is, you shall not make a person heir, or give him the character or rights of an heir, by a special limitation, unless he be the heir by the rule of law. The statute *De Donis* gave the donor, with reference to estate-tail, the power of making

special heirs inheritable under the entail." 1 Prest. Est. 475.

³ Challis' Real Prop. 271.

Compare the resolution of the judges, that the Isle of Man, though no part of the kingdom, yet, being granted under the Great Seal of England to Sir John Stanley and his heirs, was descendible according to the courts of the common law.

1 Co. Litt. (19th ed.) 9a;

4 Inst. 284.

CHAPTER XII.

QUALIFIED FEE-SIMPLE.

- SEC. 444. Definition of qualified fee-simple.
SEC. 445. Power of tenant of qualified fee-simple over the estate.
SEC. 446. Qualified fee distinguished from other fees.
SEC. 447. Objections to qualified fees-simple.
SEC. 448. The doctrine of *Blake v. Hynes*.
SEC. 449. Nature and mode of limitation.
SEC. 450. Course of descent of a qualified fee-simple estate.
SEC. 451. Alienation of a qualified fee-simple estate.

SEC. 444. **Definition of qualified fee-simple.**—A qualified fee-simple is a fee which has a qualification subjoined thereto, and which terminates whenever the qualification is at an end.¹ Thus where an estate is limited to a person and his heirs with a qualification annexed to it, by which it is provided that the estate must terminate whenever that qualification is at an end, this limitation creates a qualified fee-simple ; as where land is granted to A and his heirs, tenants of a designated tract of land, whenever the heirs of A cease to be tenants of that tract their estate terminates.² And where a person holds an estate to himself and his heirs, as long as B has heirs to his body, this is a species of qualified fee-simple, liable to be terminated at any time on the failure of heirs of the body of B.³

SEC. 445. **Power of tenant of qualified fee-simple over the estate.**—The proprietor of a qualified fee-simple has the

¹ *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 94 Ill. 93 ; *Whart.* (Pa.) 427 ;
People v. White, 11 Barb. (N. Y.) 28 ; *McLean v. Barea*, 35 Wis. 36 ;
Lott v. Wyckoff, 1 Barb. (N. Y.) 575 ; *United States v. Reere*, 5 Dill. C. 411 ;
Union Canal Co. v. Young, 1 2 Bl. Com. 109.
² 1 Inst. 27a.
³ *Seymour's Case*, 10 Co. 97b.

same rights and privileges over his estate, till the qualification upon which it is limited is at an end, as he would have if he were a tenant in fee-simple.¹

SEC. 446. Qualified fee-simple distinguished from other fees.—A qualified fee-simple differs in a marked manner from a simple determinable fee,² since it is limited by a restriction to a particular class of heirs, and not by reference to happenings or a future event. A qualified fee-simple differs from a conditional fee in this, that so long as it endures, the power of the tenants is neither enlarged nor bridged by anything in the nature of the performance of a condition. It differs from a fee-tail, among other things, in the fact that the issue never had any claim against the alienation, by whatever assurance it might be effected, of the ancestor. It differs from a base fee in particulars that will be made manifest in the next chapter. This species of fee-simple has been treated by Preston in his work on Estates,³ where he makes it quite plain that it was his intention to place qualified fees-simple in a separate class, and not merely to classify them among the other fees usually collected under the terms “qualified fees,” or “qualified or base fees,” which terms are commonly used to include all fees except fees-simple or absolute and conditional fees.

SEC. 447. Objections to qualified fees-simple.—There has been considerable discussion over the question whether there is such an estate as a qualified fee-simple. Blackstone⁴ throws the weight of his authority on the negative of the question, but the authority of Littleton and of Lord Coke has been said to establish in the most decisive manner the certainty of its existence.⁵ The rare occurrence of an example of this species of estate has led to this difference of opinion. Some writers have gone so far as to declare that a case of the kind never had

¹ Walsingham's Case, 2 Plow. 557.

² Preston recognizes a material difference between qualified fees-simple and other determinable fees, but thought that for purposes of alienation they

have the quality of ordinary determinable fees.

³ 1 Prest. Est. 467.

⁴ 1 Prest. Est. 449–475.

⁵ 2 Bl. Com. 222.

⁶ 1 Prest. Est. 469.

occurred and never would occur in practice. But in May, 1884, a case came before the House of Lords, on an appeal from Ireland, which seems to go far towards setting the question at rest. This was the case of *Blake v. Hynes*.¹

SEC. 448. *The doctrine of Blake v. Hynes.*—The circumstances in the case of *Blake v. Hynes* were as follows: In 1857, Columbus O'Flanagan died leaving a will which was duly probated, and his real and personal estate was subsequently administered in the Irish Court of Chancery. His co-heirs at law were two nieces, Eliza and Jane Dowell. In the course of the administration proceedings an order was made, by consent of all the parties, in 1859, by which it was ordered that notwithstanding the probate, which was declared valid, of the testator's will, the right of his co-heirs as to certain lands devised should be the same as if he had died intestate as to the said lands. Jane Dowell, who was a lunatic at the time of the testator's death, died insane and intestate as to her moiety in the said lands. Proceedings were instituted in 1873, under the Irish Lunacy Law, for the administration of her real and personal estate. At the time of her death her heirs at law were Edward Blake and Thomas Hynes, claiming respectively under two deceased aunts of the lunatic, who, if they had been living, would have been her co-heirs. At the same time the heir at law of the testator O'Flanagan was Roderick O'Connor. Among the questions presented for determination was whether Jane Dowell had taken her moiety, to which she was entitled under the terms of the order of 1859, to all intents as a purchaser. If she had, upon her death intestate, the land would have descended to her heirs at law; but if she took by virtue of the said order of the court, the lands would descend as though the original testator, Columbus O'Flanagan, had been the last purchaser. In which case the moiety in dispute would pass to Roderick O'Connor, as being his heir at law at the time of Jane Dowell's death. The Master of the Rolls held that she took as a purchaser, and that her moiety descended to

¹ L. R. (Ir.) 11 Eq. 417; s.c. 11 L. R. (Ir.) 284.

her co-heirs at law. This decision was unanimously reversed by the Court of Appeals in Ireland.¹ The case was taken on appeal to the House of Lords for the decision of the Court of Appeals. The question of the validity of the limitations was explicitly raised, argued before the House, and the respondent's counsel rested their argument in favor of its validity upon the authority of Littleton, Lord Coke, and Preston. At the conclusion of the arguments, the House of Lords reversed its judgment, and the appeal was subsequently compromised before any judgment had been delivered.

SEC. 449. *Nature and mode of limitation.*—At common law a fee may be explicitly limited to a man and the heirs of any ancestor, in the paternal line, whose heir he is. The limitations must be made in this form by a feoffee who is seized in fee-simple subject to a condition to re-infeoff "many men"² jointly in fee-simple, in case all of them should die before any feoffment has been made pursuant to the condition. Under such circumstances the feoffment should be made to the heir of the last survivor, habendum to him and the heirs of the aforesaid survivor.³ The simplest example that has been given to this kind of limitation would occur if the heir of the last survivor should be a son; in which case we should arrive at a limitation to a man and his heirs *ex parte paterna*, so as to exclude altogether from the succession the heirs *ex parte materna*, who, if he had taken a fee-simple absolute, since he would have taken it by purchase and not by descent, would have been entitled to succeed on a failure of the heirs *ex parte paterna*.

¹ Hitherto the question as to the validity at the common law of a limitation in the form above styled a qualified fee-simple was not explicitly raised; but the Lord Justice FITZGIBBON, in the course of his judgment, made the following remark, which bears very closely upon it: "If conveyances had been settled (with a view to carry into effect the directions of the Order of 20th of May, 1859, as to the rights of Eliza and Jane

Dowell in respect to the said lands) it would have been the duty of those carrying out the arrangements to see that the descent of the lunatic's (moiety in the) lands was not altered from that which was stipulated for; namely, the descent of lands taken by her as co-heiress of Columbus O'Flanagan under an intestacy."

² Plusors homes.

³ Litt., § 354.

See: 2 Co. Litt. (19th ed.) 220b.

SEC. 450. **Course of descent of a qualified fee-simple estate.**—The course of descent of a qualified fee-simple does not differ, so long as the estate endures, from the course of descent which would have been taken by a fee-simple absolute. This is upon the hypothesis that it had actually descended from the specified ancestor. In certain cases, however, it may be said that the *quantum* of the estate differs,¹ the descent being restricted to one class only of the heirs, and the estate determining with the exhaustion of this class.

SEC. 451. **Alienation of qualified fee-simple.**—There is nothing in the nature of a qualified fee-simple to suggest that the guarantee, or the inheritor of a qualified fee-simple, is subject to any restraint upon his power to alienate the estate. The question has been raised, however, as to what estate is taken by the person to whom, upon alienation, the estate is conveyed, and whether in his hands the estate becomes a fee-simple absolute. Preston has repeatedly expressed the opinion, that the grantee, or the inheritor, of a qualified fee-simple has, for the purpose of alienation, only a determinable fee ; that he cannot convey a fee-simple ; and that the estate in the hands of an assignee will determine, if and when the particular class of the heirs of the grantee, to whom it was originally limited, should come to an end. He also holds that, upon the determination of the estate, there is no escheat to the lord (which is peculiar to fees-simple absolute) but a reverter to the heirs of the person by whom the re-feoffment was made.²

¹ There is a difference, at all events, in the sense in which an estate *par autre vie* is said to be less in *quantum* than the

estate of a tenant for his own life.

² 1 Prest. Est. 471.

See, also, pp. 420, 466.

CHAPTER XIII.

ESTATES IN TAIL.

- SEC. 452. Definition of an estate-tail.
SEC. 453. What construed an estate-tail.
SEC. 454. Distinguished from estates determinable.
SEC. 455. Origin of estates-tail.
SEC. 456. Same—Statute *De Donis*.
SEC. 457. Same—Effect of construction.
SEC. 458. Attempt to defeat the statute *De Donis*.
SEC. 459. Recognition in the United States.
SEC. 460. Kinds of tails.
SEC. 461. Same—General and special estates-tail.
SEC. 462. Same—Same—Limitation in tail special valid where.
SEC. 463. Same—Estates-tail male and female.
SEC. 464. Same—Estate in frank-marriage.
SEC. 465. Same—Fees-tail with conditional limitations.
SEC. 466. Same—Estates-tail after possibility.
SEC. 467. How estates-tail are created.
SEC. 468. Same—Words of procreation necessary.
SEC. 469. Same—Methods of creation—a. By deed.
SEC. 470. Same—Same—Same—“Heirs” *nomen collectivum*.
SEC. 471. Same—Same—b. By devise.
SEC. 472. Same—Same—Same—Words creating estate-tail.
SEC. 473. Same—Same—Same—Devise to several and survivors.
SEC. 474. Same—Same—Same—Remainder over on failure of issue.
SEC. 475. Same—Same—Same—Effect of reversion on indefinite failure.
SEC. 476. Same—Same—Same—Rules of construction.
SEC. 477. Same—Same—Same—Intention of testator.
SEC. 478. Same—Same—Same—Expressions which carry estate-tail.
SEC. 479. Same—Same—Same—Fee reduced by context.
SEC. 480. Same—Same—Same—Doctrine of *Price v. Taylor*.
SEC. 481. Same—Same—Same—Devise in tail not enlarged by implication.
SEC. 482. Same—Same—Same—Doctrine of *Wight v. Thayer*.
SEC. 483. Same—Words in frank-marriage sufficient.

SEC. 452. Definition of an estate-tail.—A fee-tail is simply a conditional fee at the common law, so modified by the

statute *De Donis Conditionalibus*, known as the statute of Westminster II.,¹ that the estate can descend only to certain classes of heirs which are held not to take a conditional fee-simple, but a particular estate which has been denominated a fee-tail, the donor holding the ultimate fee-simple expectant on the failure of issue ; in other words, the reversion.² This estate corresponds with the *feudum talliatum* of the feudal law,—that is, a fee from which the general heirs are *taille* or cut off ;³ and is thought to have been derived from the Roman system of restricting estates.⁴

SEC. 453. **What construed an estate-tail.**—Whenever it appears in the instrument creating the estate that it was intended that the issue of the first taker should take by inheritance in a direct line, and in a regular order and course of descent, so long as his posterity should endure, and an estate in fee or in tail is given in remainder, upon an indefinite failure of issue, then the estate first created will be construed to be an estate-tail.⁵ But if it appears that the limitation over was not postponed until an indefinite failure of issue, but on failure of children only, or on failure of issue within a given time, the estate will not belong to the class known as estates-tail.⁶

SEC. 454. **Distinguished from estates determinable.**—

¹ 13 Edw. I., c. 1, passed about 1285.

² Reeves' Hist. Eng. L. (2d ed.) 64, *et seq.*

See : Pierson v. Lane, 60 Iowa 60 ; s.c. 14 N. W. Rep. 90 ;

Maslin v. Thomas, 8 Gill (Md.) 18 ;

Hall v. Thayer, 71 Mass. (5 Gray) 523 ;

Wight v. Thayer, 67 Mass. (1 Gray) 284, 286 ;

Jewell v. Warner, 35 N. H. 176 ;

Ransley v. Stott, 26 Pa. St. 126 ; Wright, Ten. 187.

² 2 Bl. Com. 112.

See : Paterson v. Ellis, 11 Wend. (N. Y.) 259, 278.

³ Paterson v. Ellis, 11 Wend. (N. Y.) 259, 278.

⁴ See : 2 Bl. Com. 112n ;

2 Co. Inst. 333 ;

4 Kent Com. (13th ed.) 14, *et seq.* ;

1 Spence Eq. Jur. 21.

⁵ Outland v. Bowen, 115 Ind. 150 ; s.c. 7 Am. St. Rep. 420 ; 17 N. E. Rep. 281.

Citing : Shimer v. Mann, 99 Ind.

190 ; s.c. 50 Am. Rep. 82 ;

King v. Rea, 56 Ind. 1 ;

Huxford v. Milligan, 50 Ind. 542 ;

Tipton v. La Rose, 27 Ind. 484 ;

Potts' Appeal, 30 Pa. St. 168 ;

Eichelberger v. Barnitz, 9 Watts (Pa.) 447.

⁶ Outland v. Bowen, 115 Ind. 150 ; s.c. 7 Am. St. Rep. 420 ; 17 N. E. Rep. 281.

Citing : Allender v. Sussan, 33 Md. 11 ; s.c. 3 Am. Rep. 171 ;

Nightingale v. Burrell, 32 Mass. (15 Pick.) 104 ;

Hill v. Hill, 74 Pa. St. 173 ; s.c. 15 Am. Rep. 545.

While it is necessary to create an estate-tail that the limitation should be to the heirs of the body of the donee, yet all limitations of this kind are not estates-tail. Thus, where the heirs who may take are unlimited, but the duration of the estate given is measured or limited by the length of time that the line of succession of heirs of the donee's body, or of another person named, may last, does not create an estate-tail but a fee-simple determinable.¹

SEC. 455. **Origin of estates-tail.**—It has been said that the origin of estates-tail dates back to the time of the Saxons, who borrowed it from the laws of Rome, according to which lands might be entailed upon children and freedmen and their descendants, with restrictions on alienation. The custom of settling lands upon males in preference to females, and thus entailing lands upon the male issue, was in use before the time of Alfred the Great;² and the custom of conveying or devising lands to a man and the issue of a particular marriage, or to a man and the issue of his body, either male or female, was continued after the Conquest.³ These estates were the conditional fees of the common law. The readiness with which these conditional fees could be converted into a fee-simple, as heretofore set out,⁴ led to the enactment of the famous statute of Westminster II.⁵

SEC. 456. **Same—Statute De Donis.**—The converting of conditional fees into fees-simple destroyed the reversions, made them descendible according to the rules of the common law, diminished the property of the landed gentry, and frequently defeated the object of the original donation. It was in order to perpetuate their possessions in their own families that the nobility procured the passage of the statute *De Donis*; which, after reciting the rights of alienation assumed by the donees of conditional fees, enacts “that the will of the giver, according

¹ 2 Bl. Com. 113;
2 Prest. Est. 358-360, 361.

² See : Barringt. Stat. 113 ;
1 Spence Eq. Jur. 21.

³ 1 Spence Eq. Jur. 140.

⁴ See : *Ante*, § 432.

⁵ See : 1 Co. Litt. (19th ed.) 21 ;
2 Bl. Com. 112 ;
4 Kent Com. (13th ed.) 11, 12.

to the form in the deed of gift manifestly expressed, shall be from henceforth observed ; so that they to whom the land (*tenementum*) was given under such condition shall have no power to alien the land (*tenementum*) so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert to the giver or his heirs if issue fail, either by an absolute default of issue, or, after the birth of issue, by its subsequent extinction.”¹ This law only repeated what the law of tenures had said before, that the tenure of the grant should be observed ; and the judges in construing it held that where an estate was limited to a man and the heirs of his body, this limitation did not create a conditional fee, but divided the estate, giving a particular estate to the donee, called an estate-tail, subject to change, and a reversion in fee remained in the donor.² It is said by Reeves³ that the construction of the judges upon the wording of the statute was, that the donee should no longer have a fee conditional, as before, but that the fee should be *entaille*, cut, or divided, and he should have a *feudum talliatum*. Indeed, this seems to have been foreseen by the makers of the act ; for in the same parliament, and before the statute could have been considered in the courts of law, we find the term *feudum talliatum* as expressing an estate then existing in the law. It appears, that very early after the statute the judges had gone a great way in pursuing its intention ;

¹ Per hoc, quod nullus sit exitus omnino, vel si aliquis exitus fuerit, per mortem deficiet, herede hujusmo diexitus deficiente. The English version is here unintelligible. 1 Stat. Rev., p. 42.

The effect of the first paragraph is to destroy the threefold capacity which the tenant of a conditional fee acquired by having issue of the prescribed class, to alienate, to forfeit by attainder, and to charge with incumbrances.

“Neither shall the second husband of any such woman,” that is, of a female donee in special tail, “from henceforth have everything in the land (*in*

tenemento) so given upon condition, after the death of his wife, by the law of England, nor the issue of the second husband and wife shall succeed in the inheritance, but immediately after the death of the husband and wife, to whom the land (*tenementum*) was so given, it shall come to their issue, or return unto the giver, or his heir, as before is said.”

See : 2 Reeves’ Hist. Eng. L. (2d ed.) 164, 165.

² Taylor v. Horde, 1 Burr. 115 ; Willion v. Berkley, 1 Plowd. 248 ; 2 Inst. 335.

³ 2 Reeves’ Hist. Eng. L. (2d ed.) 166.

for they not only cut a fee-tail out of a fee-simple, but they again divided the fee-tail. For instance, if a person took land by purchase to him and his wife, and to the issue begotten by them in lawful matrimony, nothing would here accrue to the purchasers but a freehold for their lives and a fee to their issue; if they had no issue, the fee would remain in the person of the donor till they had issue, and if the purchaser had no issue, or the issue failed, the land reverted to the donor.¹ In this construction they seemed entirely justified by the terms of the statute; for it speaks of the land not as descending to the issue but as remaining,² or reverting, and, notwithstanding the term *descendere* in the writ given by the act, it seems to consider the issue and the donor as in the same light.

SEC. 457. **Same—Effect of construction.**—In consequence of this construction put upon the statute *De Donis* by the judges, estates thus limited are not conditional; nor is the right of entry of the donor on failure of issue of the donee considered as arising from a breach of the condition, but as a right of reverter accruing to the donor on the particular expiration of the estate granted. The judges had previously held that a donation of this kind created a conditional fee; the statute declares that it vests a state of inheritance in the donee, and some particular heirs of his to whom it must descend, notwithstanding any act of the ancestor; thus creating in the donor a reversion expectant on the determination of the estate limited.³ The modifications thus introduced into a conditional fee by this statute refer chiefly to the power of the donee, or tenant in tail for the time being, by alienation, to bar the succession of his issue and the reversion to the donor. We have already seen⁴ that at common law the issue could be barred even before birth, but that the donor's reversion could not be barred until after the birth of inheritable issue. The statute *De*

¹ Berth., fol. 93.

² An estate *ad remanetiam*, in Glanville, signifies an estate in fee. Litt. 7, c. 1.

³ Taylor v. Horde, 1 Burr. 115;

Willion v. Berkley, 1 Plowd. 242, 248;

² Inst. 335.

⁴ See: *Ante*, § 432.

Donis enacted that in future no such alienation should be a bar either to the succession of the issue or to the reversion of the donor. It did not create any new estate, but, by disaffirming the supposed performance of the condition, preserved the fee to the issue, while there was issue to take it, and the reversion to the donor when the issue failed.¹ It is to be observed further that the statute had the effect of preventing descent of the fee to persons not included in the original form of the gift, which, under certain circumstances, was permitted by the common law.

SEC. 458. **Attempt to defeat the statute De Donis.**—The numberless evil consequences which followed from the restriction imposed by this statute furnish no small part of the difficulties to which real property afterwards became subject.² Among the evil effects of the statute was the withdrawing of land from commerce; the defrauding of purchasers by secret entails; the exempting of lands from forced sale for payment of debts; and loss to the crown of a restraint upon treasonable practices through the forfeiture of estate by attainder of high treason. These evil effects of the statute soon became manifest, and there was a general demand for its repeal. But the landed barons, for whose benefit the statute *De Donis* had been passed, successfully resisted every attempt at change, and after an endurance of upwards of two hundred years, it was finally evaded in the reign of Edward IV., by a contrivance of the courts,³ “in the exercise of their Pretorian authority,”⁴ enabling the tenant to change his fee-tail into a fee-simple.⁵ This object was accomplished, to a limited extent, by levying fines, and more completely by means of common recoveries; both of which processes are sufficiently treated in a succeeding chapter.⁶

¹ 2 Co. Litt. (19th ed.) 327a, Butler's note 2.

² See: 2 Reeves' Hist. Eng. L. (2d ed.) 166, *et seq.*

³ See: 3 Reeves' Hist. Eng. L. (2d ed.) 324, *et seq.*

⁴ See: 1 Spence Eq. Jur. 143.

⁵ 2 Bl. Com. 116;

2 Prest. Est. 454.

See: Partington's Case, 10 Co. 37a;

Taltarum's Case, Y. B. 12 Edw. IV. 19.

⁶ See: *Post*, §§ 532, 533, *et seq.*

SEC. 459. **Recognition in the United States.**—Estates-tail were introduced into this country with our elements of the common law, as modified by the statute *De Donis*, and became the general law of the land in the thirteen original states,¹ with the exception of South Carolina, where a fee-simple conditional at common law existed as an estate from early times.² In those states where estates-tail prevailed they could be barred by fines and recoveries.³ But estates-tail were so manifestly opposed to our Republican institutions and the policy of our law, which promoted the free alienation of land, they were either prohibited by statute, or turned into estates in fee-simple absolute.⁴ In some of the original states, how-

¹ See: *Allyn v. Mather*, 9 Conn. 114;

Chappell v. Brewster, Kirby (Conn.) 175;

Wellas v. Olcott, 1 Kirby (Conn.) 118;

Atlin v. Bunce, 1 Root (Conn.) 96;

Partridge v. Dorsey, 3 Har. & J. (Md.) 302;

Jackson v. Van Zandt, 12 John. (N. Y.) 169;

Hawley v. Northampton, 8 Mass. 3-34; s.c. 5 Am. Dec. 66;

Dennett v. Dennett, 40 N. H. 498, 500;

Jewell v. Warner, 35 N. H. 176;

Holcomb v. Lake, 24 N. J. L. (4 Zab.) 686;

Den ex d. James v. Dubois, 16 N. J. L. (1 Harr.) 285;

Den v. Fox, 10 N. J. L. (5 Halst.) 39;

Pollock v. Speidel, 17 Ohio St. 439;

Price v. Taylor, 28 Pa. St 95; s.c. 70 Am. Dec. 105;

Lyle v. Richards, 9 Serg. & R. (Pa.) 322, 330;

Giddings v. Smith, 15 Vt. 344;

Van Rensselaer v. Kearney, 52 U. S. (11 How.) 297; bk. 13 L. ed. 703.

New Jersey statute of 1799.—It seems that the statute of New Jersey, of June, 1799, abolishing all English statutes, did not abolish estates-tail, they being recognized, and the statute *De Donis* supplied by the statute of 1784.

Pat. 54, § 2.

See: *Den v. Fox*, 10 N. J. L. (5 Halst.) 39.

² *Murrell v. Mathews*, 2 Bay (S. C.) 397;

Wright v. Herron, 5 Rich. (S. C.) Eq. 441.

³ See: *Partridge v. Dorsey*, 3 Har. & J. (Md.) 302;

Perry v. Kline, 66 Mass. (12 Cush.) 120;

Corbin v. Healy, 37 Mass. (20 Pick.) 515;

Hawley v. Northampton, 8 Mass. 34; s.c. 5 Am. Dec. 66;

Dennett v. Dennett, 40 N. H. 498, 500;

Jewell v. Warner, 35 N. H. 170;

Den v. Schenck, 8 N. J. L. (3 Halst.) 29;

McGregor v. Comstock, 17 N. Y. 162;

Jackson v. Van Zandt, 12 John. (N. Y.) 169;

Lyle v. Richards, 9 Serg. & R. (Pa.) 330;

De Witt v. Eldred, 4 Watts & S. (Pa.) 421;

Croxall v. Sherrerd, 72 U. S. (5 Wall.) 283; bk. 18 L. ed. 572;

4 Kent Com. (13th ed.) 214.

Fines and recoveries were abolished in New York in 1830.

See: *McGregor v. Comstock*, 17 N. Y. 162.

⁴ See: *Allyn v. Mather*, 9 Conn. 114;

Allen v. Craft, 109 Ind. 476; s.c. 58 Am. Rep. 425; 9 N. E. Rep. 919; 7 West Rep. 516;

Posey v. Budd, 21 Md. 477;

Watkins v. Sears, 3 Gill (Md.) 492;

ever, like Pennsylvania¹ and Massachusetts,² and probably others, such estates are still recognized. But even in those states where they are still recognized, estates-tail are subject to be barred by deed, and also by common recovery.³

SEC. 460. **Kinds of tails.**—Estates-tail may be divided into two general classes, with respect to the heirs that are to take. Thus they may be limited generally to the heirs of one's body, in which case the estate granted is called an estate-tail general; or they may be limited to particular heirs of the body, as to the heirs of one's body begotten upon the body of a certain named spouse, in which case the estate granted is called an estate-tail special. Such

Jewell v. Warner, 35 N. H. 176;
Redstrake v. Townsend, 39 N. J.
L. (10 Vr.) 372, 379;

Den v. Fox, 10 N. J. L. (5 Halst.)
39;

Morehouse v. Cotheal, 1 N. J. L.
(Coxe) 480;

Albany Fire Ins. Co. v. Bay, 4 N.
Y. 9;

Van Rensselaer v. Poucher, 5
Den. (N. Y.) 35;

Orndoff v. Turman, 2 Leigh (Va.)
200; s.c. 21 Am. Dec. 608;

Croxall v. Sherrerd, 72 U. S. (5
Wall.) 268; bk. 18 L. ed. 572.

**De Donis not law of western
states.**—The statute *De Donis*
never has been a part of the
law of many of the western
and southern states.

See: *Pierson v. Lane*, 60 Iowa
60; s.c. 14 N. W. Rep. 90;

Jordan v. Roach, 32 Miss. 481;

Rowland v. Warren, 10 Oreg.
129.

Same — Mississippi doctrine.—"As
early as the year 1807, all the
statutes of England and Great
Britain not re-enacted were, by
express enactment of the Leg-
islature, excluded from oper-
ation within the territory
(Hutch. Dig. 65); and when
the act of June 13, 1822, con-
cerning conveyances, was
passed, neither the statute of
Westminster, the statute *De*
Donis, nor the statute of wills
was in force within this com-
monwealth; the whole doc-

trine, therefore, in regard to
estates-tail and executory de-
vises, which was engrafted
upon the statutes above named,
never had existence in this
state by any express or positive
legislative enactment."

Jordan v. Roach, 32 Miss. 481.

¹ *Reinhard v. Lantz*, 37 Pa. St. 488;

Price v. Taylor, 28 Pa. St. 95; s.c.
70 Am. Dec. 105;

Potts' Appeal, 30 Pa. St. 172.

See: *Taylor v. Taylor*, 63 Pa. St.
486;

Gable v. Daub, 40 Pa. St. 217,
229;

Guthrie's Appeal, 37 Pa. St. 9.

² In *Wight v. Thayer*, 67 Mass. (1
Gray) 284, 286, it is said that
"estates-tail, with their legal
incidents, have been too long
and too often recognized in
this commonwealth to be now
questioned."

Citing: *Buxton v. Uxbridge*, 51
Mass. (1 Met.) 87;

Corbin v. Healy, 37 Mass. (20
Pick.) 515;

Davis v. Hayden, 9 Mass. 514.

³ See: *Laidler v. Young*, 2 Har. &
J. (Md.) 69;

Weld v. Williams, 54 Mass. (13
Met.) 486;

Nightingale v. Burrell, 32 Mass.
(15 Pick.) 104, 116;

Lithgow v. Kavenagh, 9 Mass.
161, 167, 175;

Pollock v. Speidel, 17 Ohio St.
439.

estates may be again divided, as to the sex of the heirs who are to take, into estates-tail male and estates-tail female. Thus the estate may be limited to the male heirs of the donee, in which case it is known as an estate-tail male; or it may be limited to the female issue of the donee, in which case it is called an estate-tail female. Estates-tail male and tail female may be either general or special estates-tail.

SEC. 461. Same—General and special estates-tail.—Every estate-tail is either general or special.¹ Where the estate in lands is given to a man and to the heirs of his body, generally, the devisee takes an estate in tail general;² but where the gift is restricted to certain heirs of the donee's body, exclusive of others, it becomes an estate-tail special.³ Thus where a devise of lands is to one "to hold to him and to the heirs of his body forever," the devisee takes an estate in tail general;⁴ but if the gift

¹ *Butler v. Huestis*, 68 Ill. 594; s.c. 18 Am. Rep. 589, 592;

2 Bl. Com. 113.

² *Riggs v. Sally*, 15 Me. (3 Shep.) 408; *Hoxton v. Archer*, 3 Gill & J. (Md.) 199;

Den v. Hugg, 5 N. J. L. (2 South.) 427;

Den v. Laquear, 4 N. J. L. (1 South.) 301;

Den v. Emans, 3 N. J. L. (2 Penn.) 967.

³ 2 Bl. Com. 113, 114.

⁴ See: *Riggs v. Sally*, 16 Me. (3 Shep.) 408;

Hoxton v. Archer, 3 Gill & J. (Md.) 199.

Sewall v. Howard, 1 Har. & McH. (Md.) 45;

Keys v. Goldsborough, 2 Har. & J. (Md.) 369;

Den v. Laquear, 4 N. J. L. (1 South.) 301;

Den v. Emans, 3 N. J. L. (2 Penn.) 967.

A devise "to my daughter and her heirs forever, and not to be disposed of to none from them, but my said daughter and her heirs forever," entails the land upon such daughter and her heirs, in fee-tail general.

Sewall v. Howard, 1 Har. & McH. (Md.) 45.

The words in a devise, "My will

is, that my daughter M. shall be partaker of all my estate, both real and personal, provided she leaving an issue, male or female;" and afterwards, in the same will, "that the issue, male or female, from the body of my daughter M. shall be next partaker," create an estate-tail general in M.; and her issue do not take as devisees under the will.

Den v. Emans, 3 N. J. L. (2 Penn.) 967.

The words, "I give and bequeath, etc., to my daughter E., during her lifetime, and then to the heirs of her body, and so to her heirs' heirs forever;" and "if all the heirs of either or both my daughters should die and leave no issue, as aforesaid, then what should or was to be theirs, to be equally divided among my three sons, J., S., and J., or to their heirs forever," creates an estate-tail general in E., with remainder in fee to J., S., and J., as tenants in common.

Den v. Laquear, 4 N. J. L. (1 South.) 301.

A devise was as follows: "I give and bequeath the whole of my estate, both real and per-

be to a person and the heirs of his body on his present spouse, who is designated by name, the devisee takes an estate in tail special, the issue of the donee and any other spouse being excluded.¹

SEC. 462. Same—Same—Limitation in tail special valid where.—In order that a limitation in special tail shall be good, it must be to the issue to be begotten upon the body of some spouse named, who must be either the donee's present spouse or a person who by possibility may become his spouse. Thus, if the person designated as such spouse be so near of kin to the donee as to render their union in marriage unlawful, the estate would be in the donee for life only.² Probability that such a union will take place between the parties named is not necessary to the validity of the gift; nor is the validity of such a limitation affected by the impossibility that, if married, the parties should have issue to inherit. Thus where the two parties named are at the time married to two other persons, the gift will be valid, because it is possible that such other parties may both die and the donee and the person designated in the will may afterwards intermarry. And where the parties are married at the time of the gift, such gift will not be invalid by reason of the fact that because of old age or physical defect the birth of issue is impossible. Such an estate will not become an estate-tail after possibility of issue extinct so long as the parties named are living.³

SEC. 463. Same—Estates-tail male and female.—Where lands are given to a person and the heirs male of his or her body, this is called an estate in tail male general, to

sonal, unto my five daughters, to them and their heirs forever, to be equally divided amongst them; and it is my will, that, if either of the said children die without issue lawfully begotten of their body, in that case the part of the said child be equally divided among my surviving daughters." Held, in Maryland, that, this will being made before the act to

direct descents, the devisees each took estates-tail general, with cross remainders in fee, under the limitation over to the survivors.

Hoxton v. Archer, 3 Gill & J. (Md.) 199.

¹ 2 Bl. Com. 113, 114.

See: *McKenzie v. Jones*, 39 Miss. 230.

² 2 Prest. Est. 417.

³ 2 Prest. Est. 395.

which the heirs female are not inheritable;¹ and where lands are given to a person and the heirs female of his or her body, this constitutes a tail female general, to which the heirs male are not inheritable.²

SEC. 464. Same—Estate in frank-marriage.—It was formerly the practice in England for a person to give lands to another, as a marriage portion with his daughter or cousin, to hold to the husband and wife with the understanding and upon the condition that it was to descend to the issue of such marriage. Such an estate was called a frank-marriage.³ Courts construe gifts in frank-marriage in the same manner as donations to persons and the heirs of their bodies, by which means they came to be considered to be conditional fees,⁴ and the condition being considered as having been performed on the birth

¹ *Dart v. Dart*, 7 Conn. 250 ;
Atlin v. Bunce, 1 Root (Conn.) 96 ;
Manwaring v. Tabor, 1 Root (Conn.) 79 ;
Hurlburt v. Emerson, 16 Mass. 241 ;
Den v. Hugg, 5 N. J. L. (2 South.) 427 ;
Den v. Fogg, 3 N. J. L. (2 Penn.) 819, 880 ;
Wilcox v. Heywood, 12 R. I. 196 ;
Jillson v. Wilcox, 7 R. I. 515 ;
DeWindt v. DeWindt, L. R. 1 H. L. 87.

² Some English authors question whether an estate-tail female is valid. Challis says : “ No motive can be imagined which would be likely to induce any one to limit a fee-tail to heirs female, though nothing is more common than the limitation of a fee-tail to heirs male. The former kind of limitation was probably suggested by the latter ; and it probably exists only in the logical imagination of text writers. But there is no reasonable doubt as to its legal validity ; which, indeed, is expressly recognized by the Conveyancing Act of 1881, § 51.” Challis’ Real Prop. 230.

Same—Hargrave, in note on Coke Littleton (1 Co. Litt. (19th ed.) 25a, note 1), makes mention of an attempt to prove in

argument that limitations in tail female are invalid. In *Goodtitle v. Burtenshaw*, *Fearne Cont. Rem.*, App. No. 1, a limitation occurred to the heirs female, but as purchasers. From some remarks made by Lord Coke (2 Co. Litt. (19th ed.) 377a), it may perhaps be inferred that limitations in tail female, in remainder upon a limitation in tail male, may actually have occurred as the work of short-sighted conveyancers, who mistook their effect. Lord Coke points out the danger of such limitations, and shows that the proper limitation to effect the probable intention is a limitation in tail general, in remainder upon a limitation in tail male.

See : 1 Co. Litt. (19th ed.) 25b.

³ Glanville says : “ *Liberum dicitur maritagium quando aliquis liber homo aliquam partem terræ suæ dat, cum aliqua muliere, alicui in maritagium.*” Glanv., lib. 7, c. 18.

Not given with man.—Lands, it seems, could not be given in frank-marriage with a man that was cousin to the donor, but always with a woman.

See : Finch, b. 2, c. 3, 29a.

⁴ See : *Ante*, chapter X., “ Conditional Fees.”

of issue, the estate thereafter became alienable.¹ This construction, being manifestly contrary to the evident intention of the person creating such estate, was limited by the statute *De Donis*,² which, after reciting the case of a gift in frank-marriage, comprises it in the remedial part of the law, by which means gifts of this kind become estates in tail special, and the donees were restrained from alienating them; on failure of issue the land reverted to the donor or his heirs.³

SEC. 465. Same—Fees-tail with conditional limitations.—Where estates are given determinably to a person and the heirs of his body as long as a tree shall stand, or until the donor or a specified person return from Rome, or do a prescribed act, the estate conveyed is a determinable fee,⁴ defeasible by the happening of such contingency. In such a case the same rule applies as where a similar limitation is annexed to a fee-simple estate, determinable upon condition.⁵

SEC. 466. Same—Estates-tail after possibility.—Where an estate has been given to two donees in special tail, the death of one without issue leaves the other tenant in tail with an estate of a peculiar character, which has been denominated an estate-tail after possibility of issue extinct. The tenant holding such an estate is known as a tenant in tail after possibility;⁶ and where the estate in tail is an estate in remainder, which does not become an estate in possession until after such death, the survivor is nevertheless tenant in tail after possibility.⁷ Such tenant is not liable in an action for waste by a revisioner, but may be restrained by injunction for willful and malicious waste. This estate can only happen where the limitation is to the donee and his heirs begotten upon the body of a specified person, and such person has since died. If the limitation be to the heirs of one's body generally,

¹ 1 Cruise, Real Prop. (4th ed.) 71, § 18.

² See: *Ante*, § 456.

³ 1 Inst. 21a; 2 Id. 332, 333; 2 Prest. Est. 378.

⁴ See: *Ante*, chapter IX., on

“Determinable Fees.”

⁵ See: 2 Prest. Est. 362, 446.

⁶ Litt., §§ 32, 33.

See; 1 Co. Litt. (19th ed.) 27b, 28b.

⁷ 1 Co. Litt. (19th ed.) 28a, 28b.

as long as the donee survives, there is a legal possibility of issue.¹ An estate-tail after possibility of issue extinct can be created only by death, and not by act of the parties. For this reason where two donees in special tail are divorced *a vinculo matrimonii*, they will thereafter be joint tenants for life,² because there is no presumption *de jure* that any person, however advanced in years, cannot have issue.³ The duration of the estate of a tenant in tail, after the possibility of issue extinct, does not differ from the duration of a bare estate for life; and the exchange between a tenant after possibility and the tenant for life is good.⁴

SEC. 467. **How estates-tail are created.**—An estate-tail may be created by three different modes: (1) By a gift to a man and his wife and to the heirs of their bodies; (2) by a gift in frank-marriage; and (3) by a gift to a person and the heirs of his body issuing. And if lands are given to a person and his heirs, with the condition that in case the donee die without heirs of his body, it shall remain to another, this is an estate-tail within the equity of the statute *De Donis*, though not within the words; for it is thought the makers of that statute did not mean to enumerate all the forms of estates-tail, but simply to put those above given as examples. As we have heretofore seen,⁵ at common law, the intent of the donor was infringed and eluded, and it was regarded as contrary to right and good conscience, and for that reason the statute was passed to restrain that vicious liberty of breaking such intents, which was suffered by the common law.⁶

SEC. 468. **Same—Words of procreation necessary.**—In the creation of an estate-tail it is essential that there should

¹ List v. Rodney, 83 Pa. St. 483;
Jee v. Audley, 1 Cox Eq. 324; s.c.
1 Rev. Rep. 46;
2 Bl. Com. 125;
1 Co. Litt. (19th ed.) 27b, 28a.

² 1 Co. Litt. (19th ed.) 28a, 28b.
See: *Post*, chapter on "Joint Tenants."

³ 1 Co. Litt. (19th ed.) 28a-28b.

⁴ 1 Co. Litt. (19th ed.) 28a.
Not liable for waste.—But such ten-

ant is not punishable for waste.
Williams v. Williams, 12 East
209.

⁵ See: *Ante*, § 456.

⁶ See: Maslin v. Thomas, 8 Gill
(Md.) 18;

Steel v. Cook, 42 Mass. (1 Met.)
281;

2 Inst. 334;

Plowd. 53.

be a limitation to the heirs of the donee's body ;¹ and for this reason the word "body," or some other words indicating procreation, are indispensably necessary to create a fee-tail, as well as to indicate to what heirs in particular the fee is limited.² Where words of procreation are omitted no other words which may be inserted will serve to create an estate-tail.³

SEC. 469. **Same—Methods of creation—a. By deed.**—Estates-tail are created either by deed or by will.⁴ In the creation of an estate-tail by deed the words "heirs of the body" are the technical words used. Thus, a deed to the grantee for her support during her natural life, and after her decease to the heirs of her body and to their heirs and assigns forever, creates a fee-tail general.⁵ But where a deed was made to husband and wife of land during their lives, then to the use of the issue of the husband, their heirs and assigns ; in default of issue by the husband, then to the husband's right heirs, their heirs and assigns forever ; it was held that the husband took an estate-tail.⁶ The word "heirs," in the limitation

¹ *Corbin v. Healy*, 37 Mass. (20 Pick.) 515 ;

Williamson v. Daniel, 25 U. S. (12 Wheat.) 568 ; bk. 6 L.ed.731 ;

Idle v. Cooke, 2 Ld. Raym. 1152 ;

Althan's Case, 8 Co. 154b ;

2 Prest. Est. 360.

² See : *Atlin v. Bunce*, 1 Root (Conn.) 96 ;

Pratt v. Flamer, 5 Har. & J. (Md.)

10 ;

Perry v. Kline, 66 Mass. (12 Cush.)

127 ;

1 Co. Litt. (19th ed.) 20b ;

2 Bl. Com. 114, 115 ;

2 Prest. Est. 480.

³ See : *Baker v. Scott*, 62 Ill. 86 ;

Butler v. Huestis, 68 Ill. 594 ; s.c.

18 Am. Rep. 592 ;

2 Bl. Com. 115 ;

2 Prest. Est. 412.

⁴ The deed or the will may be either produced, or a proper foundation laid for presuming that it had existed.

Maslin v. Thomas, 8 Gill (Md.) 18.

⁵ *Den v. McPeake*, 2 N. J. L. (1 Penn.) 291.

But in the case of *Dott v. Cunningham*, 1 Bay (S. C.) 453 ; s.c.

1 Am. Dec. 624, where a parent gave sundry property by deed to a married daughter, distinct from her husband, during her life, "and at her death to the heirs of her body." These words were held to be words of limitation, and not of purchase, and constituting an estate-tail, which being too remote, the property vested in the first taker. An estate conveyed by indenture to A and his heirs, to the use of B, the wife of C, for life, remainder to C for life, remainder to "the joint heirs of the body of E and C, by them lawfully begotten;" and the estate so limited to B declared to be in trust, that, in case of the insolvency of C, it should not be liable for his debts, is an estate in special fee-tail in B and C, and their eldest son is entitled after their death, exclusively of their other children.

Davis v. Hayden, 9 Mass. 514.

⁶ *Baughman v. Baughman*, 2 Yeates (Pa.) 410.

of a fee-tail, is as necessary as in the limitation of a fee-simple,¹ because of the derivation of a fee-tail from a conditional fee.²

SEC. 470. **Same—Same—"Heir" nomen collectivum.**—The word "heir" is *nomen collectivum*, and serves the same purpose as the word "heirs."³ Thus, in the case of *Osborne v. Shrieve*,⁴ a testator devised an estate to his son, "J. S., and to his male heir" (in the singular), "and to his heirs and assigns forever; but if it should so be that J. S. should depart this life leaving no male heir, lawfully begotten of his body, as aforesaid," then to the testator's grandson, W. O., in fee. The court held that J. S. took an estate-tail, with remainder over to W. O., on the indefinite failure of the issue of J. S. The estate may be created without the use of the words "of the body," by the use of words regarded as their equivalent,⁵ as by conveying to a designated person "and his heirs, namely, the heirs of his body;" or to a person and the heirs "of himself lawfully issuing or begotten;" or to a person and the heirs "of his wife," or "of his wife begotten;" or to a person and to the heirs "which he shall happen to have or beget."⁶ But if the word "heirs" be omitted, an estate for life only will pass, although the terms of entailment are otherwise sufficient. Thus a grant by deed to a person and his issue of his body, or to him and his seed, or to him and his children or offspring, would create an estate for life, and not an estate in tail.⁷

¹ See: *Ante*, §§ 325–338.

² 1 Co. Litt. (19th ed.) 20a.

³ *Hall v. Vandegrift*, 3 Binn. (Pa.) 374.

See: *Manwaring v. Tabor*, 1 Root (Conn.) 79.

⁴ 3 Mas. C. C. 391.

Lord Coke cites an old case, in which it seems to have been held that the word "heir" in the singular might be used as a word of limitation to create some kind of estate-tail. But the form of the limitations there given is so strange and abnormal that it cannot be safely relied upon as a precedent.

1 Co. Litt. (19th ed.) 20a.

See: *Dubber v. Trollop*, 8 Vin. 233, pl. 13.

⁵ 1 Co. Litt. (19th ed.) 20b;

2 Bac. Abr. 543.

⁶ 1 Co. Litt. (19th ed.) 20b;

2 Prest. Est. 485.

⁷ In the case of *Sale v. Crutchfield*, 8 Bush (Ky.) 636, 648, a devise of property provided that in case the devisee "should die without lawful issue," the estate should pass to another, the court held that the devisee took a defeasible fee, and that the intention of the testator was not to create an estate-tail.

In the creation of an estate-tail, words of inheritance may be supplied by reference to another limitation, where such limitation is clearly of an estate-tail; such as a gift to A and the heirs of his body, with remainder to B, "in manner aforesaid."¹ And where the estate-tail is given with the habendum of the deed creating such estate to the grantee and his heirs, this will not enlarge the estate to a fee-simple;² nor will the entail be destroyed by a warranty to the grantee "and his heirs as aforesaid."³ And where lands are conveyed by deed "to A, the heirs of his body, and assigns forever," the addition of the word "assigns" will not enlarge an estate granted to a fee-simple.⁴

SEC. 471. **Same—Same—b. By devise.**—An estate-tail, either general or special, male or female, may be created by devise as well as by deed. Where an estate-tail is sought to be created by devise the technical words necessary for that purpose are the same as those used in creating such an estate by deed.⁵ A devise of real estate to a person

¹ 1 Co. Litt. (19th ed.) 20b.

² Corbin v. Healy, 37 Mass. (20 Pick.) 515;

1 Co. Litt. (19th ed.) 21a.

³ Corbin v. Healy, 37 Mass. (20 Pick.) 514.

⁴ Pollock v. Speidel, 17 Ohio St. 439, 446.

⁵ A list of estates-tail and the form of their limitation is contained in the following schedule. For the sake of clearness and convenience the masculine gender only is used in specifying a single donee.

I. GENERAL TAILS.

1. *General*:—To A and the heirs of his body begotten. Litt., §§ 14, 15; 1 Co. Litt. (19th ed.) 19b–20b.

2. *Male*:—To A and the heirs male of his body begotten. Litt., § 23; 1 Co. Litt. (19th ed.) 24a–25a.

3. *Female*:—To A and the heirs female of his body begotten. Litt., § 23; 1 Co. Litt. (19th ed.) 24a–25a.

II. SPECIAL TAILS.

4. *General*, one donee:—To A and his heirs which he shall

beget on the body of his (specified) wife. Litt., § 29; 1 Co. Litt. (19th ed.) 26b. This was anciently regarded as the only proper form of limitation; but it was decided in Chudleigh's Case, 1 Co. 120, and in Dillon v. Freine, 1 Co. 140b, by resolution (5), that a limitation "to A and his heirs of the body of Jane S. begotten," was sufficient for the purpose. This had previously been doubted, and a very plausible reason was alleged in favor of the doubt. 1 Co. Litt. (19th ed.) 26b.

5. *Male*, one donee:—To A and his heirs male which, etc.

6. *Female*, one donee:—To A and his heirs female which, etc.

7. *General*, two donees:—To A and B, the heirs of their two bodies begotten. Litt., § 16; 1 Co. Litt. (19th ed.) 21a.

8. *Male*, two donees:—To A and B and the heirs male of their two bodies begotten. Litt., § 25; 1 Co. Litt. (19th ed.) 25b.

for life, and the heirs of the body of such donee, creates an estate-tail general,¹ although there is no limitation over ;² and this is true although the devise is made subject to the devisee's making payment of specific pecuniary legacies out of the land.³ Such charge upon the devisee in tail will not alter or enlarge the estate.⁴ Such a devise creates a valid estate-tail general, although it is immediately followed by a devise of other land to another devisee, with the provision that if either lot should, upon appraisal, prove more valuable than the other, the devisee of the more valuable lot should "give unto the other as much as the overplus is."⁵

SEC. 472. Same—Same—Same—Words creating estate-tail.—Such an estate may be created by a devise to a donee and his "heirs,"⁶ or "the heirs of his body,"⁷ or to their

9. *Female*, two donees :—To A and B and the heirs female of their two bodies begotten.
- ¹ Welles v. Olcott, 1 Kirby (Conn.) 118 ;
Atlin v. Bunce, 1 Root (Conn.) 96 ;
Manwaring v. Tabor, 1 Root (Conn.) 79 ;
Watts v. Clardy, 2 Fla. 369 ;
Pournell v. Harris, 29 Ga. 736 ;
Brown v. Wever, 28 Ga. 377 ;
Lee v. McElvy, 23 Ga. 129 ;
Hall v. Thayer, 71 Mass. (5 Gray) 523 ;
Wight v. Thayer, 67 Mass. (1 Gray) 284 ;
Malcolm v. Malcolm, 57 Mass. (3 Cush.) 472 ;
Nightingale v. Burrell, 32 Mass. (15 Pick.) 104 ;
Davis v. Hayden, 9 Mass. 514 ;
Den v. Fogg, 3 N. J. L. (2 Penn.) 819, 880 ;
Seely v. Seely, 44 Pa. St. 434 ;
Haldeman v. Haldeman, 40 Pa. St. 29 ;
Lapsley v. Lapsley, 9 Pa. St. 130 ;
Bender v. Fleurie, 2 Grant Cas. (Pa.) 345 ;
- Elliott v. Pearsoll, 8 Watts & S. (Pa.) 38 ;
Heffner v. Knapper, 6 Watts (Pa.) 18 ;
Burrough v. Foster, 6 R. I. 534 ;
Cooper v. Coursey, 2 Cold. (Tenn.) 416 ;
Giddings v. Smith, 15 Vt. 344 ;
Sleigh v. Strider, 5 Call (Va.) 439 ;
Good v. Good, 7 El. & B. 295 ; s.c. 90 Eng. C. L. 294 ;
Parker v. Tootal, 3 Hurl. & C. 1006 ;
Webb v. Byng, 2 Kay & J. 669 ;
s.c. 39 Eng. L. & Eq. 241.
- ² Good v. Good, 7 El. & B. 295 ;
s.c. 90 Eng. C. L. 294.
- ³ Good v. Good, 7 El. & B. 295 ;
s.c. 90 Eng. C. L. 294.
- ⁴ Den ex d. Wilson v. Small, 20 N. J. L. (1 Spenc.) 151.
See : Lapsley v. Lapsley, 9 Pa. St. 130.
- ⁵ Hall v. Thayer, 71 Mass. (5 Gray) 523.
- ⁶ Devise to one and his heirs special.—Thus in Seely v. Seely, 44 Pa. St. 434, a devise was to two daughters "to hold during their natural lives, and after their
- ⁷ Perry v. Kline, 66 Mass. (12 Cush.) 118.
Devise to several.—The same is true regarding a devise to several "and the heirs of their bodies begotten."
True v. Nicholls, 2 Duv. (Ky.) 547 ;
Johnson v. Johnson, 2 Met. (Ky.) 334 ;
Brown v. Alden, 14 B. Mon. (Ky.) 141 ;
Lachland v. Downing, 11 B. Mon. (Ky.) 33 ;
Prescott v. Prescott, 10 B. Mon. (Ky.) 56, 58.

heirs and assigns forever,¹ or “the lawful heirs of her body,”² or “to her children.”³ A devise to one, and his heirs by his present wife, will give an estate-tail special.⁴ Within this rule a devise to daughters and their unborn children has been held to create an estate-tail.⁵ Whenever in the devise of a remainder to the “child” or “children” of the first taker, it clearly appears that these words are used in the sense of “issue” or “heirs of the

decease to their heirs, if any,” and if without heirs, then to heirs of testator. The devisees took, under the will, as tenants in tail, undivided moieties of the land devised; and on the death of either one unmarried and without issue, the remainder of her estate passed to testator’s heirs in fee under the will.

Devise to one and his heirs general.—It has been said, however, that a devise to one for life and to his heirs generally does not create an estate-tail.

Spencer v. Chick, 76 Me. 347;

Paddison v. Oldham, 1 Har. & McH. (Md.) 336.

Same—Indiana doctrine.—In *Helm v. Frisbie*, 59 Ind. 526, a testator devised his real estate to his wife during her life, remainder to the issue of her body by him begotten, living to lawful age, and, on failure thereof, “the remainder to my own relatives by consanguinity at the time of her decease, who may lawfully inherit the same by the rules of the common law.” She died, and her issue died during minority. In an action by such “relatives,” etc., the court held that the will did not create an estate-tail, and the devise was not within the rule in *Shelley’s Case*.

¹ *Welles v. Olcott*, 1 Kirby (Conn.) 118.

Wight v. Thayer, 67 Mass. (1 Gray) 284;

Cooper v. Coursey, 2 Coldw. (Tenn.) 416.

In *Welles v. Olcott*, 1 Kirby (Conn.) 118, a devise to “my daughter Mary, and the heirs of her body, forever,” was held

to create an estate-tail.

In *Cooper v. Coursey*, 2 Coldw. (Tenn.) 416, a testator made the following devise: “I give and bequeath to my daughter C. the following tracts of land . . . for and during her life, and at her death to go to the heirs of her body.” Held, that the words “heirs of her body” were words of limitation, so that the devisee took an absolute entail, and having died leaving issue of the marriage, her husband became tenant by the curtesy.

² *Giddings v. Smith*, 15 Vt. 344.

Devise without words of procreation.

—The same is true of a devise to one “and his lawful begotten heir or heirs forever,” without words of procreation.

Den ex d. Ewan v. Cox, 9 N. J. L. (4 Halst.) 10.

Same—Virginia doctrine.—In *Sleigh v. Strider*, 5 Call (Va.) 439, a devise to R. H. “during his natural life and no longer; and after, to his eldest son and his heirs forever; but if no male issue, to his eldest daughter and her heirs forever,” gives an estate-tail to R. H.

³ Where a testatrix devised “in trust to my executors, for my niece M. A. B. and her children, my estates, provided she takes the name of C. and arms, and her children, with my mansion-house, furniture” (and other articles), “as heirlooms with my estate,” the court held, that M. A. B. took an estate-tail.

Webb v. Byng, 2 Kay & J. 669; s.c. 39 Eng. L. & Eq. 241.

⁴ *Den ex d. Somers v. Peirson*, 16 N. J. L. (1 Harr.) 181.

⁵ *Brown v. Wever*, 28 Ga. 377.

body," they will be treated as words of limitation describing lineal succession to the entail, not words of purchase in their general sense.¹ The devise of land to a person "to be enjoyed" during his life, and at his death to be enjoyed by his heirs, so on in tail forever, creates an estate-tail.² And a devise to a person of specified property, reciting that it is "loaned" to the donee "during his natural life and after his death" to his heirs, creates an estate-tail.³ A devise to a man and the heirs male of his body, lawfully begotten, is an estate-tail;⁴ and, upon the death of the devisee without male heirs of his body, the land reverts to the donor or his heirs, creates an estate-tail.⁵

SEC. 473. Same—Same—Same—Devise to several and survivors.—A devise of an estate to several devisees, with remainder to the survivors and their heirs, and if any of them die without issue their share to be divided between the survivors, creates an estate-tail in the devisees, with remainder in fee to those who survive, and to the heirs of those who died before those who died without issue.⁶ Thus

¹ *Haldeman v. Haldeman*, 40 Pa. St. 29.

² *Elliott v. Pearsoll*, 8 Watts & S. (Pa.) 88.

³ *Lee v. McElvy*, 23 Ga. 129;
Watts v. Clardy, 2 Fla. 369;
Collis v. Kemp, 11 Gratt. (Va.) 78.

⁴ *Manwaring v. Tabor*, 1 Root (Conn.) 79;
Atlin v. Bunce, 1 Root (Conn.) 96;
Malcolm v. Malcolm, 57 Mass. (3 Cush.) 472;
Den v. Fogg, 3 N. J. L. (2 Penn.) 819, 880;
Parker v. Tootal, 13 Hurl. & C. 1006.

Where a testator devised as follows: "I give and bequeath to my grandson D. my dwelling-house wherein I now live, he to take possession of the same at the age of twenty-one years; to hold the same to him during his life, and at and upon his decease, I give the same dwelling-house to the eldest male heir of his body lawfully begotten, and upon the decease

of such male heir, to the male heir of said deceased and his heirs forever. And in case my said grandson shall not leave any male heirs, I then give said house to his next eldest brother during his life, and upon his decease to his eldest male heir, lawfully begotten, and to his heirs forever." It was held that D. took an estate-tail. *Malcolm v. Malcolm*, 57 Mass. (3 Cush.) 472.

A will gave to T. an "estate for life, with remainder to the first son of the body of T. lawfully begotten, severally and successively in tail male." The court held that the words "and other sons" might be introduced in order to prevent the words "severally," etc., from being in effect struck out of the will; and T. was held to take an estate-tail by implication.

Parker v. Tootal, 3 Hurl. & C. 1006.

⁵ *Den v. Fogg*, 2 Pa. St. 819, 880.

⁶ *Nightingale v. Burrell*, 32 Mass. (15 Pick.) 104;

a devise to the testator's children A and B, their heirs and assigns; if either die without issue, to the survivor; if both, then to the next heir of the testator's family, gives an estate-tail.¹ And a devise to one and his wife, and the heirs of her body, to be disposed of by him among his children as he shall think proper, on condition that he, or his heirs or assigns, pay to the wife of the devisor a certain sum yearly during her life, does not create a fee-simple in the husband, the devisee, but either vests an estate-tail in him and his wife jointly, or in her alone; the husband having in his own right a term for his own life, and a seisin, in right of his wife, of the tenancy in tail, during their joint lives.²

SEC. 474. **Same—Same—Same—Remainder over on failure of issue.**—An absolute bequest followed by a limitation over will create an estate-tail by implication.³ Thus a devise to a person during his natural life, and, at his death, to his heirs or the lawful issue of his body; and if he should die without leaving issue of his body living at the time of his death, then over, is construed an estate-tail by implication.⁴ But an estate-tail is never raised by im-

Lithgow v. Kavenagh, 9 Mass. 161;

Doyle v. Mullady, 33 Pa. St. 264;

Lapsley v. Lapsley, 9 Pa. St. 130;

Heffner v. Knapper, 6 Watts (Pa.) 18;

Burrough v. Foster, 6 R. I. 534.

¹ *Doyle v. Mullady*, 33 Pa. St. 264.

² *Lithgow v. Kavenagh*, 9 Mass. 161, 175.

³ *Dart v. Dart*, 7 Conn. 250;

Laidler v. Young's Lessee, 2 Har. & J. (Md.) 69;

Hurlburt v. Emerson, 16 Mass. 241;

Morehouse v. Cothel, 21 N. J. L. (1 Zab.) 480;

Ogden's Appeal, 70 Pa. St. 501;

Gast v. Baer, 62 Pa. St. 35;

Matlack v. Roberts, 54 Pa. St. 148;

Curtis v. Longstreth, 44 Pa. St. 297;

Wynn v. Story, 38 Pa. St. 166;

Criley v. Chamberlain, 30 Pa. St. 161;

Wall v. Maguire, 24 Pa. St. 249;

Hansell v. Hubbell, 24 Pa. St. 244;

Pierce v. Hakes, 23 Pa. St. 231;

Amelia Smith's Appeal, 23 Pa. St. 9;

Vaughan v. Dickes, 20 Pa. St. 509;

Braden v. Cannon, 1 Grant Cas. (Pa.) 60;

Shoofstall v. Powell, 1 Grant (Pa.) 19;

Irwin v. Dunwoody, 17 Serg. & R. (Pa.) 61;

Amelong v. Dorney, 16 Serg. & R. (Pa.) 323, 325;

Eichelberger v. Barnitz, 9 Watts (Pa.) 447;

Heffner v. Knapper, 6 Watts (Pa.) 18;

Hill v. Burrow, 3 Call (Va.) 342;

Sydnor v. Sydnor, 2 Munf. (Va.) 263;

Williamson v. Daniel, 25 U. S. (12 Wheat.) 568; bk. 6 L. ed. 731.

⁴ *Turrill v. Northrop*, 51 Conn. 33;

Williams v. McCall, 12 Conn. 328;

Dart v. Dart, 7 Conn. 250;

Hamilton v. Hempstead, 3 Day (Conn.) 362;

plication upon the words "dying without issue," whether the first devise was for life or in fee, without additional

- Waples v. Harman*, 1 Harr. (Del.) 223;
Watts v. Clardy, 2 Fla. 369;
Haddock v. Perham, 70 Ga. 572;
Lee v. McElvy, 23 Ga. 129;
Hollifield v. Stell, 17 Ga. 280;
Wiley v. Smith, 3 Ga. (3 Kelly) 551;
Deboe v. Lowen, 8 B. Mon. (Ky.) 616;
Riggs v. Sally, 15 Me. (3 Shep.) 408;
Chew v. Chew, 1 Md. 163;
Hatton v. Weems, 12 Gill & J. (Md.) 83;
Pratt v. Flamer, 5 Har. & J. (Md.) 10;
Shanks v. Blackiston, 4 Har. & J. (Md.) 481;
Pottenger v. Stewart, 3 Har. & J. (Md.) 347;
Laidler v. Young, 2 Har. & J. (Md.) 69;
Brown v. Anderson, 2 Har. & McH. (Md.) 100;
Mockbee v. Clagett, 2 Har. & McH. (Md.) 1, 83;
Chew v. Weems, 1 Har. & McH. (Md.) 463;
Hayward v. Howe, 78 Mass. (12 Gray) 49; s.c. 71 Am. Dec. 734;
Hall v. Priest, 72 Mass. (6 Gray) 18;
Albee v. Carpenter, 66 Mass. (12 Cush.) 382;
Perry v. Kline, 66 Mass. (12 Cush.) 118;
Malcolm v. Malcolm, 57 Mass. (3 Cush.) 472;
Canedy v. Haskins, 54 Mass. (13 Met.) 389; s.c. 46 Am. Dec. 739;
Terry v. Briggs, 53 Mass. (12 Met.) 17;
Cuffee v. Milk, 51 Mass. (10 Met.) 366;
Nightingale v. Burrell, 32 Mass. (15 Pick.) 104;
Hurlburt v. Emerson, 16 Mass. 241;
Lithgow v. Kavenagh, 9 Mass. 161, 175;
Hawley v. Northampton, 8 Mass. 3, 34; s.c. 5 Am. Dec. 66;
Ide v. Ide, 5 Mass. 500;
Williams v. Hichborn, 4 Mass. 189;
Executors of Condict v. King, 13 N. J. Eq. (2 Beas.) 375;
Chetwood v. Winston, 40 N. J. L. (11 Vr.) 337;
Den ex d. Somers v. Peirson, 16 N. J. L. (1 Harr.) 181;
Den ex d. Ewan v. Cox, 9 N. J. L. (4 Halst.) 10;
Den v. Hugg, 5 N. J. L. (2 South.) 427;
Den ex d. Wilson v. Small, 20 N. J. L. (1 Spenc.) 151;
Den v. Fogg, 3 N. J. L. (2 Penn.) 819, 880;
Den v. Moore, 1 N. J. L. (Coxe) 386;
Den ex d. Hinchman v. Clark, 1 N. J. L. (Coxe) 446;
Lott v. Wykoff, 2 N. Y. 355, affirming s.c. 1 Barb. (N. Y.) 565;
Ebbets v. Quick, 66 How. (N. Y.) Pr. 184;
Jackson v. Billinger, 18 John. (N. Y.) 368;
Burnet v. Denniston, 5 John. Ch. (N. Y.) 35;
Roosevelt v. Thurman, 1 John. Ch. (N. Y.) 220;
Ross v. Toms, 4 Dev. (N. C.) L. 376;
Sanders v. Hyatt, 1 Hawks. (N. C.) 247;
Gibson v. Maulton, 2 Disn. (Ohio) 158;
Lawrence v. Lawrence, 105 Pa. St. 335;
Hope v. Rusha, 88 Pa. St. 127;
Moody v. Snell, 81 Pa. St. 359;
Seeley v. Seeley, 44 Pa. St. 434;
Curtis v. Longstreth, 44 Pa. St. 297;
Walker v. Dunshee, 38 Pa. St. 430;
Wynn v. Story, 38 Pa. St. 166;
Kay v. Scates, 37 Pa. St. 31; s.c. 78 Am. Dec. 399;
Doyle v. Mullady, 33 Pa. St. 264;
Rancel v. Creswell, 30 Pa. St. 158;
Wall v. Maguire, 24 Pa. St. 248;
Hansell v. Hubbell, 24 Pa. St. 244;
Willis v. Bucher, 2 Binn. (Pa.) 455;
Braden v. Cannon, 1 Grant Cas. (Pa.) 60;
Shoofstall v. Powell, 1 Grant Cas. (Pa.) 19;
Caskey v. Brewer, 17 Serg. & R. (Pa.) 441;

words to control the construction.¹ A limitation in a will to one for life, with power of appointment in favor

Amelong v. Dorney, 16 Serg. & R. (Pa.) 323;
Gause v. Wiley, 4 Serg. & R. (Pa.) 509;
Sheetz's Will, 3 Serg. & R. (Pa.) 487, n.;
Clark v. Baker, 3 Serg. & R. (Pa.) 470;
Duer v. Boyd, 1 Serg. & R. (Pa.) 203;
Eichelberger v. Barnitz, 9 Watts (Pa.) 447;
Heffner v. Knapp, 6 Watts (Pa.) 18;
Shoemaker v. Huffnagle, 4 Watts & S. (Pa.) 437;
Sharp v. Thompson, 1 Whart. (Pa.) 139;
Haines v. Witmer, 2 Yeates (Pa.) 400;
Roe v. Davis, 1 Yeates (Pa.) 332;
Wilcox v. Heywood, 12 R. I. 196;
Brownell v. Brownell, 10 R. I. 509;
Jillson v. Wilcox, 7 R. I. 515;
Arnold v. Brown, 7 R. I. 188;
Manchester v. Durfee, 5 R. I. 549;
Whitworth v. Stuckey, 1 Rich. (S. C.) Eq. 404;
Tate v. Tally, 3 Call (Va.) 354;
Hill v. Barrow, 3 Call (Va.) 342;
Tinsley v. Jones, 13 Gratt. (Va.) 289;

Callis v. Kemp, 11 Gratt. (Va.) 78;
Nowlin v. Winfree, 8 Gratt. (Va.) 346;
Eldridge v. Fisher, 1 Hen. & M. (Va.) 559;
Doe v. Craiger, 8 Leigh (Va.) 449;
Thomason v. Andersons, 4 Leigh (Va.) 118;
Bramble v. Billups, 4 Leigh (Va.) 90;
Jiggetts v. Davis, 1 Leigh (Va.) 368;
Ball v. Payne, 6 Rand. (Va.) 73;
Broaddus v. Turner, 5 Rand. (Va.) 308;
Bells v. Gillespie, 5 Rand. (Va.) 273;
Goodrich v. Harding, 3 Rand. (Va.) 280;
Kendall v. Eyre, 1 Rand. (Va.) 288;
Tidbali v. Lupton, 1 Rand. (Va.) 194;
Williamson v. Daniel, 25 U. S. (12 Wheat.) 568; bk. 6 L. ed. 731;
James' Claim, 1 U. S. (1 Dall.) 47; bk. 1 L. ed. 31;
Murdock v. Shackelford's Heirs, 1 Brock. C. C. 131;
Osborne v. Shrieve, 3 Mas. C. C. 391;

¹ *Sale v. Crutchfield*, 8 Bush (Ky.) 636, 648;

Hawley v. Northampton, 8 Mass. 3-34;

Ide v. Ide, 5 Mass. 500;

Wynn v. Story, 38 Pa. St. 166.

Dying without issue over—Pennsylvania rule.—In the case of *Wynn v. Story*, 38 Pa. St. 166, where a testator devised certain real estate to one, his heirs and assigns, forever, if he should die leaving lawful issue, but if he should die without such issue, for life only, and then over, as provided in the will, it was held that the words of the devise imported an indefinite failure of issue, and that the devisee took an estate-tail.

Same—Massachusetts rule.—The Supreme Judicial Court of Massachusetts say, in the case

of *Ide v. Ide*, 5 Mass. 500, that a devise to one in fee-simple, with a devise over if he die "without issue, or without leaving issue," gives him an estate-tail, with a remainder over, expectant on its determination, the words meaning an indefinite failure of issue after the death of the first taker.

Same—New Jersey rule.—The Supreme Court of New Jersey say in *Chetwood v. Winston*, 40 N. J. L. (11 Vr.) 337, that a devise of a fee, followed by a limitation that if the devisee shall die, leaving no lawful issue, the lands shall be sold and the money divided between the testator's children, excepting one of them, creates an estate-tail at common law.

of the issue of his body, and in default of such appointment to such issue; and if he should die leaving no such issue of his body, then over, creates an estate-tail in the first taker.¹

SEC. 475. **Same—Same—Same—Effect of reversion on indefinite failure.**—A provision for a reversion on an indefinite failure of issue has the same effect as a remainder in fee or tail limited thereon.² The expressions “die with-

Lillibridge v. Adie, 1 Mas. C. C. 224 ;

Parkman v. Bowdoin, 1 Sum. C. C. 359 ;

Wright v. Scott, 4 Wash. C. C. 16 ;

Willis v. Bucher, 3 Wash. C. C. 369 ;

Biddulph v. Lees, 1 El. & B. & E. 289 ;

DeWindt v. DeWindt, L. R. 1 H. L. 87 ;

Biss v. Smith, 40 Eng. L. & Eq. 541 ;

Good v. Good, 7 El. & Bl. 295 ; s.c. 90 Eng. C. L. 294 ; 40 Eng. L. & Eq. 212 ;

Butt v. Thomas, 36 Eng. L. & Eq. 571 ;

Voller v. Carter, 4 El. & Bl. 173 ; s.c. 29 Eng. L. & Eq. 267 ; 82 Eng. C. L. 172.

A devise to one when he shall arrive at age of twenty-one years, and the heirs of his body lawfully begotten, and in case he should die without issue, then over in fee, is a gift in fee-tail, and not an executory devise.

Williams v. Hichborn, 4 Mass. 189.

Fee conditional—Heirs not take as purchasers.—Land was devised to a son of the testator, “during his natural life, and, at his death, to the lawful issue of his body; but if he should die without leaving issue of his body living at the time of his death,” then over. Held, that the son took an estate-tail, or fee conditional, and that his issue could not take as purchasers.

Whitworth v. Stuckey, 1 Rich. (S. C.) Ch. 404.

To survivor and over.—By will, dated 1778, a testator devised land to his two sons to be

equally divided between them, to them and their heirs forever; but in case either of them should die without issue lawfully begotten, then to the survivor; and in case both should die without lawful issue, then to be sold and given to his daughters, the court held that the sons took an estate-tail, which, by the Virginia statute of 1776, was converted into a fee-simple.

Broadbuss v. Turner, 5 Rand. (Va.) 308.

A will giving the widow certain property for life or widowhood, and should she marry again, the same to be equally divided between her and his children, and should she marry again and die leaving no child by her second husband, then her part to go to testator's children, cannot be construed as conveying an estate-tail.

Clements v. Glass, 23 Ga. 395.

¹ *Kay v. Scates*, 37 Pa. St. 31 ; s.c. 78 Am. Dec. 399.

² *Hayward v. Howe*, 78 Mass. (12 Gray) 49 ; s.c. 71 Am. Dec. 734.

See: *Whitcomb v. Taylor*, 122 Mass. 243, 249 ;

Wheatland v. Dodge, 51 Mass. (10 Met.) 502 ;

Parker v. Parker, 46 Mass. (5 Met.) 138.

An estate-tail will pass if the language in which the devise is made implies an intention on the part of the testator that the issue of the first taker shall have the estate after their father, as heir of his body, and that the devise over shall not take effect until the indefinite failure of such issue.

out issue" or "having no issue" or "die without leaving issue," and the like, in the absence of any qualifying words showing a contrary intent, will always be held to refer to the indefinite failure of issue.¹ An important and controlling element in determining whether a definite or indefinite failure of issue is intended by the testator, is the nature of the estate limited in remainder, a devise over for life necessarily implying that the devise in remainder may outlive the first estate,² because it is not likely in such case that the testator was contemplating an indefinite failure of issue, as that might, and most probably would, not happen until many years after the death of the object of the ulterior limitation.³ While it is true that the character of the estate limited is an important element in determining the intention of the testator, yet it is not all-controlling, if the limitation of the life estate in remainder does not of itself convert what would otherwise be construed an indefinite into a definite failure of issue.⁴

SEC. 476. Same—Same—Same—Rule of construction.—In construing such devises the manifest intention of the testator must govern; and where it is apparent that the

- Whitcomb v. Taylor, 122 Mass. 249.
¹ Riggs v. Sally, 15 Me. 408;
 Newton v. Griffith, 1 Har. & G. (Md.) 111;
 Brightman v. Brightman, 100 Mass. 238;
 Allen v. Trustees of Ashley School Fund, 102 Mass. 265;
 Hall v. Priest, 72 Mass. (6 Gray) 18;
 Weld v. Williams, 54 Mass. (13 Met.) 486;
 Parker v. Parker, 46 Mass. (5 Met.) 134;
 Nightingale v. Burrell, 32 Mass. (15 Pick.) 104;
 Executors of Condict v. King, 13 N. J. Eq. (2 Beas.) 375;
 Waples v. Harmon, 16 N. J. L. (1 Harr.) 223;
 Kay v. Scates, 37 Pa. St. 31; s.c. 78 Am. Dec. 399;
 Stone v. McMullin (Pa.), 10 W. N. C. 541;
 Abbott v. The Essex Co., 59 U. S. (18 How.) 202; bk. 15 L. ed. 352; s.c. 2 Curt. C. C. 126.
² Hope v. Rusha, 88 Pa. St. 127;
 Taylor v. Taylor, 63 Pa. St. 485; s.c. 3 Am. Rep. 565;
 Eichelberger v. Barnitz, 9 Watts (Pa.) 450.
 See: Pells v. Brown, Cro. Jac. 590;
 Roe v. Jeffery, 7 T. R. 589.
³ Eichelberger v. Branitz, 9 Watts (Pa.) 450.
 See: French v. Caddell, 3 Bro. P. C. 257;
 Wellington v. Wellington, 4 Burr. 2165;
 Fearne on Rem. 450, note 6.
⁴ Watkins v. Sears, 3 Gill (Md.) 492.
 The simple addition of "unmarried" to the qualification "dying without issue" will not turn an indefinite into a definite failure of issue.
 Matlack v. Roberts, 54 Pa. St. 148;
 Vaughan v. Dickes, 20 Pa. St. 509.

intention of the testator was that the issue shall take by inheritance from the first taker, and that there shall be an estate in fee-simple or in fee-tail in remainder on an indefinite failure of issue, the devise will be construed as creating an estate-tail.¹ In Kentucky, however, a devise in fee followed by a devise over, in case the first taker shall die without lawful issue, creates a defeasible fee, and not an estate-tail.²

SEC. 477. Same—Same—Same—Intention of testator.—In the creation of estates-tail, as in the creation of estates in fee-simple, by devise, a much more liberal practice existed at common law than in the creation of the same estates by deed.³ The general rule of construction of devises creating either an estate in fee-simple or an estate-tail, is that the intention of the testator shall prevail where such intention can be carried out without a violation of any of the well-known rules of law.⁴ This rule has been said by Chief Justice MARSHALL to be “the polar star to guide us in the construction” of such instruments.⁵

While the technical⁶ words for the creation of an estate-tail by will are the same as those that are required to create the same estate by deed, yet, because of the probable want of technical knowledge on the part of the testator, as well as the possible lack of time for deliberation and the attention paid by the courts to the intention of the testator, these technical words are not essential; and any expression in the will under consider-

¹ Pott's Appeal, 30 Pa. St. 168.

² *Sale v. Crutchfield*, 8 Bush (Ky.) 637;

Daniel v. Thomson, 14 B. Mon. (Ky.) 662;

Hart v. Thompson, 3 B. Mon. (Ky.) 482.

³ See: *Ante*, § 345.

⁴ See: *Ante*, § 348.

⁵ *Smith v. Bell*, 31 U. S. (6 Pet.) 68, 75, 84; bk. 8 L. ed. 322, 325, 328.

See: *Ante*, § 307.

⁶ **Technical rules.**—The policy of the law is against entails, the courts will give effect to a testator's intent, notwithstanding technical rules.

Nussbaum v. Evans, 71 Ga. 753.

The nature of the property bequeathed does not restrict the meaning of the technical terms.

Hollifield v. Stell, 17 Ga. 280.

Nor are such terms restrained by the distributive disposition following the word “then,” since it is only when the distributive words change the line of descent marked out by the words upon which they are engrafted, that the latter are taken as words of purchase.

Hollifield v. Stell, 17 Ga. 280.

ation which shows that the intention of the testator was to give an estate to a person for his life, and that such estate should be inherited by his issue, will be construed to be an estate-tail.¹ Thus, where a testator devised his lands to two persons to hold to them and their lawful issue forever, share and share alike in two equal shares, with the further direction that in case either of the devisees should die without leaving issue of their bodies, then the land should go to the survivor and his lawful issue forever, and that if both devisees died without issue, then over in fee, the court said that "there was a plain intention to provide for each devisee and issue forever; that is to say, as long as issue should remain, which might possibly be forever." The intent is equally plain, too, that the issue of each should take through the ancestor by descent, and not with the ancestor by purchase, because the land is to be divided into but two parts; whereas, if even all the children of the daughter and granddaughter were to take as purchasers with their parents, it might be necessary to divide it into many parts; and also because there is no mode but by descent in which the estate can be secured to the issue indefinitely. The intention of giving to the parents first, and then to the issue so long as issue should remain, is an intent to give an estate-tail.²

SEC. 478. **Same—Same—Same—Expressions which carry estate-tail.**—Although the words heirs of the body are the necessary technical words to create an estate-tail, yet there are other words and phrases which have been held equivalent to the words "heirs of the body,"³ and con-

¹ *Wright v. Scott*, 4 Wash. C. C. 16.

² *Clark v. Baker*, 8 Serg. & R. (Pa.) 470.

See: *Stone v. McMullen* (Pa.), 10 W. N. C. 541.

³ **Word of limitation and not of purchase.**—A limit in a devise to a donee and "his heirs," and should the donee die without heirs of his body, the word "heirs" must be considered a word of limitation and not of purchase.

See: *Johnson v. Johnson*, 2 Met. (Ky.) 331;

Perry v. Kline, 66 Mass. (12 Cush.) 118;

Allen v. Henderson, 49 Pa. St. 333;

Haldeman v. Haldeman, 40 Pa. St. 29.

"Heirs" and "heirs of body"—Not indispensable.—It is said in *Price v. Taylor*, 28 Pa. St. 95; s.c. 70 Am. Dec. 105, 108, that the word "heirs" and "heirs of

strued to carry a fee-tail. The word "issue" in a will has been held to mean, *prima facie*, the same thing as "heirs of the body," and in general is to be construed as a word of limitation,¹ in the absence of anything on the

the body" most frequently express the relation in which the second must stand to the first, in order to come within the rule. But the presence or absence of these words is not conclusive either way, for any other words, such as "next of kin," "sons," "daughters," "issue," "children," "descendants," will answer quite as well, if they appear to be equivalent; and the most appropriate words will not answer, if used in a special and inappropriate sense.

Any form of words sufficient to show that the remainder is to go to those whom the law points out as the general or lineal heirs of the first taker will be sufficient, unless it be perfectly clear that such heirs are selected on their own account, and not simply as heirs of the first taker.

Jones v. Morgan, 1 Bro. C. C. 219.

See: *Price v. Taylor*, 28 Pa. St. 95; s.c. 70 Am. Dec. 105, 108.

- ¹ The word "issue" in a will is primarily a word of limitation.—Where a testator devised one-third of his estate to each of his three children for life, with power of appointment in favor of the issue of his or her body, in default thereof to said issue, and in default of any issue to the heirs of the testator, directing the same to be held in trust by his executors, who were directed to sell and invest the property in real estate, and allow the children, from their income therefrom, such money for their support and education as they may think proper, and also, on their attaining the age of twenty-five, to pay them respectively during their natural lives, in quarterly installments, the income of the said real estate for their respective benefit, it was held, that on the children's attaining respectively the age

of twenty-five, the devise created a complete estate-tail in each, clear of the trust, which, by the act of 1855, was converted into an estate in fee-simple.

Kay v. Scates, 37 Penn. St. 31; s.c. 78 Am. Dec. 399.

"Issue" is *nomen collectivum*—Embraces lineal descendants.—Vice-Chancellor MCCOUN says, in *Kingsland v. Rapelye*, 3 Edw. Ch. (N. Y.) 1, 6, that "'issue' is a word as extensive in its import as the phrase 'heirs of the body.' It embraces lineal descendants of every generation; and is not satisfied by applying it to those at any given period, since it equally applies to all objects of that description at every period. It is *nomen collectivum*; and when used in a devise, by which the ancestor takes a freehold without any words to modify or restrict its meaning and application, it is a word of limitation and of the same effect with 'heirs of the body.' This position is abundantly supported by authority. In *King v. Melling*, 1 Vent. 225, where the devise was to a son for life, and, after his decease, to the issue of his body by a second wife, and for the want of such issue, over, the question was, whether the son took an estate for life or in tail. Two of the judges of the King's Bench decided he took an estate for life, against the opinion of Chief Justice HALE, who, upon mature consideration, held that an estate-tail was created. Hale observes: 'It must be admitted that, if the devise were to the son and the issue of his body, he having no issue at the time, it would be an estate-tail; for the law will carry over the word "issue" not only to his immediate issue, but to all that shall descend from him. It would

face of the instrument to show that the word was intended to have a less extended meaning, and to be applied only to children, or to descendants of a particular class or at a particular time.¹ Where the word "heirs" is used, and

be otherwise if there were no issue at the time;' because, as I apprehend, in that case the issue (meaning children) would take jointly with their parents as purchasers. 'Again,' he says, 'if a devise be made to a man, and after his death to his issue (or children) having issue at that time, they take by way of remainder.' This can be only by reading the word 'issue' as a word of purchase, synonymous with 'children,' which he evidently does. He then proceeds to give the reasons for his opinion in the case itself and to answer the objections against his conclusion, one of which was that the limitation to the son was expressly for life; upon which he observes, that 'though these words do weigh the intention that way, yet they are balanced by an apparent intention that weighs as much on the other side; which is that, as long as the son should have children, the land shall never go over, for there was as much reason to provide for the issue of the issue as the first issue.' Again he observes: 'A tenant in tail has, for many purposes, but an estate for life; but it is by consequence and operation of law only that it becomes an estate-tail.' (See: *King v. Melling*, 2 Lev. 58, 61.) In *Shaw v. Weigh*, 2 Str. 798—but better reported in *Fitzg.* 7, and s.c. 3 Bro. P. C. tom. ed. 120, under the name of *Sparrow v. Shaw*, where a judgment of reversal in B. R. was itself reversed—the same doctrine will be found and the principle established. *Roe v. Grew*, 2 Wils. 322; s.c. *Wilm. Op.* 272, is likewise a strong authority upon the point. There was a devise to George Grew for life; and from and after his decease to the issue male of his body, etc., and for the want of such issue male

then over; and the question was whether George Grew took an estate-tail or for life only. The judges were unanimous that it was an estate-tail. It was admitted that the word 'issue' in a will is a word either of purchase or limitation, as would best effectuate the intention of the testator; and, although it was clearly the testator's intention that George Grew should have an estate for life only, yet it was also as clear that he intended his sons should take in succession, under the limitation to the issue male of his body; and as both intentions could not be effected since, if George Grew took only for life, his sons could not take in succession through their father, but would be entitled, if at all, in remainder as devisees or purchasers, therefore, in balancing the two intentions, the weightiest appeared to be that they should take in succession, and so, to enable them to take, it was necessary to adjudge him to be tenant in tail. It is to be observed in this case that it was considered as making no difference that George Grew had no child at the time of making the will, and that he had died after the testator without leaving issue male."

¹ *Taylor v. Taylor*, 63 Pa. St. 481; s.c. 3 Am. Rep. 565.

See: *Johnson v. Johnson*, 2 Met. (Ky.) 331.

Narrowing the word "issue."

There is less reluctance to narrow the *prima facie* meaning of the word "issue" than of the words "heirs of the body," because these latter words are proper technical words of limitation, while "issue" is not, when used in a deed; and accordingly, in a will it is to be construed as a word of purchase or of limitation, as will

it is manifest from the will that "issue" is thereby meant, it will be given the same construction as the word "issue";¹ and when it is apparent that the word "heir" is used in the sense of issue as "male heir," or as a *nomen collectivum*, it will be given the same construction;² the phrase "legal heirs" or "lawful issue"³ in a will has been construed to have the same effect.⁴ A devise to one and to his "legal offspring" forever;⁵ or to one and his "male heirs";⁶ or to a devisee "and his children," where such devisee has no children at the time

best effectuate the intention of the testator, gathered from the entire instrument. This was well expressed long ago by Chief Justice WILLES: "Why does the word 'issue' in a will signify the same as 'heirs of the body'? Only because it may be supposed that the testator, who was ignorant of the law, intended it should have that construction. It does not, therefore, *ex vi termini* create an estate-tail in a will as 'heirs of the body' do in a deed, but only when it appears to be the intent of the testator that the word should have that construction, or, at least, that it does not appear that the intent of the testator was otherwise.

Taylor v. Taylor, 63 Pa. St. 481; s.c. 3 Am. Rep. 565.

See: Lessee of Findlay v. Riddle, 3 Binn. (Pa.) 139;

Paxson v. Lefferts, 3 Rawle (Pa.) 59;

Abbott v. Jenkins, 10 Serg. & R. (Pa.) 296;

Clark v. Baker, 3 Serg. & R. (Pa.) 470;

Hoge v. Hoge, 1 Serg. & R. (Pa.) 144;

Slater v. Dangerfield, 15 Mees. & W. 263;

Doe ex d. Cooper v. Collis, 4 T. R. 294; s.c. 2 Rev. Rep. 388;

Ginger v. White, Willes, 348.

Construction of "issue" when equivalent to "children."—It is a position not open to dispute, that if it appears, either by expression or by clear implication, that by the word "issue" the testator meant "children" or issue living at a particular period, as at the death of the

first taker, and not the whole line of succession which would be included under the term "heirs of the body," it must necessarily be construed to be a word of purchase; and the rule in Shelley's Case can have no application.

Taylor v. Taylor, 63 Pa. St. 481; s.c. 3 Am. Rep. 565.

¹ See: Jordan v. Roache, 32 Miss. (3 George) 481;

Albee v. Carpenter, 66 Mass. (12 Cush.) 382;

Holcomb v. Lake, 24 N. J. L. (4 Zab.) 686;

Haldeman v. Haldeman, 40 Pa. St. 29;

Wall v. Maguire, 24 Pa. St. 248;

Voller v. Carter, 4 El. & Bl. 173; s.c. 32 Eng. C. L. 172; 29 Eng. L. & Eq. 267.

"Heirs" used as "children."—The same is true where the testator used the word "heirs" and it appears that he intended it to mean children.

Brown v. Wever, 28 Ga. 377;

Seibert v. Wise, 70 Pa. St. 147;

Parkman v. Bowdoin, 1 Sumn. C. C. 359.

² Cuffee v. Milk, 51 Mass. (10 Met.) 366;

Den d. Ewan v. Cox, 9 N. J. L. (4 Halst.) 10;

Hall v. Vandegrift, 3 Binn. (Pa.) 374;

Brownell v. Brownell, 10 R. I. 509.

³ Kingsland v. Rapelye, 3 Edw. Ch. (N. Y.) 1, 5.

⁴ Bradon v. Cannon, 24 Pa. St. 168; s.c. 1 Grant Cas. (Pa.) 60.

⁵ Allen v. Markle, 36 Pa. St. 117.

⁶ Den ex d. Crane v. Fogg, 3 N. J. L. (2 Penn.) 598.

of the making of the will ;¹ or to one "and his heirs lawfully begotten," followed by a remainder in case the devisee die without heirs ;² or a devise to one and his "lawful heirs from generation to generation ;"³ or a devise to one "and his grandchildren,"⁴ have all been construed to carry an estate-tail.

SEC. 479. Same—Same—Same—Fee reduced by context.—In some cases where the testator has used the words "in fee-simple," in defining the estate devised, they have been made to give way to the context of the instrument, and an estate in fee-tail held to have been created by the instrument. Thus a fee is converted by implication into a tail by limitation over an indefinite failure of issue,⁵ but if, instead, the limitation over be on default of issue at death of the first taker, no such implication arises, and the limitation over merely reduces the fee to a conditional one.⁶ If the remainder is to persons standing in the relation of general or special heirs of the tenant for life, the law presumes that they are to take as heirs, unless it unequivocally appears that individuals

¹ *Nightingale v. Burrell*, 32 Mass. (15 Pick.) 104 ;

Clark v. Baker, 8 Serg. & R. (Pa.) 470.

In *Voller v. Carter*, 4 El. & Bl. 173 ; s.c. 29 Eng. L. & Eq. 267 ; 82 Eng. C. L. 172, a life interest in two freehold houses was devised to E. D., and "should she marry and have issue, then to go to her children ; if she have no issue, then to go to F. W." The court held that E. D. took an estate-tail, the word "children" being used synonymously with the word "issue."

² *Pratt v. Flamer*, 5 Har. & J. (Md.) 10.

³ *Gause v. Wiley*, 4 Serg. & R. (Pa.) 509.

⁴ *Wheatland v. Dodge*, 51 Mass. (10 Met.) 502.

⁵ See : *Ante*, § 474.

⁶ *Price v. Taylor*, 20 Pa. St. 95 ; s.c. 70 Am. Dec. 105 ;

Lessee of Willis v. Bucher, 2 Binn. (Pa.) 455 ;

Sheetz's Will, 3 Serg. & R. (Pa.) 487, note ;

Hoge v. Hoge, 1 Serg. & R. (Pa.) 144 ;

Eichelberger v. Barnitz, 9 Watts (Pa.) 950 ;

Stewart v. Kenower, 7 Watts & S. (Pa.) 288 ;

Doe ex d. Barnfield v. Wetton, 2 Bos. & P. 324.

A limitation to the issue in fee does not affect the question.

Price v. Taylor, 28 Pa. St. 95 ; s.c. 70 Am. Dec. 105, 115.

See : *George v. Morgan*, 16 Pa. St. 95 ;

Hileman v. Bouslaugh, 13 Pa. St. 344 ; s.c. 53 Am. Dec. 474 ;

Measure v. Gee, 5 Barn. & Ad. 910 ; s.c. 7 Eng. C. L. 495 ;

Lewis ex d. Ormond v. Waters, 6 East 336 ;

Frank v. Stovin, 3 East 548 ;

University of Oxford v. Clifton, 1 Eden 473 ;

Wright v. Pearson, 1 Eden 119 ;

Goodright d. Lisle v. Pullin, 2 Stra. 729 ;

Alpass v. Watkins, 8 T. R. 518.

other than persons who are to take simply as heirs are intended.¹ But an estate-tail will not be reduced by a provision on the devise that if the first taker "should decease not having lawful heirs" that the estate should go over in fee-tail.² Yet an estate-tail may be followed by limitation on a definite failure of issue, and, like an estate in fee, may depend for its continuance on the performance of a condition, or may be divided by the happening of a contingency, but when once created it forms an estate-tail until the occurrence of the contingency or until the condition is broken upon which continuance is made to depend.³

SEC. 480. **Same—Same—Same—Doctrine of Price v. Taylor.**—In speaking of devises of this kind Judge LOWRIE says, in the case of *Price v. Taylor*,⁴ that they are regarded not according to their accidental, but according to their substantial, character, and thus erects a general principle of interpretation for all such grants, and saves them from the mere arbitrariness that would necessarily result from supposing that every grant has a purpose peculiar to itself. There is another reason, somewhat more specific, and which appears especially in cases where the subsequent takers are described as lineal descendants of the prior one. In almost all such cases the sons, daughters, children, or issue that are to take are to be ascertained at the death of the first taker. If, therefore, the devise be to A for life, with remainder to his eldest son and his heirs general or special, or to his children and their heirs, and the like, then it must be treated in one of these two modes. The eldest son or the children must take either as purchasers from the devisor, or as heirs of their ancestor. But generally they are not living at the time of the devise and are left to be ascertained at the death of the ancestor, and not until

¹ *Price v. Taylor*, 28 Pa. St. 95 ; s.c. 70 Am. Dec. 105 ;

Lessee of Findlay v. Riddle, 3 Binn. (Pa.) 163, 164 ; s.c. 5 Am. Dec. 355 ;

Jones v. Morgan, 1 Bro. C. C. 219 ;

Doe v. Charlton, 1 Man. & Gr. 429.

² *Tidball v. Lupton*, 1 Rand. (Va.) 194.

³ *Linn v. Alexander*, 59 Pa. St. 43.

⁴ 28 Pa. St. 95 ; s.c. 70 Am. Dec. 105.

then can the grant take effect in their favor. If, therefore, the eldest son or the children are to take as purchasers, and should die before their parent, they would take nothing, and, of consequence, no children or grandchildren of theirs could take under such a devise, for no one can take as heir that which his ancestor never owned. On this hypothesis, a devise over may take effect even while many of the descendants of him who was intended to be the first taker are still living ; yet it is very certain that, as a general rule, it is intended in such devises that they shall be for the benefit of all the issue of the first taker indefinitely, and shall not go to others so long as any of them survive. If we treat the descendants of the first taker as deriving title by descent from him, and not by gift from the devisor, then this purpose is effected, and without it, it could not be.¹

SEC. 481. **Same—Same—Same—Devise in tail not enlarged by implication.**—Like a devise in fee-simple, an express devise in tail will not be enlarged by implication.² Thus, where an estate-tail is given by devise, a charge upon the person of the devisee in tail will not alter or change the estate given.³ And a devise in tail by apt words will not be enlarged to a fee by a subsequent general devise in the same will to the same person of all of the testator's property "except what is before excepted."⁴ Where a devise in fee has been reduced to an estate-tail by implication, a charge on legacies will not increase it to a fee.⁵ The word "heirs" in a clause of limitation superadded to the devise, which otherwise would be considered an estate-tail, will not change the meaning of the former words so as to pass an estate in fee-simple.⁶ The addition of the words "and assigns" to the usual words of procreation

¹ See: *Boggett v. Frier*, 11 East 301 ;
Doe ex d. Chandler v. Smith, 7 T. R. 531 ; s.c. 4 Rev. Rep. 521 ;
Bennett v. Tankerville, 19 Ves. 178.

² See : *Ante*, §§ 369, 370.

³ *Den ex d. Wilson v. Small*, 20 N. J. L. (1 Spen.) 151 ;
DeWitt v. Eldred, 4 Watts & S.

(Pa.) 421.

⁴ In such a devise the exception will cover the former devise as well as that which has been devised to other persons.

Browne's Lessee v. Anderson, 2 Har. & McH. (Md.) 100.

⁵ *Heffner v. Knapper*, 6 Watts (Pa.) 118.

⁶ *Kingsland v. Rapelye*, 3 Edw. Ch. (N. Y.) 1.

will not enlarge an estate-tail to a fee-simple.¹ The use of the word “forever,” after “heirs of the body,” will not enlarge a fee-tail to a fee-simple.² It has been said that a devise to a person “and the heirs of his body lawfully begotten, and to their heirs and assigns forever,” creates but an estate-tail, and does not, on the death of the devisee, become enlarged to a fee-simple, and go to the general heirs of the entail.³

SEC. 482. **Same — Same — Same — Doctrine of Wight v. Thayer.**—In laying down the rule as above set out in the case of *Wight v. Thayer*,⁴ Chief Justice SHAW said: “An estate-tail, though created and brought into existence by deed or will, is still an estate of inheritance, and when once vested and until barred, passes, like other states of inheritance, by operation of law; and though it is competent for a devisor to create as many particular estates as he will hold in succession, yet it is not competent for him to alter the rules of law which govern the descent of an estate, either in fee or in tail, which has once vested. Were such an intention manifested, it could not be carried into effect, because contrary to the rules of law. If it was an estate-tail, then it must continue an estate-tail until barred by common recovery or otherwise, or until failure of heirs in tail. So long as there are heirs in tail capable of taking by the form of the gift, there can be no limitation over to heirs general. The very nature of an estate-tail is that it is an estate exclusively limited to a particular class of heirs; the legal construction put on it is that it divides the inheritance or general estate in fee, making a particular estate to the donee in tail and the special heirs, and leaving the estate in the donor, which he may limit over by way of remainder,

¹ *Doe d. Doremus v. Zabriskie*, 15 N. J. L. (3 J. S. Gr.) 404;

Lessee of Wright v. Scott, 4 Wash. C. C. 16.

In the latter case the court was influenced to a certain extent by the fact that if the first given estate were enlarged to a fee, the will would then contain a limitation of a fee upon a fee.

² *Den d. Ewan v. Cox*, 9 N. J. L. (4 Halst.) 10;

Grout v. Townsend, 2 Den. (N. Y.) 336;

Hall v. Vandegrift, 3 Binn. (Pa.) 374;

Lessee of Wright v. Scott, 4 Wash. C. C. 16.

³ *Wight v. Thayer*, 67 Mass. (1 Gray) 284.

⁴ 67 Mass. (1 Gray) 284.

and which without such limitation will revert to the donor, or his general heirs.¹ It has been said, upon the authority of Lord Coke,² that when a person in the premises of a deed gives land to another, and the heirs of his body, habendum, to him and his heirs forever, he will take an estate-tail with a fee-simple expectant. In tracing this proposition, it will be found to be this: When it is manifest, by the premises, that the donor intends to give an estate-tail, and from the subsequent part of the deed it is equally manifest that he intends to give ultimately an estate in fee, it will operate as a grant of a present estate-tail with a fee-simple expectant. But expectant upon what event or contingency? Clearly upon the determination of the particular estate, the estate-tail, by the failure of heirs in tail, which is its own proper limitation. It operates by way of gift of the particular estate in tail with a limitation over, by way of remainder, to the general heirs of the same donee in fee. Of course, such a remainder over in fee cannot take effect until the failure of the issue in tail.³

SEC. 483. Same—Words in frank-marriage sufficient.—Words in frank-marriage, or *in liberum maritagium*, will by themselves suffice for the limitation of an estate in special tail to a man and his wife, or intended wife; being for this purpose exactly equivalent to the words, “and to the heirs of their two bodies between them begotten.” The nature of this estate is subject to certain restrictions, and the validity of the gift depends upon the existence of certain conditions.⁴ The wife, or intended wife, must be the daughter, or other near relation of the donor.⁵ The donees and their issue in tail hold of the donor and his heirs, discharged of all services except

¹ 2 Inst. 335.

² 1 Co. Litt. (19th ed.) 21a.

³ See: *Buxton v. Uxbridge*, 51 Mass. (10 Met.) 87.

Remainder to survivors.—A devise among sons equally, they paying certain legacies, and if any of them die without issue, their share shall be divided between the surviving brothers, creates an estate-tail in the sons, with

a vested remainder in fee to those who survive, and the heirs of those who died before the son who died without issue.

Lapsley v. Lapsley, 9 Pa. St. 130. See: *Den ex d. Wilson v. Small*, 20 N. J. L. (1 Spen.) 151.

⁴ Litt., §§ 17, 19, 20.

See: 1 Co. Litt. (19th ed.) 21a, 21b, 22a, 22b, 23a, 23b.

⁵ *Dyer*, 286b, pl. 46.

fealty, until the fourth degree in descent from the original donee is passed ; after which event, the succeeding issue hold by such services as the donor owes to his lord next paramount. Gifts in frank-marriage are wholly obsolete in practice ; but where the requisite conditions are fulfilled, they are thought to be still valid at common law.

CHAPTER XIV.

ESTATES IN TAIL—*continued.*

- SEC. 484. Rules relating to limitations creating estates-tail.
- SEC. 485. Of whom an estate in tail is held.
- SEC. 486. What property may be entailed.
- SEC. 487. Same—What essential to an entailment.
- SEC. 488. Same—Personalty not entailable.
- SEC. 489. Same—Annuities not entailable.
- SEC. 490. Same—Copyholds—Entailment by special custom.
- SEC. 491. Same—Conditional fee-simple entailable.
- SEC. 492. Same—Freehold or chattel interest not entailable.
- SEC. 493. Who may hold as tenant in tail.
- SEC. 494. Remainder upon fee-tail.
- SEC. 495. Heirs of donee in tail take by descent.
- SEC. 496. Rule in Shelley's Case.
- SEC. 497. Same—When rule prevails.
- SEC. 498. Same—Where "heirs" *descriptio personarum*.
- SEC. 499. Same—What within the rule.
- SEC. 500. Same—Rule of construction and not of law.
- SEC. 501. Same—Applied to estates in husband and wife.
- SEC. 502. Incidents of an estate in tail.
- SEC. 503. Same—Power to commit waste.
- SEC. 504. Same—Right to bar estate.
- SEC. 505. Same—Right to title-deeds—English rule.
- SEC. 506. Same—Same—American rule.
- SEC. 507. Same—Curtesy and dower.
- SEC. 508. Same—Forfeiture for treason.
- SEC. 509. Same—Incidents of fees which do not attach—Alienation.
- SEC. 510. Same—Same—Duty to pay off incumbrances.
- SEC. 511. Same—Same—Merger.
- SEC. 512. Abolition and curtailment by statute.
- SEC. 513. Same—Effect of abolishing estates-tail.
- SEC. 514. Descent of estates-tail.
- SEC. 515. Same—Successive descents.
- SEC. 516. Same—Legislative change of descent.

SECTION 484. Rules relating to limitations creating estates-tail.—The general rules relating to limitations creating an estate of this kind are as follows :

1. There is no difference, in point of fact, between the words "their heirs" and the words "his heirs," or, in the case of a female, "her heirs;"¹ but in limitations to a single donee in special tail, the possessive pronoun adds something in clearness.²

2. The words "the heirs male or female" will amount to a limitation to the heirs general.³

3. The word "heirs" is the word which creates the estate, and the estate-tail is in the person, or persons, whose heirs are specified; so that, in all limitations in special tail, if the word is not referable to one donee more than to the other, the estate-tail is in both donees jointly; but if the word refers to one donee rather than to the other, the estate-tail is only in that one.⁴

4. On a gift to a single donee in special tail, the spouse assigned to the donee is not necessarily a specified individual, but may be one of a specific class; such as any person bearing a specified name.⁵

5. A limitation resembling a limitation in special tail,

¹ 1 Co. Litt. (19th ed.) 26a, *et seq.*; see note 1, 26b.

² The indifferent usage of the two words "his" and "their" is safely permissible only in formal and direct limitations, such as those above given. In special cases, the use of the word "his" may introduce an absurdity, which may render the limitation void. Lord Coke expressly lays it down that a limitation to A and "his" heirs, etc., is void for absurdity. If the ancestor is living at the time of the limitation, or if the donee is for any other reason not the heir of the ancestor, this does not make the limitation void, but alters the nature of the estate or estates, arising under it, according to the special circumstances.

Same—In *Mandeville's Case*, reported in 1 Co. Litt. (19th ed.) 26b, where the specified heirs were not the heirs of the body of an ancestor at all, but were the heirs of the body of the deceased husband of the person named as donee, the limitation created a good estate-tail, but

in remainder upon an estate for life taken by the person named as donee. Similarly, a limitation to A and the heirs of the body of his father, during the life of the father, gives rise to two distinct estates, an estate for life to A, followed by a contingent remainder in tail to the person who, at the death of the father, can bring himself within the description of heir of his body.

See: 3 Prest. Conv. 77-79.

Therefore, if A should die in the lifetime of the father, this contingent remainder will be destroyed by the expiration, pending the contingency, of the precedent estate of freehold. If the father should die in the lifetime of A, leaving A as the heir of his body, the remainder in tail will forthwith be vested in A, and his life estate will be destroyed by merger, whereby the estate will become itself the estate in possession.

³ 1 Co. Litt. (19th ed.) 26a.

⁴ 1 Co. Litt. (19th ed.) 26a.

⁵ Page v. Hayward, 2 Salk. 570.

if made to two persons who are not married, nor capable of lawful marriage, as where they are of the same sex; or within the prohibited degrees of relationship, and who therefore cannot have an heir begotten of their two bodies, creates neither an estate in special tail nor a joint special tail, but a joint estate for life, and separate estates-tail in common in remainder;¹ and a limitation to a man and two women, and the heirs of their bodies begotten, has a similar operation.²

6. The mere fact that, at the time of limitation, lawful marriage between the two donees is, by reason of the circumstances, impossible,—as where they are both, or either of them, already married to another person,—this will not prevent the limitation from taking effect to create an estate in special tail, if there is a possibility that the donees may, at a future time, become capable of lawful marriage.³ The mere fact that the donees are not married at the time is, if they are capable of lawful marriage, *a fortiori*, no obstacle. But the circumstances may be such as to create a presumption of law that the parties, though not absolutely impossible, will never marry; as where, for example, having been married, they were subsequently divorced *a vinculo matrimonii*.⁴

SEC. 485. **Of whom an estate in tail is held.**—At common law, where the donor of an estate-tail granted over his reversion to a stranger, the donee of the estate in tail would hold of such stranger. But if the lands were given to A in tail, with remainder in fee to a stranger, the donee of the estate-tail would hold to the chief lord in case the whole estate was regarded as conveyed away.⁵ But where the tenant in tail has also the revision in fee in himself, because he cannot hold of himself, it being a maxim in law that *nemo potest esse tenens et dominus*,⁶ he shall hold of the superior lord. The reason for this

¹ Litt., § 283.

See: 2 Co. Litt. (19th ed.) 182a–184a.

² Litt., § 25.

See: 1 Co. Litt. (19th ed.) 25b.

³ 1 Co. Litt. (19th ed.) 20b.

⁴ 1 Co. Litt. (19th ed.) 25b, Lord

Hale's note 2.

⁵ 2 Inst. 505.

See: Bingham's Case, 2 Co. 92a; Metteforde's Case, Dyer 362b.

⁶ No one can be both lord and tenant.

Johnson v. Hines, 61 Md. 135.

seems to have been the fact that the object of the passage of the statute *De Donis* was to render estates-tail unalienable, and if they were permitted to merge in the fee-simple, an obvious means would be afforded for destroying the estate-tail by purchasing the reversion, which would be adopted by the tenant in tail.¹

SEC. 486. What property may be entailed.—Under the statute *De Donis*, the enactment of which created the peculiar estate known as an estate-tail, the only kind of property which is mentioned was *tenementum*, which signifies everything that may be holden, or proved to be of a permanent nature ; so that not only lands might be entailed under it, but also every species of incorporeal property of a real nature.²

SEC. 487. Same—What essential to an entailment.—It seems that two things were essential to an entailment within the statute *De Donis* : (1) That the subject be land or something of a real nature ; (2) that the estate in it be an estate of inheritance. It is not necessary, however, that the thing to be entailed should issue out of lands ; if it be annexed to lands or in any wise concerns lands, or relates to them, it may be entailed.³ Thus it has been said that rents, estovers, commons, or any other property whatever, granted out of land, may be entailed.⁴ We have already seen that where money is directed to be laid

¹ Wiscot's Case, 2 Co. 61a ;
Carell v. Cuddington, 1 Plowd.
296.

See : 1 Cruise's Real Prop. (4th
ed.) 82, § 21 ; 85, § 38.

² Nevil's Case, 7 Co. 33 ;
Child v. Baylie, Cro. Jac. 461.

³ Nevil's Case, 7 Co. 33.
See : Steel v. Cook, 42 Mass. (1
Met.) 281 ;

Stockton v. Martin, 2 Bay (S. C.)
471 ;

Atkinson v. Hutchinson, 3 Pr.
Wms. 259 ;

Wimfish v. Tarlbois, 1 Plowd.
53 ;

2 Bl. Com. 117 ;

2 Inst. 334.

⁴ 2 Bl. Com. 113 ;
1 Co. Litt. (19th ed.) 20a.

It is said by the Supreme Court of
Pennsylvania, in *Shoemaker v.*
Huffnagle, 4 Watts & S. (Pa.)
437, that a warrant for a city
lot, granted in 1683, and re-
maining unlocated, is not cap-
able of being entailed by devise
in tail of a man's land and
plantation. But an estate held
by covenant and survey may
be entailed.

Duer v. Boyd, 1 Serg. & R. (Pa.)
203.

At common law the office of ser-
geant of the Common Pleas
and the office of keeper of a
church could be entailed ; as
also could the office of steward,
receiver, or bailiff of a manor.
1 Inst. 20a.

out in real estate, that it is to be considered and treated as real estate ;¹ from this it follows that where money has been directed to be laid out in the purchase of land it is considered in equity as land.² In such a case, if the land to be purchased is directed to be conveyed to a person in tail, the donee will be considered in equity as tenant in tail of the money until the purchase is actually made.³

SEC. 488. **Same—Personalty not entailable.**—But where inheritances are merely personal, and neither issue out of, nor relate to, land, or some certain place, they cannot be entailed within the statute *De Donis* ;⁴ hence in a bequest of things of this character to a person and the heirs of his body with remainder over, the donee takes a conditional fee, and may dispose of the property as soon as he has issue born ; though a further limitation over,⁵ or a limitation of an estate-tail after an estate for life, would be void, and the legacy would become absolute in the second taker.⁶

SEC. 489. **Same—Annuities not entailable.**—An annuity,⁷

¹ See : *Ante*, § 103.

² *Foreman v. Foreman*, 7 Barb. (N. Y.) 215 ;

Craig v. Leslie, 16 U. S. (3 Wheat.) 563 ; bk. 4 L. ed. 460 ;
Trelawney v. Booth, 2 Atk. 307 ;
Biddulph v. Biddulph, 12 Ves. 161.

That agreed to be done regarded as done.—This is in accordance with the principle that the Court of Equity considers things directed or agreed to be done as having been actually performed, where nothing has intervened to prevent such performance.

See : *Thomas v. Wood*, 1 Md. Ch. 296 ;

Coman v. Lakey, 80 N. Y. 345, 350 ;

Arnold v. Gilbert, 5 Barb. (N. Y.) 190 ; s.c. 7 N. Y. Leg. Obs. 209, reversing 3 Sandf. Ch. (N. Y.) 531 ;

Slocum v. Slocum, 4 Edw. Ch. (N. Y.) 613 ;

Hawley v. James, 5 Paige Ch. (N. Y.) 318 ;

Craig v. Leslie, 16 U. S. (3 Wheat.) 563 ; bk. 4 L. ed. 460 ;

Rowley v. Adams, 7 Beav. 548 ;

Lysaght v. Edwards, L. R. 2 Chan. Div. 499 ; s.c. 17 Moak Eng. Rep. 594.

³ 1 *Cruise's Real Prop.* (4th ed.) 83, § 26.

⁴ See : *Adams v. Cruft*, 31 Mass. (14 Pick.) 16, 25 ;

Dorr v. Wainwright, 30 Mass. (13 Pick.) 328 ;

Green v. Stephens, 1 Ves. 73.

It was formerly held that slaves could not be entailed without being annexed to the land.

See : *Blackwell v. Wilkinson*, 1 Jefferson (Va.) 73.

⁵ 1 Inst. 20a.

⁶ *Dorr v. Wainwright*, 30 Mass. (13 Pick.) 323, 328, 330.

⁷ An annuity is a yearly sum of money, payable to the grantee, and charging the person only of the grantor. 1 Co. Litt. (19th ed.) 144b. If granted to the party and his heirs, it is an incorporeal hereditament ; but

which only charges the person of the grantor, and not his lands, although granted in fee, cannot be entailed ;¹ therefore such an estate being settled upon A and the heirs of his body, will be a conditional fee at common law,² and A, upon the birth of issue, might alien it and thereby bar the possibility of reverter.³

SEC. 490. Same—Copyholds—Entailment by special custom.—At common law a special custom to entail copyholds might exist in a manor, and was a good custom.⁴ The theory laid down by Lord Coke, that the statute *De Donis*, without a special custom, does not extend to copyholds, and that a custom alone cannot avail to create an estate-tail, is open to the stringent criticism that, by the hypothesis, a custom to entail could not, and therefore

it is only personal, unless the real estate is also charged by the terms of the grant; in which case it may be real estate, though still generally termed an annuity; for the grantee may recover by writ of annuity, in which case the land is discharged, or he may distrain for the arrears, and so make it real by charging the land.

² Bl. Comm. 40;

¹ Co. Litt. (19th ed.) 20a, 144b;

Doctor and Student, ch. 30;

Litt., § 219.

See: *Horton v. Cook*, 10 Watts (Pa.) 124, 127; s.c. 36 Am. Dec. 151;

Aubin v. Daly, 4 Barn. & Ald. 59; s.c. 6 Eng. C. L. 389.

¹ *Aubin v. Daly*, 4 Barn. & Ald. 59; s.c. 6 Eng. C. L. 389;

Holderness v. Carmarthen, 1 Bro. C. C. 377;

Stafford v. Buckley, 2 Ves. Sr. 171.

² *Nevil's Case*, 7 Co. 33, 125;

2 Bl. Com. 113.

³ 1 Inst. 20a, note 5.

See: *Stafford v. Buckley*, 2 Ves. Sr. 170.

Annuity personal estate.—In *Aubin v. Daly*, 4 Barn. & Ald. 59; s.c. 6 Eng. C. L. 389, such an annuity was held to be a personal estate, and to pass under a will attested by two witnesses only.

⁴ Litt., § 73;

1 Co. Litt. (19th ed.) 60a, 60b;

Co. Cop. Supp., § 12;

Co. L. Tracts, 178;

6 Vin. Abr. 197.

Custom to entail copyholds.—This proposition is now treated as an axiom beyond the reach of argument. It was denied *obiter* by the Chief Baron, Sir ROGER MANWOOD, in *Heydon's Case*, 3 Co. 7; and it would seem, from the report, that the rest of the barons concurred in his opinion; though Lord Coke, in the above-cited passage from the Supplement to his Complete Copyholder, says it was "agreed" that by special custom lands might be entailed. (See: Co. L. Tr. 179.) In that case the question at issue was not, whether copyholds are within the statute *De Donis*, but whether they were within the statute of 31 Hen. VIII., c. 13, by which certain ecclesiastical leases are made void. It was undoubtedly denied by three out of four judges of the Court of Common Pleas in *Rowden v. Maltster*, Cro. Car. 42, that copyholds are entailable. (See: Co. L. Tr. pp. 44, 45.) In this case the question was not material, because the special verdict had expressly found, that in the particular manor of which the lands were parcel, there existed no special custom.

did not, exist before the statute, while, by the unquestioned rule of the law, no such custom could spring up after the statute. Relying upon this criticism, the Court of Exchequer in Heydon's Case¹ inclined towards the conclusion that copyholds are not within the statute *De Donis*, and that all entails of copyholds are impossible. But those who are of the opinion that copyholds are within the statute, pursuing a similar line of criticism, strongly favor the opposite conclusion, namely, that copyholds which may be held for a customary fee-simple may be entailed without showing any special custom.² While these conclusions are both equally logical, yet the former is preferable; because the reasons for holding that copyholds are not within the statute seem to be decidedly better than those for holding that they are within the statute. But so far as practice in this country is concerned they are neither of any importance.

SEC. 491. **Same—Conditional fee-simple entailable.**—In the absence of a special custom, words of limitation which would create an entail in a common law will, if applied to a customary fee, create a conditional fee-simple, analogous to a conditional fee-simple at common law,³ and will be entailable.

SEC. 492. **Same—Freehold or chattel interest not entailable.**—An estate-tail, being an estate of inheritance, could not exist in respect to a mere freehold estate for life, or in a chattel interest. A limitation in terms which would create an estate-tail, if applied to real estate, will vest the whole interest absolutely in the first taker if applied in relation to chattels, or chattel interests in lands. In such a case a limitation of chattels over to the issue of the first taker will be void, because the statute *De Donis* applies to lands and tenements and not to personal property and chattel interests.⁴

¹ 3 Co. 7.

² See : 1 Watkins Cop. 215.

³ Doe d. Spencer v. Clark, 5 Barn. & Ald. 458; s.c. 7 Eng. C. L. 252;

Simpson v. Simpson, 4 Bing. N. C. 333; s.c. 33 Eng. C. L. 738 ;

Rowden v. Maltster, Cro. Car. 42;

Pullen v. Middleton, 9 Mod. 483.

⁴ 2 Bl. Com. 113 ;
1 Co. Litt. (19th ed.) 20a, n. 120.
See : Albee v. Carpenter, 66 Mass. (12 Cush.) 382 ;

SEC. 493. **Who may hold as tenant in tail.**—All natural persons capable of taking and holding estates of inheritance in land may be tenants in tail;¹ and it was early determined that the sovereign or king was within the statute *De Donis*, as well as common persons; because the statute was made to remedy the error which had crept into the law, that the donee had the power of alienating an estate given to him, and the heirs of his body, after issue had; and to restore the common law, in this point, to its right and just course. This it did by restoring to the donor the observance of his intent. And when the statute *De Donis* ordained that the will of the donor should be observed, it made his will to be a law, as well against the king as against another.²

SEC. 494. **Remainder upon fee-tail.**—Upon every gift in tail by a donor seized in fee-simple, there remains in such donor, by virtue of the statute *De Donis*, a reversion expectant upon fee-tail.³ For this reason a remainder may be limited in expectancy upon a fee-tail, and the latter, though of inheritance, takes effect as a particular estate.⁴ Where such a limitation is to one and his heirs, either general or special, the remainder limited in expectancy would be a contingent estate so long as the parents whose heir was to take lived, because, *nemo est hæres viventis*, no one can be heir to the living,⁵ and for that reason the person to take as heir cannot be ascertained until after the parents' death.⁶

SEC. 495. **Heirs of donee in tail take by descent.**—The heirs of the donee in tail take by descent and not by purchase, because they cannot claim the estate as coming from

Dorr v. Wainwright, 30 Mass. (13 Pick.) 328, 330;

Stockton v. Martin, 2 Bay (S. C.) 471;

Child v. Baylie, Cro. Jac. 461;

Britton v. Twining, 3 Meriv. 176, 183;

Whitmore v. Weld, 1 Vern. 326, 343, n.;

Atkinson v. Hutchinson, 3 Pr. Wms. 258.

¹ 1 Cruise's Real Prop. (4th ed.) 74, § 30.

² Willion v. Berkeley, 1 Plowd. 227; Case of a Fine, 7 Co. 32a.

³ 1 Co. Litt. (19th ed.) 22a-23b; Litt., § 19.

See: Willion v. Berkeley, 1 Plowd. 223, 242.

⁴ Challis on Real Prop. 241.

⁵ See: *Ante*, § 441.

⁶ Frogmorton v. Wharrey, 2 W. Bl. 728, 730; s.c. 3 Wils. 144.

their ancestor as its source, but as an estate coming through such ancestor as special heir, which cannot be intercepted by him except in the mode provided by law.¹ Where the limitation is to the heirs of the body of a designated donee, whoever answers that description will take as purchasers, and the estate will then descend to the same issue and in the same order of succession as if the estate had been limited to the donee and the heirs of his body.²

SEC. 496. Rule in Shelley's Case.—There is an ancient rule of the common law,³ respecting the nature of estates, which was stated so clearly in Shelley's Case,⁴ that the principle has ever since been designated as "the rule in Shelley's Case," and which at the present time prevails in England and in several of the states of the Union, though it has been abrogated by statute in others. It is a rule of construction and not of law,⁵ simply providing that where an estate of freehold is limited to a person and the same instrument contains a limitation, either mediate or immediate, to his heirs, or the heirs of his body, the word "heirs" is a word of limitation; that is, the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of his body, he takes a fee-tail; if to his heirs general, a fee-simple.⁶

SEC. 497. Same—When rule prevails.—This rule is not a means to discover the intention of the grantor or testator; but, supposing the intention ascertained, the rule controls it, giving effect to the general and legal rather than to the more particular and prescribed intent. The party making such a limitation is supposed to have in his mind two purposes which are legally in conflict. One is to give the ancestor only a life estate; the other to limit the

¹ *Perry v. Kline*, 66 Mass. (12 Cush.) 118, 127;

Davis v. Hayden, 9 Mass. 514.

² 2 Prest. Est. 360, 375.

³ The case in which the doctrine known as the rule in Shelley's Case was first enunciated was decided in the reign of Edward II. (See : 18 Edw. II., fol. 577.)

The next one is that of *Perrin v. Blake*, 4 Burr. 2579, and then follows the case from which the rule takes its name.

⁴ 1 Co. 94.

⁵ See : *Post*, § 500.

⁶ See : *Shelley's Case*, 1 Co. 94, 104a; *Perrin v. Blake*, 4 Burr. 2579; 2 Jarman Wills, 332.

land to his heirs collectively, and in indefinite succession. These two intents cannot stand together, without more or less of general mischief to the public welfare ; and the rule prevails simply to subordinate the particular and apparently less important design of limiting the ancestor's interests to a life estate, to the more comprehensive, and probably the preferred, purpose of transmitting the inheritance in the manner indicated.¹

SEC. 498. **Same**—Where "heirs" *descriptio personarum*.—Where this double intent appears, the rule must prevail ; but if it can be plainly collected from the will that the testator used the word "heirs" as a *descriptio personarum*, then the rule in Shelley's Case is not applicable. The word "heirs" or "heirs of the body" must be used in its technical sense, as importing a class of persons to take indefinitely in succession. Hence, if it appears that the words were not employed in this sense, but inaccurately, as designating particular individuals only, the rule in Shelley's Case would not be applicable ; but the persons who, at the time of the limitation, were the ancestor's heirs, apparent or presumptive, would take a vested remainder.²

Although the rule in Shelley's Case has been more

¹ *Leathers v. Gray*, 96 N. C. 548 ; s.c. 2 S. E. Rep. 455.

See : *Minor Inst.* 394.

² *Leathers v. Gray*, 96 N. C. 548 ; s.c. 2 S. E. Rep. 455.

See : *Minor Inst.* 395.

North Carolina doctrine.—In the case of *Jarvis v. Wyatt*, 4 Hawks. (N. C.) 227, 254, an effect was given to the words "heirs of the body" which seems not to have been followed or referred to in subsequent cases in that state. In that case Judge HALL says : "But there is another view of this case taken by my Brother Henderson, to which I altogether subscribe, which leads to the same result ; and that is, that the words 'heirs of the body' give an estate in fee by purchase, although there is an estate for life to the parent preceding it, because heirs of

the body are not heirs general ; and our law, since estates-tail are done away, recognizes none as heirs except such as can inherit collaterally as well as lineally ; and that although, where there is an estate for life to the parent, remainder to his heirs, both estates unite in the parent under the operation of Shelley's Case, yet there can be no such union where the remainder is to heirs of the body. Our law knows of no such heirs. Of course, they are words of description, and those that take under them must take as purchasers. In England the case is otherwise, because heirs of the body are recognized as heirs, and can inherit as such."

A different view from this was taken in the case of *King v. Utley*, 85 N. C. 61.

strictly observed in England than in the United States, even there, when it clearly appears that the word "heirs" or "heirs of the body" was intended by the testator as *descriptio personæ*, they are treated as words of purchase.¹ Any superadded words that would change the course of indefinite succession implied by the word "heirs," in its technical sense, take the case out of the operation of the rule; as, for instance, in England, when the gift is for life, "remainder to the heirs female," for that is a change of the course of descent.²

SEC. 499. **Same—What within the rule.**—A devise to one "for his use and benefit during his life, and then to his heirs and assigns," instead of being, as it apparently is, and as, by statute, it is declared to be in many of the states, an estate for life, with remainder to the heirs of the tenant for life, it is within the rule in Shelley's Case, and the word "heirs" is held to denote the extent and character of the estate, as a term of limitation and not of purchase.³

¹ Theob. Wills, 340-342.

² See: *Leathers v. Gray*, 96 N. C. 548; s.c. 2 S. E. Rep. 455.

³ *Siceloff v. Redman's Adm'r*, 26 Ind. 251;

Cooper v. Cooper, 6 R. I. 261.

Thus a devise of lands to "my grandson, Stephen Cooper (son of Stephen), my afore-named grandson to come into possession at twenty-one years of age, and to have and to hold the above-named bequest to him during his natural life; and after his decease, I give the proceeds unto his male heirs, equally between them, and, for want of heirs male, then to go in equal shares to his daughters," vests an estate-tail in Stephen, the grandson, under the rule in Shelley's Case; the clause of the statute of wills, in relation to the creation and continuance of estates-tail, not being applicable to such a case.

Cooper v. Cooper, 6 R. I. 261.

Not within the rule.—But where a father by deed gave to his daughter and the heirs of her

body a tract of land, and provided that, "if the said daughter should die and leave an heir or heirs of her body, in that case, said heirs being her children or child, is to have, occupy, and possess all the property herein given to them and their heirs forever," the court held that the daughter's children take as purchasers, and that the rule in Shelley's Case does not apply.

Williams v. Beasley, 1 Winst. (N. C.) No. 1, 102.

And where A, by will, devised as follows: "2d, I give to my son, J. D., the use of the plantation whereon I now live, to him, the said J. D., during his natural life, and if it should please God, should have issue born of his body lawfully begotten, then such issue, after the death of the said J. D., to have the aforesaid devised premises in fee-tail, but if the said J. D. should die without issue of his body lawfully begotten," then over to his son, T. D., in fee-simple; the court

SEC. 500. Same—Rule of construction and not of law.—This rule was established as a convenient and necessary rule of construction, where the intention of the testator could be effectuated by it. This is not an imperious rule of law, which must control the operation of the will, where a contrary intention appears on its face, but a rule of construction which prevails only where a contrary intention does not appear.¹

In an early case in North Carolina,² it was questioned whether the rule in Shelley's Case would apply where the limitation was to A for life, with remainder to the heirs of his body and their heirs; but this doubt seems to have been settled by the case of *Kingsland v. Rapelye*,³ in which a testator by his will gave to his daughter an estate for life, and upon her death he gave the estate to her "lawful issue, his, her, and their heirs, executors, administrators, and assigns, forever," equally to be divided among them, share and share alike; and the court held that the daughter took an estate-tail by the rule in Shelley's Case.

SEC. 501. Same—Applied to estates in husband and wife.—In the case of the limitation of the estate to a husband and wife and their heirs in tail, if the heirs are the heirs of the body of the two donees, they take by descent within the rule in Shelley's Case; if the heirs of only one of them, they take as remaindermen and purchasers. So that if the gift is to the husband and his heirs which he shall beget on the body of his wife, it will create in him an estate-tail, and his wife will be excluded; but if the remainder be limited to the heirs on the body of the wife by the husband to be begotten, she will take an estate-tail, and the husband will be excluded.⁴ But where the devise is to the husband and wife and their heirs on the body of the wife begotten, they both take an estate in

held, that by this devise, the son, J. D., took only a life estate, the rule in Shelley's Case not being applicable. *Chilton v. Henderson*, 9 Gill (Md.) 432.

¹ *Chilton v. Henderson*, 9 Gill (Md.) 432.

² *Williams v. Beasley*, 1 Winst. (N. C.) No. 1, 102.

³ 3 Edw. Ch. (N. Y.) 1-6.

⁴ *Denn v. Gillot*, 2 T. R. 431; s.c. 1 Rev. Rep. 516.

tail: In either of these events the heirs take, if at all, by descent and not by purchase. Where the estate is given to both husband and wife, they will each have a life estate, and if the one whose heirs are to take die first, such heirs will take an estate-tail in remainder after the death of the wife.¹ Where the estate is given either to the husband or wife for life, with remainder to the heirs of the body of husband and wife, such heirs take as purchasers and not by descent.²

SEC. 502. **Incidents of an estate in tail.**—At common law estates in tail, like estates in fee-simple,³ have certain incidents inseparably annexed to them, which cannot be restrained by any provision or condition whatever.⁴ These incidents are the power to commit waste, the right to bar the estate, the right to the possession of the title-deeds, the right of curtesy and dower, and forfeiture for treason. But there are certain incidents belonging to estates in fee which do not attach to estates in tail; such as the right of alienation, the duty to pay incumbrances, and merger.

SEC. 503. **Same—Power to commit waste.**—Among the incidents pertaining to an estate in tail one of the most important is the right and power on the part of the tenant in tail to commit every kind of waste;⁵ as by

¹ 2 Prest. Est. 443, 483.

See: *Denn v. Gillot*, 2 T. R. 431; s.c. 1 Rev. Rep. 516;

Gassage v. Taylor, Sty. 325;

Frogmorton d. Robinson v. Wharrey, 3 Wils. 125, 144; s.c. 2 Bl. Rep. 728.

² The same is true where the limitation is to the husband or to the wife and the heirs of the bodies of husband and wife. 2 Prest. Est. 441, 442.

³ See: *Ante*, chapters III. and IV., "Incidents of an Estate in Fee-simple."

⁴ 1 Cruise's Real Prop. (4th ed.) 74, § 31.

⁵ See: *Liford's Case*, 11 Co. 50a; *Attorney-General v. Marlborough*, 3 Madd. 531;

Hales v. Petit, 1 Plowd. 259;

Sacheverel v. Dale, Poph. 194;

Jervis v. Bruton, 2 Vern. 251;

2 Co. Litt. (19th ed.) 224a.

Conveyance by tenant in tail—Grantee punishable.—At common law if the tenant in tail granted away all his estate, the grantee was punishable for waste; and if the grantee granted it over, his grantee was also punishable.

Anonymous, 3 Leon. 121.

It has been said that a chancery court will not, in any case whatever, restrain a tenant in tail from committing waste. Thus Lord Talbot is reported to have said that in *Mr. Saville's Case*, who being an infant, and tenant in tail in possession, in a very bad state of health, and not likely to live to full age, his guardian cut down a quantity of timber just before his death, and the remainderman

falling timber, pulling down houses, opening and working mines, and the like.¹ This power, however, must be exercised during the tenant's life,² for at the incidence of his death this right or power ceases. Consequently if the tenant in tail sells trees growing on the land, the vendee must cut and remove them during the life of the vendor, otherwise they will descend to the heir as parcel of the inheritance.³

SEC. 504. Same—Right to bar estate.—Another important right possessed by the tenant in tail is a right to bar the estate, either by fine and common recovery, or by any of the statutory methods now in force in any of the states;⁴ and any attempt to restrain the exercise of this right on the part of the tenant has ever been held void.⁵ The right to bar an entail is so essential a part of an estate-tail that even where the tenant is out of possession through a sale of his estate, either by auction or through judicial proceedings, he still retains sufficient interest therein to enable him to bar the entail.⁶

SEC. 505. Same—Right to title-deeds — English rule.—A tenant in tail, having an estate of inheritance, has a right to all title-deeds and monuments belonging to the land;⁷ and a court of chancery will compel their delivery immediately to him.⁸

applied for an injunction to restrain him, but could not prevail.

Attorney-General v. Marlborough, 3 Madd. 498;

Lord Glenorchy v. Bosville, Talbot 16.

A bond to restrain a tenant in tail from committing waste is void. Thus where a person settled lands on his daughter and the heirs of her body, and took a bond from her not to commit waste, and the bond was put in suit, the court held it to be an idle bond, and decreed it to be delivered up to be canceled.

Jervis v. Burton, 2 Vern. 251; 2 Co. Litt. (19th ed.) 224a.

¹ *Attorney-General v. Marlborough*, 3 Madd. 498;

Hales v. Petit, 1 Plow. 259;

Jervis v. Bruton, 2 Vern. 251;

2 Bl. Com. 115, 116.

² *Liford's Case*, 11 Co. 50a.

³ *Liford's Case*, 11 Co. 50a;

Hales v. Petit, 1 Plowd. 259.

⁴ See: *Post*, chapter XV., "Alienation and Barring Estates-tail."

⁵ 2 Co. Litt. (19th ed.) 379b;

1 Spenc. Eq. Jur. 144n.

See: *Weld v. Williams*, 54 Mass. (13 Met.) 486;

Doyle v. Mullady, 33 Pa. St. 264;

Dewitt v. Eldred, 4 Watts & S. (Pa.) 421.

⁶ *Hall v. Thayer*, 71 Mass. (5 Gray) 523;

Waters v. Margerum, 60 Pa. St. 39;

Elliott v. Pearsoll, 8 Watts & S. (Pa.) 38;

Sharp v. Pettitt, 4 Yeates (Pa.) 413;

Watts v. Cole, 2 Leigh (Va.) 653;

⁷ *Harrington v. Price*, 3 Barn. & Ald. 170; s.c. 23 Eng. C. L. 83.

⁸ *Harrington v. Price*, 3 Barn. & Ald. 170; s.c. 23 Eng. C. L. 83;

Jones v. Morgan, 1 Bro. C. C. 206;

SEC. 506. **Same — Same — American rule.**—In the United States, it is the general practice for the grantor to retain his own title-deeds, instead of delivering them over to the grantee; and the grantee is not ordinarily bound, in deducing his title, to produce any original deeds to which he was not a party; but, the practice of registration being universal, he is entitled to have read in evidence certified copies from the registry, of all such deeds of which he is not supposed to have the control.¹

SEC. 507. **Same—Curtesy and dower.**—Among the other incidents of estates-tail is the fact that they are subject to the curtesy of the husband and the dower of the wife.² At common law these incidents were as inseparably connected with the estate as the right to commit waste or to bar the entail, and could not be restrained by any condition.³

SEC. 508. **Same—Forfeiture for treason.**—At common law, estates-tail, like estates in fee-simple, were forfeitable for treason, but in this country they are not forfeitable for any longer period than the life of the person attainted for the treason;⁴ and this would seem to be the rule in this country regarding such estates independently of the provision of the constitution and statutes of the United States.⁵

SEC. 509. **Same—Incidents of fees which do not attach—Alienation.**—But there are several incidents which pertain to and go with a fee-simple which do not attach to a fee-tail. Thus the tenant in tail cannot alien the land for a longer time than his own life, and his alienee will take the estate *par autre vie*, voidable by the entry of

Papillon v. Voice, 2 Pr. Wms. 471.

¹ See: 1 Greenl. Ev. (14th ed.) 571.

² Mandlebaum v. McDonell, 29 Mich. 78; s.c. 18 Am. Rep. 61, 72;

Kennedy v. Kennedy, 29 N. J. L. (5 Dutch.) 185, 188;

Smith's Appeal, 23 Pa. St. 9;

Voller v. Carter, 4 El. & B. 173; s.c. 82 Eng. C. L. 172; 29 Eng. L. & Eq. 267;

2 Co. Litt. (19th ed.) 224a;

2 Bl. Com. 115, 116.

³ Partington's Case, 10 Co. 38, 39;

See: Mandlebaum v. McDonell, 29 Mich. 78; s.c. 18 Am. Rep. 61, 72.

⁴ See: *Ante*, § 318.

⁵ See: *Denn ex d. Hincman v. Clark*, 1 N. J. L. (Coxe) 446;

Roe d. Evans v. Davis, 1 Yeates (Pa.) 332.

the issue in tail.¹ And this is true also where the land is sold on execution for the debts of the tenant in tail.² Neither can the tenant in tail mortgage the entailed land, in the absence of a statute enabling him to do so.³ Where the tenant in tail has attempted to alien the entailed land, the heir in tail is not bound by the conveyance of his ancestor, nor is such heir bound to carry out a contract made by his ancestor for the conveyance of the entailed estate.⁴

SEC. 510. Same—Same—Duty to pay off incumbrances.—The tenant in tail, having only a partial estate, and not the entire property, is not bound to pay off any charges or incumbrances affecting the estate;⁵ and he cannot be compelled by the heir in tail or remainderman to keep

¹ *Waters v. Margerum*, 60 Pa. St. 39;

Watts v. Cole, 2 Leigh (Va.) 653; Litt., § 613.

See: 2 Co. Litt. (19th ed.) 321a.

² Except in those states where it is otherwise provided by statute, as in Massachusetts (Mass. Stat. 179, c. 60, § 2, p. 412), Pennsylvania (Pa. Act Apr. 15, 1859, § 1, P. L. 670), and perhaps other states.

Estate-tail in remainder.—Such statute, it would seem, however, does not apply to the estate-tail in remainder. Thus it has been held in Massachusetts that the statute of 1791 making estates-tail “subject to the payment of the debts to the tenant in tail, in the same manner as their real estates,” does not make a remainder in tail liable to the debts of the remainderman.

See: *Holland v. Cruft*, 69 Mass. (3 Gray) 162, 184.

The courts say: “Section 2, which renders lands liable for the debts of tenants in tail, is supposed to extend further; it provides that all lands, etc., held in fee-tail shall be liable to the payment of the debts of the tenant in tail, in the same manner as other real estates. Here it is ‘lands held in fee-tail,’ for ‘the debts of the tenant in tail,’ ‘as other real estates.’

These terms distinctly apply to an estate in possession, as the term ‘held’ implies. Not a mere right as tenant in tail in remainder, but ‘lands held,’ and for the debts of a tenant so holding. On any other construction, estates might be taken to satisfy the debt of a party, who could not convey or charge the realty by his deed, and, upon the decease of the tenant to the freehold, the estate would be liable for the debts of the intermediate tenants in tail, however numerous, who had died before the death of the tenant for life; a supposition too extravagant to be entertained.”

³ *Todd v. Pratt*, 1 Har. & J. (Md.) 465.

⁴ *Partridge v. Dorsey's Lessee*, 3 Har. & J. (Md.) 302; *Jones v. Jones*, 2 Har. & J. (Md.) 281.

A formal entry by the heir in tail is not required to void the attempted conveyance of the tenant in tail.

Den v. Robinson, 5 N. J. L. (2 South.) 689.

⁵ *Partridge v. Dorsey*, 3 Har. & J. (Md.) 302;

Wharton v. Wharton, 2 Vern. 3; *Amesbury v. Brown*, 6 Ves. 477; *Chaplin v. Chaplin*, 3 Pr. Wms. 235.

down the interest, except in special cases. Where a tenant in tail does pay off an incumbrance which is a charge on the fee, or keep down the interest thereon, the presumption is that such payments are made in exoneration of the estate ; and he cannot, by discharging such incumbrances or keeping down the interest thereon, make himself a creditor of the estate to the amount so paid, except by taking an assignment of the incumbrances.¹

SEC. 511. **Same—Same—Merger.**—To the general rule that where a less and a greater estate unite in one person, the former is merged and lost in the latter, an estate-tail furnishes an exception, for it is not subject to the doctrine of merger ;² and consequently a person may have at the same time, and in his own right, both an estate-tail and an immediate reversion in fee upon failure of issue, but the estate-tail will remain intact and cannot be barred, except in the mode hereinafter indicated.³ The reason why an estate-tail does not merge with the fee where the tenant in tail acquires the reversion or remainder in fee-simple, is because the estate-tail grows out of the statute *De Donis*, which meant to restrain the tenant in tail from passing this estate from him, which he could easily do by acquiring the reversionary interest if the merger were permitted.⁴

SEC. 512. **Abolition and curtailment by statute.**—Although estates-tail were introduced into this country with our elements of the common law, yet they were regarded as being contrary to public policy, and because of the limitation which they imposed upon the right of free disposal of land, they have ever been regarded with disfavor in this country.⁵ Most of the states have passed statutes either abolishing them altogether,⁶ or regulating them.

¹ Jones v. Morgan, 1 Bro. C. C. 206 ;
Kirkham v. Smith, 1 Ves. Sr. 258.

² Wiscot's Case, 2 Co. 61a ;
Carell v. Cuddington, 1 Plowd.
295 ;
Roe v. Baldwere, 5 T. R. 104, 110 ;
s.c. 2 Rev. Rep. 550.

³ See : Pool v. Morris, 29 Ga. 374 ;
s.c. 74 Am. Dec. 68 ;
Corbin v. Healy, 37 Mass. (20

Pick.) 515 ;

Altham's Case, 8 Co. 154b.

⁴ Pool v. Morris, 29 Ga. 374 ; s.c. 74
Am. Dec. 68 ;

Wiscot's Case, 2 Co. 61a ;

Roe v. Baldwere, 5 T. R. 104, 110 ;
s.c. 2 Rev. Rep. 550, 555.

See : *Ante*, § 485.

⁵ See : *Ante*, § 459.

⁶ 4 Kent Com. (13th ed.) 14, 15.

In the latter case they are subject to be barred by deed and by common recovery,¹ as is fully explained in the next chapter.

SEC. 513. **Same—Effect of abolishing estates-tail.**—The effect of the abolition and curtailment of estates-tail by statute in the various states has been to convert what would have been an estate-tail at common law into an estate in fee-simple in the first taker.² Thus, in Georgia,

- See: *Allyn v. Mather*, 9 Conn. 114;
Posey v. Budd, 21 Md. 477;
Watkins v. Sears, 3 Gill (Md.) 492;
Jewell v. Warner, 35 N. H. 176;
Redstrake v. Townsend, 39 N. J. L. (18 Vr.) 372, 379;
Den v. Fox, 10 N. J. L. (5 Halst.) 39;
Morehouse v. Cotheal, 1 N. J. L. (Coxe) 480;
Albany Fire Ins. Co. v. Bay, 4 N. Y. 9;
Van Rensselaer v. Poucher, 5 Den (N. Y.) 35;
Orndoff v. Turman, 2 Leigh (Va.) 200; s.c. 21 Am. Dec. 608;
Croxall v. Sherrerd, 72 U. S. (5 Wall.) 268; bk. 18 L. ed. 572.
¹ *Laidler v. Young*, 2 Har. & J. (Md.) 69;
Weld v. Williams, 54 Mass. (13 Met.) 486;
Nightingale v. Burrell, 32 Mass. (15 Pick.) 104, 116;
Lithgow v. Kavenagh, 9 Mass. 161, 167, 175.
Compare: Pollock v. Speidel, 17 Ohio St. 439.
² *Bibb v. Bibb*, 79 Ala. 437, overruling *Edwards v. Bibb*, 54 Ala. 475; s.c. 43 Ala. 666;
Ford v. Cook, 73 Ga. 215;
Pournell v. Harris, 29 Ga. 736;
Brown v. Wever, 28 Ga. 377;
Chew v. Chew, 1 Md. 163;
Perry v. Kline, 66 Mass. (12 Cush.) 118;
McKenzie v. Jones, 39 Miss. 230;
Jordan v. Roache, 32 Miss. (3 George) 481;
Redstrake v. Townsend, 39 N. J. L. (10 Vr.) 372;
Morehouse v. Cotheal, 21 N. J. L. (Zab.) 480;
Lott v. Wykoff, 2 N. Y. 355; s.c. 1 Barb. (N. Y.) 565;
Lion v. Burtiss, 20 John. (N. Y.) 483;
Roosevelt v. Thurman, 1 John. Ch. (N. Y.) 220;
Ross v. Toms, 4 Dev. (N. C.) L. 376;
Sanders v. Hyatt, 1 Hawks. (N. C.) 247;
Wells v. Newbold, 1 Tayl. (N. C.) 166; s.c. C. & N. Conf. 375;
Pollock v. Speidel, 27 Ohio St. 86;
Gibson v. Moulton, 2 Disn. (Ohio) 158;
Curtis v. Longstreth, 44 Pa. St. 297;
Wilcox v. Heywood, 12 R. I. 196, overruling *Lippitt v. Huston*, 8 R. I. 415; s.c. 94 Am. Dec. 115;
Tinsley v. Jones, 13 Gratt. (Va.) 289;
Callis v. Kemp, 11 Gratt. (Va.) 78;
Nowlin v. Winfree, 8 Gratt. (Va.) 346;
Eldridge v. Fisher, 1 Hen. & M. (Va.) 559;
Doe v. Craiger, 8 Leigh (Va.) 449;
Thomason v. Andersons, 4 Leigh (Va.) 118;
Bramble v. Billups, 4 Leigh (Va.) 90;
Jiggetts v. Davis, 1 Leigh (Va.) 368;
Ball v. Payne, 6 Rand. (Va.) 73;
Kendall v. Eyre, 1 Rand. (Va.) 288.
In Massachusetts it has been held, in *Hayward v. Howe*, 78 Mass. (12 Gray) 49, that a devise of land to be equally divided among three persons, with a subsequent provision that, in case one of them shall die without lawful issue, the property given to him shall descend to the testator's heirs in fee, gives him an estate-tail, and not an estate for life, under the Revised Statutes, c. 59.
The New Jersey statute of 1784, limiting the entailment to the life

a devise which, at common law, would create an estate-tail by implication, will be construed to give a life estate in the first taker, with a remainder over in fee to his children and their descendants.¹ The policy of the American law is to limit and destroy estates-tail.² It is said by the Supreme Court of Mississippi, in the case of *Jordan v. Roache*,³ that the object of the Legislature was, by converting fees-tail into fees-simple, to withdraw the restraints upon the alienation of property imposed by the system of entailments, and to render the property of the community subservient to the purposes of the community.

SEC. 514. *Descent of estates-tail.*—At common law an estate-tail must always be traced from the donee in tail. Thus, where lands are given to A in tail they would descend upon his death to his eldest son,⁴ and upon the death of such eldest son without issue to the other sons of the first donee successively, according to priority of birth; and when all the sons are exhausted the land would go to

of the first grantee in tail, applies as well to estates created by deed as to those created by will.

Den ex d. James v. Dubois, 16 N. J. L. (1 Harr.) 285, 287.

Same—Estate-tail after life estate.—

It is said in *Doe ex d. Doremus v. Zabriskie*, 15 N. J. L. (3 J. S. Gr.) 404, that a devise in tail, after the termination of a life estate, is valid under this statute.

¹ *Ford v. Cook*, 73 Ga. 215.

² *Jordan v. Roache*, 32 Miss. (3 George) 481;

Lippitt v. Huston, 8 R. I. 415.

The express object of the Mississippi statute of 1822 was to abolish estates-tail, which the Legislature supposed were sanctioned by the law; and, thus regarded, the object and effect of the proviso of § 27 of the statute are not to allow an estate-tail to be limited directly to one, or where there are a succession of donees, to the remainderman.

Jordan v. Roache, 32 Miss. (3 George) 481.

³ 32 Miss. (3 George) 481.

⁴ In England every inference is in

favor of the rights of primogeniture; all presumptions are raised in favor of acquisitions of title to land by descent, rather than by purchase; and the intention of the testator is assumed to be in accordance therewith. In this country, as a rule, no such partialities or presumptions can be said to exist.

Chilton v. Henderson, 9 Gill (Md.) 432.

See: *Allyn v. Mather*, 9 Conn. 132;

Hamilton v. Hempsted, 3 Day (Conn.) 339;

Wells v. Olcott, 1 Kirby (Conn.) 118;

Borden v. Kingsbury, 2 Root (Conn.) 39;

Allin v. Bunce, 1 Root (Conn.) 96.

In *Massachusetts*, however, an estate-tail, as at common law, descends to the eldest son, and to the eldest son of the eldest son.

Wight v. Thayer, 67 Mass. (1 Gray) 284;

Hawley v. Northampton, 8 Mass. 3.

the first donee's daughter, if there should be but one ; but if there should be more than one, to all the daughters, taking jointly. Upon a failure of lineal heirs the estate would either go to those entitled in remainder or would revert to the donor and his heirs. If the estate created was a tail male, the issue male alone would inherit, and the same is true of an estate in tail female.¹ The common-law rule of descent for estates-tail obtained in this country prior to the Revolution.² But shortly after the Declaration of Independence a general tendency set in throughout the states to either abolish estates-tail or restrict the time during which they should be allowed to exist.³

SEC. 515. **Same—Successive descents.**—Where the statute of descents has not changed the character of an estate-tail, it will descend, in due course of law, to the issue of the donee who answer the requisite description, however remote they may be in decree from the donee in tail ; and each of such of whom, in succession, will be tenants in tail with the powers and rights which the common ancestor had in respect to the estate so long as there may by possibility be issue to answer the description in the limitation creating the estate.⁴ The course of descent in estates-tail at common law is the same as that of estates in fee-simple ; that is, to the eldest son and his eldest son, and so on, *ad infinitum*,⁵ if the ancestor has sons ;⁶ if no sons, to the daughters, taking severally. The same rule applies

¹ Litt., §§ 21, 22, 23.

See : 1 Co. Litt. (19th ed.) 24a-25a.

² See : Pratt v. Sanger, 70 Mass. (4 Gray) 84, 86 ;

Wight v. Thayer, 67 Mass. (1 Gray) 284, 286 ;

Buxton v. Inhabitants of Uxbridge, 51 Mass. (10 Met.) 87, 91 ;

Corbin v. Healy, 37 Mass. (20 Pick.) 515 ;

Davis v. Hayden, 9 Mass. 514 ;

Sumner v. Williams, 8 Mass. 162, 174 ; s.c. 5 Am. Dec. 83 ;

Reinhard v. Lantz, 37 Pa. St. 488, 491 ;

Sauder's Lessee v. Morningstar, 1 Yeates (Pa.) 313.

³ See : *Ante*, § 512 ; *Post*, § 551.

⁴ 2 Prest Est. 394.

See : Corbin v. Healy, 37 Mass. (20 Pick.) 515.

⁵ A devise to a man and the heirs of his body is a limitation of an estate-tail, with remainder over if it can take effect ; and if it descend from the devisee in tail, the heirs of his body take in succession, the eldest son and his issue, the second, etc., and so on.

Hawley v. Northampton, 8 Mass. 3.

⁶ See : Wight v. Thayer, 67 Mass. (1 Gray) 284.

in this country, where the subject is not regulated by statute.¹

SEC. 516. **Same—Legislative change of descent.**—The right of Legislatures to alter or direct, by statute, the future course of estates-tail in existence at the time of the passage of the act has been considered by our courts, and held that such a power was possessed before the adoption of the constitution.² Since the adoption of the constitution such right is unquestioned.³ Respecting the right of the Legislature of any state to declare every fee-tail to be a fee-simple in the tenant in tail, it is said in the case of *De Mill v. Lockwood*,⁴ that the Legislature by so doing would not take away any right of property from any one and invest it in another; that they would not take any strict legal rights from any one, because the issue have no right in entailed estates which can be conveyed, but only a possibility or expectancy or capacity of inheriting.

¹ See: *Cromwell v. Delany*, 4 Har. & McH. (Md.) 529;

Wight v. Thayer, 67 Mass. (1 Gray) 284;

Corbin v. Healy, 37 Mass. (20 Pick.) 514;

Hawley v. Northampton, 8 Mass. 3;

Den ex d. Spachius v. Spachius, 16 N. J. L. (1 Harr.) 172;

Nichollson v. Bettle, 57 Pa. St. 384;

Reinhard v. Lantz, 37 Pa. St. 491;

Guthrie's Appeal, 37 Pa. St. 9.

In *New Jersey*, before the statute of 1820, estates-tail general descended to the eldest son, to the exclusion of all the other

children.

Den ex d. Spachius v. Spachius, 16 N. J. L. (1 Harr.) 172.

² *Den ex d. James v. Dubois*, 16 N. J. L. (1 Harr.) 285.

³ See: *Pollock v. Speidel*, 17 Ohio St. 86;

De Mill v. Lockwood, 3 Blatch. C. C. 56.

Limitation on subsisting estates.—In *Pollock v. Speidel*, 17 Ohio St. 86, it is said that the Ohio act of December 17th, 1811, restricting entailments, operated to limit entailments then subsisting as well as those subsequently created.

⁴ 3 Blatch. C. C. 56.

CHAPTER XV.

ALIENATION AND BARRING ESTATE-TAIL.

- SEC. 517. Conditional fees.
- SEC. 518. Same—Doctrine of the common law.
- SEC. 519. Statute of Westminster II.—Origin and effect.
- SEC. 520. Same—Evils of the statute.
- SEC. 521. Same—Evading the statute—Origin of fines and recoveries.
- SEC. 522. Alienating estates-tail.
- SEC. 523. Same—By issue in tail.
- SEC. 524. Same—Meaning of statute.
- SEC. 525. Same—Discontinuance.
- SEC. 526. Same—Modes of discontinuance.
- SEC. 527. Same—Effects of discontinuance.
- SEC. 528. Same—When discontinuance not had.
- SEC. 529. Same—Creates base fee when.
- SEC. 530. Fines—Nature and kinds.
- SEC. 531. Same—Common-law and statutory fines.
- SEC. 532. Same—Fines in the United States.
- SEC. 533. Common recovery—Definition.
- SEC. 534. Same—Nature of.
- SEC. 535. Same—Statutory tenant of the præcipe.
- SEC. 536. Same—Same—Form of proceedings.
- SEC. 537. Same—Effect of.
- SEC. 538. Same—In the United States.
- SEC. 539. Same—Against estate of creator of entail.
- SEC. 540. Same—By writ *ad quod damnum*.
- SEC. 541. Alienation by bargain and sale—English doctrine.
- SEC. 542. Same—Doctrine in United States.
- SEC. 543. Same—Statutory bar by deed.
- SEC. 544. Same—Formality of deed.
- SEC. 545. Same—Conveyances of limited interests.
- SEC. 546. Same—Record of deed.
- SEC. 547. Same—By mortgage.
- SEC. 548. Same—By partition.
- SEC. 549. Same—By sale on execution.
- SEC. 550. Same—By leases and releases.
- SEC. 551. Statutory abolition and curtailment.
- SEC. 552. Equitable estates-tail.

SECTION 517. **Conditional fees.**—Those estates known as estates-tail under the statute *De Donis* were, before the passage of the statute, known to the common law as conditional fees. Estates-tail were limited to particular heirs to the exclusion of others, the condition being that if the donee died, without leaving such heirs as were specified, the estate reverted to the grantor. In this manner the nobility and great landed proprietors were enabled to preserve their lands within their own families; but the doctrine of conditional fees interfered with and tended to defeat entailment, causing an appeal to be made to Edward I. to restore the ancient law by Alfred for the preservation of entails.¹

SEC. 518. **Same—Doctrine of the common law.**—According to the common law, upon the birth of issue to which the estate was limited, it became absolute for three purposes :

1. The donee could alienate, and thus bar his own issue and the revisioner.
2. He could forfeit the estate in fee-simple for treason. Before he could only forfeit his life estate.
3. He could charge the estate with incumbrances, he might also alien it before issue born, but in that case the effect of the alienation was only to exclude the lord, during the life of the tenant and that of his issue, if such issue were subsequently born; while if the alienation was after the birth, its effects were to completely invest in the grantee a fee-simple estate.²

SEC. 519. **Statute of Westminster II.—Origin and effect.**—In this state of the law it became useful for the donee, as soon as the condition was fulfilled by the birth of issue, to alien, and afterwards to repurchase, the land. This gave him a fee-simple absolute, for all purposes. The heir was thus completely in the power of the ancestor, and the bounty of the donor was liable to be defeated by the birth of the issue, for whom it was his

¹ 1 Spence Eq. Jur. 141.

² See : Croxall's Lessee v. Sherrerd,
72 U. S. (5 Wall.) 268, 285; bk.

18 L. ed. 572, 578;
Willion v. Berkley, 1 Plowd.
241.

object to provide. To prevent such results, and to enable the great families to transmit in perpetuity the possession of their estates to their posterity, the statute *De Donis*, passed in the third year of the reign of Edward I., and known as the statute of Westminster II., was enacted. It provided "that the will of the donor, according to the form in the deed of gift manifestly expressed, should be observed, so that they to whom a tenement was so given upon condition should not have the power of alienating the tenement so given, whereby it might not remain after their death to their issue, or to the heir of the donor, if the issue should fail." Under this statute it was held that the donee had no longer a conditional fee governed by the rules of the common law, but that the estate was inalienable, and must descend "*per formam doni*," or pass in reversion.¹

SEC. 520. **Same—Evils of the statute.**—This "family law," as Sir Arthur Pigott has designated the statute, produced many serious mischiefs. Blackstone tells us² that, as a result of it, children grew disobedient when they could not be set aside; farmers were ousted of their leases, made by tenant in tail; creditors were defrauded of their debts; innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; treason was encouraged; so that these estates were justly branded as the source of new contentions and mischiefs unknown to the common law, and almost universally considered as the common grievance of the realm.³ Repeated efforts were made by the commons to secure the repeal of the statute *De Donis*,⁴ but they were uniformly defeated by the nobility, in whose interest the statute was passed.

SEC. 521. **Same—Evading the statute—Origin of fines and recoveries.**—It remained in force and was administered without evasion for about two centuries, when the judges,

¹ See: Croxall's *Lessee v. Sherrerd*,
72 U. S. (5 Wall.) 268, 285; bk.
18 L. ed. 572, 578.

(Va.) 200; s.c. 21 Am. Dec.
608.

² 2 Bl. Com. 216.

⁴ See: 1 Co. Litt. (19th ed.) 19b;
4 Kent Com. (13th ed.) 116.

³ See: Orndoff v. Turman, 2 Leigh

in the famous Taltarum's Case,¹ decided during the reign of Edward IV., devised a method to evade the statute by means of common recoveries.² This action of the judges was subsequently noticed and indirectly sanctioned by various acts of Parliament, and finally became an established form of conveyances or common assurances.³ These common recoveries had the force and effect of an absolute bar, not only of all estates-tail, but also of all remainders and reversions expectant on the determination of such estates.⁴ Fines were subsequently resorted to for the same purpose. Conveyances in England by fines and recoveries are now abolished by the statute,⁵ and estates-tail can only be barred by a deed under the statute.⁶

SEC. 522. **Alienating estates-tail.**—The statute *De Donis* affecting perpetuity restrains the tenant in tail from alienating his estate, in any manner whatever, for a greater interest than his own life.⁷ The words of the statute by which the alienation of an estate-tail is prohibited, however, extend only to the original donee, and not to his issue;⁸ but this prohibition was extended by the judges to the issue of the tenant in tail *in infinitum*. The reason for this seems to be because the judges regarded the statute as remedial, and the omission of the heirs of the donee as merely a misprision of the clerk.

¹ Y. B. 12 Edw. IV., 19;

2 Bl. Com. 357;

2 Prest. Est. 454;

1 Spear Eq. 143.

See : Roseboom v. Van Vechten,
5 Den. (N. Y.) 414.

² 2 Bl. Com. 116.

See : Ransley v. Stott, 26 Pa. St.
126;

Croxall's Lessee v. Sherrerd, 72
U. S. (5 Wall.) 268, 285; bk. 18
L. ed. 572.

³ DeWitt v. Eldred, 4 Watts & S.
(Pa.) 421;

2 Bl. Com. 357, 360;

4 Kent Com. (13th ed.) 13.

⁴ Mildmay's Case, 6 Co. 40;

Martin v. Strachan, 5 T. R. 107,
note; s.c. 2 Rev. Rep. 552,
note;

2 Bl. Com. 361.

⁵ 3 & 4 Will. IV., c. 74, §§ 2, 14.

See : Croxall's Lessee v. Sherrerd,

72 U. S. (5 Wall.) 268, 285; bk.
18 L. ed. 572, 578.

⁶ Church v. Edwards, 2 Bro. C. C.
180;

Egerton v. Earle, etc., 1 Sim. N.
S. 464; s.c. 7 Eng. L. & Eq. 170.

See : Roseboom v. Van Vechten,
5 Den. (N. Y.) 414.

⁷ Littleton says that "if a tenant
in tail grants all his estate to
another, the grantee has no
estate but for term of life of
the tenant in tail, and the re-
version of the tail is not in the
tenant in tail; because he has
granted all his estate, and his
right," etc.

Litt., § 650.

See : 2 Co. Litt. (19th ed.) 345a.

⁸ Nec habeant illi. quibus tene-
mentum sic fuerit datum,
potestatum alienandi.

⁹ Reniger v. Fagossa, 1 Plowd. 13;

SEC. 523. **Same—By issue in tail.**—It was adjudged by Beresford that “the issue in tail should not alien, no more than they to whom the land was given, and that was the intent of the makers of the act; and it was but their negligence that it was omitted, as there it is said. In this case, by way of purchase, the land is given to the donees, and by way of limitation to the issues in tail; and, therefore, by a benign interpretation, the purview of this extends to the issues in tail.”¹

SEC. 524. **Same—Meaning of statute.**—While the statute *De Donis* restrains tenants in tail from alienating their estates for any longer period than that of their own lives, yet it has not been construed literally to mean that the grantee took an estate only for the life of the tenant in tail, which determined *ipso facto* by the death of such tenant in tail. The statute has been construed to mean that the grantee's estate was certain and indefeasible during the life of the tenant in tail only, upon whose death it became defeasible by his issue, or the remainderman or the reversioner.² It was otherwise, however, where anything was granted out of an estate that was in tail, such as rent, and the like; for such grant became absolutely void by the death of the grantor, and could never be made good.³

SEC. 525. **Same—Discontinuance.**—The law considering the tenant in tail as having not only possession, but also the right of possession of inheritance, restrains him from alienating them by certain modes of conveyance which takes away the entry of issue, and drives him to his action, and which is called a discontinuance. For, as Littleton says,⁴ “seeing he had an estate of inheritance, the judges compared it to the case where a man was seized in right of his wife, or a bishop in right of his bishopric, or an abbot in right of his monastery.”

SEC. 526. **Same—Modes of discontinuance.**—By the com-

Ogle's Lessee *v.* Ogle, 1 T. Jones 3³ Walter *v.* Bould, 1 Bulst. 32.
(Ir. Eq.) 339. 4 Litt., § 595;

¹ 2 Inst. 336.

2 Inst. 335.

² Machell *v.* Clarke, 2 Ld. Raym. 778.

See: 2 Co. Litt. (19th ed.) 326a.

mon law estates-tail might be discontinued by five different modes of conveyances ; namely, by a feoffment, fine, release, confirmation accompanied by a warranty,¹ and by a recovery not duly suffered, as where there was no voucher over of tenant in tail, so as to bar the issue or remainder over. A recovery duly suffered was sometimes improperly termed a discontinuance, but by reason of its peculiar operation it was an absolute conveyance by the tenant in tail.² By the common law a tenant in tail might also alien his estate by other modes of conveyance, which only transfers the possession, and not the right of possession. Alienation of innocent assurances of this kind did not become *ipso facto* void by the death of the tenant in tail, but were avoided by the entry of the issue.³

SEC. 527. **Same—Effects of discontinuance.**—The effect of a discontinuance at common law was to pass a fee-simple under a new and wrongful title, and to divest the estates in remainder and reversion, taking away from the discontinupees their right of entry and putting them on their right of action. But to work such a discontinuance the tenant in tail had to be in possession.⁴

SEC. 528. **Same—When discontinuance not had.**—At common law where, the reversion and remainder could not be discontinued, the tenant in tail could not discontinue

¹ See : Laidler v. Young, 2 Har. & J. (Md.) 69 ;

Gleason v. Scott, 3 Hen. & M. (Va.) 278.

To effect a discontinuance there must be a transmutation of the possession. But a bargain and sale, covenant to seize or release, with a general warranty annexed, might produce a discontinuance, when the warranty descends upon him who has a right to the lands, but otherwise if it descends upon a stranger.

Stevens v. Winship, 18 Mass. (1 Pick.) 318, 328 ;

2 Co. Litt. (19th ed.) 329a.

See : Mayson v. Sexton, 1 Har. & McH. (Md.) 275 ;

Hopkins v. Threlkeld, 3 Har. & McH. (Md.) 443.

² 2 Co. Litt. (19th ed.) 325a, b ; 2 Burr. 704.

³ Seymour's Case, 10 Co. 97b ; 1 Co. Inst. 51a.

⁴ See : Driver v. Hussey, 1 H. Bl. 269 ; s.c. 2 Rev. Rep. 767 ; Doe v. Finch, 4 Barn. & Ald. 283 ; s.c. 24 Eng. C. L. 130 ; Doe v. Jones, 1 Barn. & Cr. 238, 243 ; s.c. 8 Eng. C. L. 102 ; *Ex parte* Jones, 1 Cr. & Jer. 528 ; 2 Co. Litt. (19th ed.) 237b ; Litt., § 599.

In England a discontinuance happening since Dec. 31, 1893, does not take away any right of entry.

See : 3 & 4 Will. IV., c. 27, § 39.

the estate-tail. Thus where the reversion or remainder was in the crown, there could be no discontinuance ; for the king was regarded “as a body politic, of all others most high and worthy,” out of whose person no estate of inheritance or freehold could pass or be removed, except by matter of record.¹

SEC. 529. **Same—Creates base fee when.**—At common law, where the tenant in tail alienated the fee by any form of conveyance, other than a valid common recovery, his alienee had *prima facie* only an estate of inheritance, descendible to his heirs as long as the tenant in tail had issue inheritable under the entail, which was called a base or qualified fee. Where this alienation was, by what was termed an innocent conveyance, the estate of the alienee, upon the death of the tenant in tail, could be avoided by the entry of the issue in tail ; but where the alienation was made by feoffment, without fine, or was made by fine without proclamations or recovery duly suffered, the issue were put to their action in order to avoid the fine. Where a fine was duly levied with proclamations by the tenant in tail, however, both the right of entry and action of the issue were taken away.²

SEC. 530. **Fines—Nature and kinds.**—A fine was a fictitious action commenced upon any kind of writ by which lands might be either demanded or charged, which was compromised by leave of the court, the claim of the plaintiff being acknowledged by the defendant, which acknowledgment was made in open court or before a judge or commissioner, and entered of record and duly enrolled. The fine barred only the issue of the person levying the fine, and for that reason created a base fee determinable upon the failure of the issue of the person levying the fine.³ According to the common classification, fines were of four kinds, to wit : (1) *Sur consuance de droit come coe, que il ad de son done*, usually styled simply a fine *come coe* ; and the word fine, when used

¹ Walsingham's Case, 2 Plowd. 552, 562 ;
² Whiting v. Whiting, 81 Mass. (15 Gray) 179.
³ Seymour's Case, 10 Co. 95b.
 2 Co. Litt. (19th ed.) 334b.

alone, refers to this species ; (2) a fine *sur consuance de droit tantum* ; (3) a fine *concessit* ; and (4) a fine *sur done, grant et render*.¹ Of these four kinds of fines only two were distinguished by essential differences ; the second being a mutilated version of the first, and the fourth a combination of the first and third.

SEC. 531. **Same—Common-law and statutory fines.**—The fourfold fines above given have reference to the individual character of the assurance. In referring to the general mode of their operation and the general force from which they derive efficacy, fines have been divided into two classes, to wit : (1) fines levied at common law, and (2) fines levied by virtue of the statute. In both these classes the importance of the assurance depended upon the degree in which it operated as a bar to claims which were not prosecuted within a specified time after the completion of the fine. By the common law the title conferred by a fine was a bar to the claim of all persons, whether parties or privies to the fine or not, who, not being under disability, did not prosecute their claims within a year and a day.

SEC. 532. **Same—Fines in the United States.**—Although fines were a distinct part of the common law, which was adopted in this country, and became a part of our law,² they have not been much in use in any of the states, probably were never adopted, or known in practice, in most of the states of the Union. It has been denied in *Moreau v. Detchemend*,³ that fines ever existed in this country ; but this is not correct, for fines have been

¹ 2 Bl. Com., c. 21 ;

1 Cruise's Fine and Rec. (3d ed.), c. 3.

² *Boyer v. Sweet*, 3 Scam. (Ill.) 121 ;

Pierson v. Lane, 60 Iowa 60 ; s.c. 14 N. W. Rep. 90 ;

Wagner v. Bissel, 3 Iowa 396 ;

Lathrop v. Commercial Bank, 8 Dana (Ky.) 114 ; s.c. 33 Am. Dec. 481 ;

Commonwealth v. York, 50 Mass. (9 Met.) 93 ; s.c. 43 Am. Dec. 373 ;

Going v. Emery, 33 Mass. (16 Pick.) 107 ; s.c. 26 Am. Dec.

645 ;

Commonwealth v. Knowlton, 2 Mass. 530, 534 ;

Stout v. Keyes, 2 Doug. (Mich.) 184 ; s.c. 43 Am. Dec. 465 ;

Lindsley v. Coats, 1 Ohio 243 ;

Van Ness v. Pacard, 27 U. S. (2 Pet.) 137 ; bk. 7 L. ed. 374.

So much of English law only as is adapted to our circumstances and customs is properly recognized as part of our common law.

Pennock's Estate, 20 Pa. St. 268 ; s.c. 59 Am. Dec. 718.

³ 18 Mo. 522, 527.

occasionally levied in New York, for the sake of barring claims, and continued in that state until 1833, when they were abolished by statute.¹ Fines existed also in other states. They were abolished in New Jersey in 1799,² and in Pennsylvania they were enforced up till 1837.³

SEC. 533. **Common recovery—Definition.**—A common recovery has been said to be a conveyance on record, invented to give a tenant in tail an absolute power to dispose of his estate as if he were possessed of an estate in fee-simple.⁴ The power to suffer a common recovery has been invariably held to be a privilege inseparably incident to an estate-tail, and one which cannot be restrained by condition, limitation, custom, recognizance, or covenant.⁵

SEC. 534. **Same—Nature of.**—A common recovery was at first a collusive action of recovery, not compromised, but prosecuted to final judgment by the demandant or recoverer, against the tenant or recoveree. In its usual form, as an assurance by a tenant in tail, it was brought by a collusive demand against a collusive tenant, called the tenant of the *præcipe*, or writ sued out for the purpose of suffering the recovery, to whom an estate of freehold had been conveyed by the person in whom the immediate freehold in the lands was vested, in order to enable him to defend the action ; for a common recovery was obliged to conform in all essential points to the real action which it collusively represented, and by the common law no action of recovery was well grounded unless brought against the actual tenant of the first estate of freehold in the lands sought to be recovered ; for default of which the recovery might be falsified, or set aside, upon a plea of non-tenure.⁶

SEC. 535. **Same—Statutory tenant of the præcipe.**—The common law which required that the tenant of the *præ-*

¹ See : McGregor v. Comstock, 17

N. Y. 163 ;

Roseboom v. Van Vechten, 5
Den. (N. Y.) 414.

² Elmer's Dig. 90.

³ See : Prudon's Digest of the Laws
of Pennsylvania.

⁴ Martin v. Strachan, Willes 444,

451.

⁵ Dewitt v. Eldred, 4 Watts & S.
(Pa.) 421 ;

Croxall's Lessee v. Sherrerd, 72
U. S. (5 Wall.) 268, 286 ; bk. 18

L. ed. 572, 579 ;

Taylor v. Horde, 1 Burr. 84.

⁶ Booth on Real Actions, 29, 80.

cipe should be the person actually seized of the first estate of freehold was found to be very inconvenient in places where it was the custom to let out lands on leases for lives at a rent; in which case the concurrence of the lessee was necessary, in order to make a tenant to the *præcipe*; consequently an act was passed during the reign of George II.¹ which provided in effect that all common recoveries suffered or to be suffered without the concurrence of the lessee should be as valid and effectual as if they had concurred, provided that the person next in remainder or reversion should convey an estate for life at least to the tenant of the *præcipe*.

SEC. 536. **Same—Form of proceedings.**—In the proceedings in common recovery the tenant to the *præcipe* admitted the claim of the demandant, but vouched to warranty the tenant in tail, who admitted the warranty, but vouched over somebody else, always a man of law, commonly the crier of the court, who was styled the common vouchee. The demandant then “craved leave to impart;”² which being granted, the demandant and common vouchee left the court together. Afterwards the demandant came into court without the common vouchee, and the latter, having been solemnly summoned and failing to appear, was adjudged “to have departed in contempt of the court and made default.” Thereupon the demandant recovered the entailed lands against the tenant of the *præcipe*, who recovered lands of equal value against the tenant in tail, who recovered a similar recompense in value against the common vouchee. The recompense in value supposed to be recovered from the common vouchee had the same effect in law as actual assets to make the warranty good against the issue in tail.³

SEC. 537. **Same—Effect of.**—A recovery at common law by a tenant in tail barred as well the estate-tail as all remainders, the reversion expectant thereupon, and all collateral limitations connected with the estate,⁴ and all conditions or power by which the estate-tail might have been defeated,

¹ 14 Geo. II., c. 20, §§ 1 & 2.

² *Petit licentiam interloquerdi*.

³ *Shelley's Case*, 1 Co. 94b.

⁴ *Page v. Hayward*, 2 Salk. 570;
Pigott on Recoveries, 21;
2 Prest. Est. 460.

whereby the person entitled to the benefit of the recovery obtained as large an estate as could by possibility have been made by the settler who created the estate-tail.¹ A common recovery suffered by a tenant for life had the effect to cut off a contingent, but not a first remainder,² and it has been said that an executory devise may be destroyed by a common recovery against the estate-tail, which enlarges his estate into a fee, and excludes all subsequent limitations whether they be by way of remainder or by way of springing use or executory devise.³ A common recovery, however, had no effect on an estate derived out of or upon charges, or incumbrances upon the estate-tail.⁴

SEC. 538. Same—In United States.—The method of barring an entail by common recovery was in use in many of the states before the American Revolution, but became obsolete with the disuse of estates-tail in this country. This form of alienation is believed to have been early known and practiced in all the states in which estates-tail formerly existed.⁵ The law favoring the barring of estates-tail, little regard was paid to the care with which a common recovery was conducted, if the power and intention were manifest.⁶

SEC. 539. Same—Against estate of creator of entail.—In this country lands have from the earliest time generally been regarded as assets for the payment of debts; consequently where a descendant created an estate-tail in lands which were subsequently sold for the payment of his

¹ 3 Prest. Abstr. 137; Id. 393;

1 Prest. Conv. 2, 17;

1 Prest. Est. 426.

² Doe d. Davies v. Gatacre, 5 Bing. N. C. 609; s.c. 35 Eng. C. L. 327.

³ See: Taylor v. Taylor, 63 Pa. St. 481; s.c. 3 Am. Rep. 565.

⁴ 3 Prest. Abstr. 137;

1 Prest. Conv. 141, 142.

⁵ See: Wood v. Bayard, 63 Pa. St. 320;

Stump v. Findlay, 2 Rawle (Pa.) 168; s.c. 19 Am. Dec. 632;

Carter v. McMichael, 10 Serg. & R. (Pa.) 429;

Sharp v. Pettitt, 4 Yeates (Pa.) 413.

Never known in Ohio.—It is said in Pollock v. Speidel, 17 Ohio St. 439, never to have been known in Ohio, into which state this portion of the older commonwealth civilization had not penetrated at the time of the abolition of common recovery.

⁶ Ransley v. Stott, 26 Pa. St. 126.

debts, this would have the effect of extinguishing the estate-tail and the purchaser would take an estate in fee-simple. The same is true where an estate-tail was devised, charged with the payment of the testator's debts, which the devisee in tail failed to pay and the lands devised were afterwards sold therefor.¹ Because of this fact a practice sprang up in some of the states, particularly in Pennsylvania, of barring estates-tail by an action founded on some real or supposed debt of the testator, and selling the entailed land by virtue of an execution levied under the judgment secured in such action.²

SEC. 540. *Same*—By writ *ad quod damnum*.—In Virginia, as early as 1734, estates-tail were barred by writ of *ad quod damnum*. In this proceeding a writ was issued to inquire whether the land, and the entail which it was proposed to bar, were under two hundred pounds in value; and also to ascertain whether the land in question did not adjoin other lands of the tenant in tail. If these questions were found in the affirmative, an order was made by the court, by virtue of which a particular species of conveyance was declared to vest the land in fee-simple. By virtue of this writ the issue in tail and the remaindermen and reversioners were forever barred.³ In this form of action, the same as in the ordinary common recovery, the proceedings had to be instituted by a tenant in tail in possession; consequently when a tenant in tail bargained and sold to his own heir at law in fee, he could not afterwards sue out a writ of *ad quod damnum* to bar the entail, being no longer seized of an estate-tail, which was absolutely necessary to authorize him to sue out such a writ.⁴

SEC. 541. *Alienation by bargain and sale*—English doctrine.—In England a deed of bargain and sale by tenant in tail, without assets descending, did not bind the issue

¹ *Gause v. Wiley*, 4 Serg. & R. 244.
(Pa.) 509.

² *Lyle v. Richards*, 9 Serg. & R.
(Pa.) 322;

Nokes v. Smith, 1 Yeates (Pa.)

³ See: *Carter v. Tyler*, 1 Call (Va.) 165.

⁴ *Gleason's Heir v. Scott*, 3 Hen. & M. (Va.) 278.

in tail.¹ In the case of *Gilliam v. Jacocks*, it is said that if a tenant in tail bargain and sell the entailed land in fee, "it is not a discontinuance of the estate-tail, for that is a separation of the right from the estate; for the issue in tail claims not from the tenant in tail, but *per formam doni*; he is therefore a stranger to the bargainor, and as to him the bargain and sale passes only an estate for the life of the bargainor; his estate remaining still in him, he is not put to his action to recover it, for he has not lost it; he may enter, which is the touchstone by which it is ascertained whether an estate is lost or not, for if the tenant is disseized, and has not by a descent or otherwise lost his right of entry, he may compel the lord to avow upon him, and in all respects recognize him as one having the estate." This right of entry, it was said, "will support a contingent remainder dependent upon his estate as the precedent freehold, and as the issue in tail after the death of the bargainor may enter, it proves beyond a doubt that the estate-tail is in him and not in the bargainee, that is, the bargainee has no estate of any kind; for there cannot be two persons in the same estate at the same time holding adversely."³

SEC. 542. **Same—Doctrine in United States.**—In this country it has been held in some of the states that a tenant in tail has the power to defeat the entailment, and can convey in fee-simple, although the will creating the estate in tail was made and approved before the passage of the statute giving the power.⁴ In a case, however, where a

n v. Robinson, 5 N. J. L. (2 South.) 689.

was held in *Wells v. Newbold*, 1 Tayl. (N. C.) 166, that a bargain and sale by the tenant in tail worked a discontinuance, and was a bar to the entry of the issue, but this case was subsequently overruled by *Gilliam v. Jacocks*, 4 Hawks. (N. C.) 310.

² 4 Hawks. (N. C.) 310.

³ See: *Ridgely v. McLaughlin*, 3 Har. & McH. (Md.) 220; *Mayson's Lessee v. Sexton*, 1 Har. & McH. (Md.) 275.

⁴ *Riggs v. Sally*, 15 Me. (3 Shep.) 408;

Brogden v. Walker, 2 Har. & J. (Md.) 285;

Howard v. Moale, 2 Har. & J. (Md.) 249;

Gleason v. Scott, 3 Hen. & M. (Va.) 278.

But in Maryland, an heir or issue in tail, claiming *per formam doni*, is not compellable to fulfill a contract, entered into by the tenant in tail, for sale of the entailed lands. Nor has the Court of Chancery power to decree a specified execution of such a contract against the heir or issue in tail.

Partridge v. Dorsey, 3 Har. & J. (Md.) 302.

tenant in tail aliened by deed of conveyance containing a covenant for himself and his heirs to warrant and defend, and secure the possession to the alienee against all lawful claims, it was held that this conveyance did not work a discontinuance, and that the warranty was a purely personal covenant of the alienor, and not binding on the heirs, notwithstanding assets descended.¹ A deed of bargain and sale, by the heir in tail, in the lifetime of his ancestor, when he is not tenant, will not work a discontinuance;² and a bargain and sale with warranty by a *feme covert*, who is a tenant in tail, will not work a discontinuance of the estate.³ It has been said that a covenant to stand seized to the use of the covenantee will not work a discontinuance, even though the deed be in form one usually accompanying livery of seisin, no such livery in fact having been made.⁴

SEC. 543. **Same—Statutory bar by deed.**—In many if not most of the states of the Union there are statutory provisions whereby estates-tail may be barred by deed executed with greater or less formality; such as Delaware,⁵ Maine,⁶ Maryland,⁷ Massachusetts,⁸ Pennsyl-

¹ Den d. Jacocks v. Gilliam, 3 Murph. (N. C.) 47.

² Hopkins v. Threlkeld, 3 Har. & McH. (Md.) 443.

³ Mayson v. Sexton, 1 Har. & McH. (Md.) 275.

⁴ Watts v. Cole, 2 Leigh (Va.) 653.

⁵ Laws of 1874, p. 507.

⁶ The statute of 1871, c. 36, § 4, retracted the Massachusetts statute of 1791, c. 61, and was both prospective and retroactive in operation and force, affecting estates-tail already in being, as well as those created after the passage of the act.

See: Willey v. Haley, 60 Me. 176; Riggs v. Salley, 15 Me. 408.

⁷ By the statute of 1782, c. 23, a tenant in tail was empowered to convert his estate into a fee by conveying to another and taking back a conveyance in fee-simple.

See: Laidler v. Young's Lessee, 2 Har. & J. (Md.) 69.

⁸ The statute of 1791, c. 61, § 1, p.

413, provided that any tenant in tail, "being of full age, by deed, subscribed before two or more credible witnesses, and acknowledged and recorded for a good and valuable consideration, *bona fide* to grant lands held in tail in fee-simple," was sufficient and effectual to bar all tails and to vest the absolute inheritance in fee-simple in the purchaser or grantee without any force or common recovery. "Good and valuable consideration" was necessary under this statute where a deed of an estate-tail was made, purporting to be in consideration of a sum of money and of a lease of the land to the grantor for one year, at an apparently normal rent; and before the expiration of the lease, declaration of trust was made by the grantee, among other things, to permit the grantor to have possession during his life, and the grantor

vania,¹ Rhode Island,² Virginia,³ and perhaps other states. These statutes docking entails take the place, for all practicable purposes, of common recovery, but have not all the privileges and properties thereof. Thus, while a common recovery cannot be set aside on account of the infancy or insanity of a person suffering it, a deed under a statute barring an entry may be avoided by proof either of the infancy or insanity of the grantor.⁴ But a deed barring an entail destroys the remainders and reversion depending upon it,⁵ the same as, and is as effectual as, a common recovery.

SEC. 544. **Same—Formality of deed.**—It has been held in Ohio⁶ that an estate-tail cannot be barred by an ordinary deed with covenants of warranty; but this is not the prevailing doctrine. In Massachusetts it is said that a tenant in tail of an undivided half of land may bar the entail by conveying in fee, by quit-claim deed, all his right, title, interest, and estate.⁷

continued in possession from the time of giving his deed; it was held that, *prima facie*, the deed was given upon a valuable consideration and *bona fide*, and so, in these respects, was, *prima facie*, sufficient to bar the entailment, under a statute allowing estates-tail to be so barred.

Nightingale v. Burrell, 32 Mass. (15 Pick.) 104;

Soule v. Soule, 5 Mass. 61.

Same — "Love and affection" is a "good" consideration under this act.

Wheelwright v. Wheelwright, 2 Mass. 447; s.c. 3 Am. Dec. 66.

Under this statute a tenant in tail may convey by deed an undivided part of the estate-tail.

Hall v. Thayer, 71 Mass. (5 Gray) 523.

¹ In 1791 (3 Smith's Laws, 388) was passed the statute at present in force in Pennsylvania providing that any tenant in tail in possession, reversion, or remainder may convey his land as in fee-simple, provided the deed states the intention of the grantor to bar the entry

and it be acknowledged in court.

Robbs v. Ankeny, 4 Watts & S. (Pa.) 128.

Under this statute a deed executed for the express purpose of barring an estate-tail, although for a nominal consideration, and in trust, an immediate reconveyance being required, is good for its special purpose.

Lawrence v. Lawrence, 105 Pa. St. 335.

The deed of an infant or lunatic under this statute will not bar an estate-tail, or in remainder or reversion, as a common recovery would.

Wood v. Bayard, 63 Pa. St. 320.

² Rev. Stat., c. 145, § 3.

See: Manchester v. Durfee, 5 R. I. 549.

³ Watts v. Cole, 2 Leigh (Va.) 653.

⁴ Wood v. Bayard, 63 Pa. St. 320.

⁵ Greeawalt v. Greeawalt, 71 Pa. St. 483.

⁶ Pollock v. Speidel, 17 Ohio St. 439.

⁷ Coombs v. Anderson, 138 Mass. 376, 378.

Citing: Allen v. Ashley School Fund, 102 Mass. 262, 265;

SEC. 545. **Same—Conveyances of limited interests.**—Where a limited interest is conveyed by a tenant in tail, upon the expiration of the particular estate granted the tenant in tail again takes the estate-tail, as originally held.¹ Thus a lease for seven years, made by a tenant in tail, will have the effect of passing the estate only for the term therein expressed.²

SEC. 546. **Same—Record of deed.**—A deed made to bar an estate-tail will be ineffectual for that purpose if not recorded as required by the statute;³ and a deed made to bar an estate-tail will not bar it if not recorded in the proper county, even though by a decree of the chancellor it is afterwards recorded in the proper county.⁴

SEC. 547. **Same—By mortgage.**—A tenant in tail may mortgage the lands entailed,⁵ and such mortgage defeats the estate-tail for a limited time; if the money secured by the mortgage is paid the old estate is revived;⁶ but if the land mortgaged is sold for the repayment of the money loaned, the estate-tail will be barred; and if the right of redeeming the estate is sold on execution against the tenant in tail, and a deed therefor duly executed to the purchaser by the officer making the sale, and the tenant in tail afterwards duly executes a quit-claim deed to the purchaser, the estate-tail will be barred, and an inheritance in fee-simple vested in the purchaser.⁷

SEC. 548. **Same—By partition.**—Whether an estate-tail would be barred by partition is a doubtful question. This subject was discussed but not decided in an early Pennsylvania case,⁸ and in a recent North Carolina case it is said that where no members of a class to whom a conditional limitation is limited are *in esse*, a proceeding

Hall v. Thayer, 71 Mass. (5 Gray) 523;

Lithgow v. Kavenagh, 9 Mass. 175.

¹ Laidler v. Young, 2 Har. & J. (Md.) 69.

² Laidler v. Young, 2 Har. & J. (Md.) 69.

³ Theological Seminary v. Wall, 44 Pa. St. 353;

George v. Morgan, 16 Pa. St. 95.

⁴ Ridgely v. McLaughlin, 3 Har. & McH. (Md.) 220.

⁵ Todd v. Pratt, 1 Har. & J. (Md.) 465.

⁶ Laidler v. Young, 2 Har. & J. (Md.) 69.

⁷ Cuffee v. Milk, 51 Mass. (10 Met.) 366.

⁸ Tiernan v. Roland, 15 Pa. St. 429.

for partition, to which all of the parties in interest who are *in esse* are parties, will not give them a fee-simple.¹ The statute of 31 Henry VIII., conferring upon joint tenants and tenants in common the right of partition, was limited in its operation to estates of inheritance, common manors, lands, tenements, and hereditaments; the remedy given being analogous to that before open to parceners by the writ of partition.² The statute of 32 Henry VIII. extended the remedy to estates for terms of life or years, and also to estates in which some of the cotenants held for terms of life or years, and others had estates of inheritance.³ It did not affect estates in remainder or contingency,⁴ and therefore it is thought that estates at will and estates-tail were not within either of the statutes referred to, and that no writ of partition can be sued out against the tenant of such an estate.

SEC. 549. **Same—By sale on execution.**—A sale under a judgment against a tenant in tail does not bar the estate-tail.⁵ Such a sale does not so divest the tenant in tail of the inheritance that he may not afterwards execute a deed, in pursuance of the statute, for the purpose of barring the estate-tail.⁶ But if an estate-tail, created by a will, is sold for a debt of the testator, the purchaser becomes vested with a title discharged of the devise, and the proceeds must be substituted for the land.⁷

SEC. 550. **Same—By leases and releases.**—A deed of lease and release by a tenant in tail works a discontinuance of the estate-tail.⁸ Thus it has been held in Maryland that a lease for seven years, made by a tenant in tail, will have the effect to pass the estate for the term therein expressed.⁹

¹ Overman v. Sims, 96 N. C. 451; s.c. 2 S. E. Rep. 372. ⁶ Elliott v. Pearsoll, 8 Watts & S. (Pa.) 38.

² See: Allant on Part. 57; Freeman on Coten. & Part. (2d ed.), § 439.

⁷ Matlack v. Roberts, 54 Pa. St. 148.

³ See: Freeman on Coten. & Part. (2d ed.), § 439.

⁸ Orndoff v. Turman, 2 Leigh (Va.) 200; s.c. 21 Am. Dec. 608.

⁴ Bipsham's Prin. Eq., § 488.

See: Laidler v. Young, 2 Har. & J. (Md.) 69.

See: Allant on Part. 64.

⁵ Doyle v. Mullady, 33 Pa. St. 264.

⁹ Laidler v. Young, 2 Har. & J. (Md.) 69.

SEC. 551. **Statutory abolition and curtailment.**—All limitations upon the right of free disposal of land are against the policy of our institutions; and shortly after the Declaration of Independence there sprang up a general tendency throughout the Union to either abolish estates-tail entirely or to restrict the time in which they should be allowed to exist. Thus in Alabama estates-tail have been converted into fee-simple estates in the hands of the donee or devisee in tail;¹ in Arkansas an estate-tail is a life estate in the first taker, with a remainder in fee-simple to the common-law heir;² in California estates-tail are abolished, and a limitation in tail vests an estate in fee-simple absolute, unless there is a valid devise over, in which case it is declared valid, although after a fee, and vests on a definite failure of issue;³ in Colorado an estate-tail created by will or gift becomes a life estate in the first taker, with a remainder in fee-simple to the heir at common law;⁴ in Connecticut an estate-tail becomes an estate in fee-simple in the issue of the first taker;⁵ in Florida estates-tail are prohibited by statute;⁶ in Georgia they are abolished and a gift or devise in tail becomes a fee-simple;⁷ in Illinois an estate-tail becomes a life estate in the first taker, with a remainder in fee to the heir at common law;⁸ in Indiana estates-tail are

¹ Alabama Rev. Stat. 1867, § 1570 ;
Id. 1876, § 2179.

Alabama rule.—Under the statute in force in Alabama (Clay's Digest, 157, § 37), which converts an estate in fee-tail into an estate in fee-simple in the first taker, under a devise to the testator's eldest son and his lawful male issue, and, in case he should die leaving none, then to the second son and his lawful male issue, the eldest son took an absolute estate in fee. *Bibb v. Bibb*, 79 Ala. 437, overruling *Edwards v. Bibb*, 43 Ala. 666 ; s.c. 54 Ala. 475.

² Arkansas Rev. Stat. 1874, p. 273 ;
Id. 1888, p. 266, § 6.

³ Cal. Civil Code 1872, §§ 763, 764.

⁴ Colo. Gen. Laws 1877, c. XVIII.,
§ 165, p. 134.

⁵ Conn. Act 1784.
See : Gen. L. VI., § 3.

⁶ Thompson Dig., tit. 2, c. 1, § 4,

pl. 3.

⁷ Ga. Act 1799, 1821 ;
Code 1873, p. 391.

See : *Ford v. Cook*, 73 Ga. 215 ;
Pournell v. Harris, 29 Ga. 736 ;
Brown v. Wever, 28 Ga. 377.

Statute of another state regarding enforced.—A devise as follows :
“I lend the use of certain slaves to A for her life, and at her decease I give them to the heirs of her body,” gives A a fee-tail, which by the law of Virginia, where the will was made, became an estate in fee-simple.

Pournell v. Harris, 29 Ga. 736.

A devise to daughters and their unborn children creates an estate-tail, that is a fee under our statute, which passes to their husbands.

Brown v. Wever, 28 Ga. 377.

⁸ Ill. Rev. Stat. 1874, p. 273 ; Id.
1880, p. 266, § 6.

abolished, and in the absence of a valid remainder over the fee vests in the donee or devisee ;¹ in Iowa all limitations suspending the power of alienation for a longer period than lives in being and twenty-two years after, are void ;² in Kentucky estates-tail are converted into fees-simple ;³ in Maryland it was declared by a statute in 1786,⁴ that if a tenant in tail general⁵ should die intestate the lands should descend in fee-simple, which has been construed to change only the course or manner of transmitting the estate-tail by making the land to descend to all the children of the tenant in tail, cutting out collateral heirs ;⁶ in Massachusetts a statute was passed in 1791⁷ regulating entails⁸ and making them liable for the debts of the tenant in tail ;⁹ in Michigan estates-tail have been abolished and all estates of inheritance are fee-

¹ Ind. Rev. Stat. 1876, p. 368.

² Iowa Stat. 1873, § 355.

³ Ky. Gen. Stat. 1873, p. 585.

See : Sale v. Cruchfield, 8 Bush (Ky.) 636 ;

Daniel v. Thomson, 14 B. Mon. (Ky.) 662 ;

Deboe v. Lowen, 8 B. Mon. (Ky.) 616.

⁴ Md. Act 1786, c. 45.

See : Rev. Stat., art. 47, § 1 ; Id., art. 44, § 7.

Where a testator devised as follows : " Unto my wife, E. C., all my lands during her life, and after the death of my said wife, I give, etc., all the said lands to my son R. and my daughters, Ann, A., E. and Agnes, to have and to hold the same during their single lives ; and in case my said children, here mentioned, should marry, or my son R. should die without lawful issue, then, and in that case, it is my desire that my son W. have and enjoy the whole of said lands, to him, his heirs and assigns, forever." Held, that the son R. took an estate in fee-tail ; and that, as the statute of Maryland makes such an estate a fee-simple, R.'s wife was entitled to dower therein.

Chew v. Chew, 1 Md. 163.

⁵ Estates-tail special, it is thought, still exist in Maryland unaffected by the statute.

See : Newton v. Griffith, 1 Har. & G. (Md.) 111.

⁶ Roe, Lessee of Posey v. Budd, 21 Md. 477 ;

Smith v. Smith, 2 Har. & J. (Md.) 314.

⁷ Mass. Act 1791, c. 60.

⁸ In the case of Perry v. Kline, 66 Mass. (12 Cush.) 118, three brothers, Benjamin, Lambert, and Stephen, by the will of their father, took estates tail with cross remainders. In 1805, Lambert conveyed his third to Benjamin and Stephen, in fee, with covenants of warranty, by deed executed in presence of two witnesses, for a valuable consideration, and duly acknowledged. Held, that, under St. 1791, c. 60, § 1, this deed barred the entail, and vested Lambert's third equally in the grantees in fee, and that Benjamin and Stephen then held each one-half of the estate, viz., two-sixths in tail under the will, and one-sixth in fee under said deed.

⁹ The statute of 1791, c. 60, § 2, making estates-tail " subject to the payment of the debts of the tenant in tail, in the same manner as other real estates," did not make a remainder in tail liable to the debts of the remainderman.

Holland v. Cruft, 69 Mass. (3 Gray) 162.

simple, either conditional or absolute;¹ in Minnesota estates-tail are abolished by statute, and all estates are declared to be estates in fee-simple absolute in the absence of an estate limited after a limited estate granted;² in Mississippi estates-tail are converted into fee-simple estates, but lands may be limited to two living donees in succession, and then to the heirs of the body of the remainderman, and in default of such heirs, to the heirs by the donor in fee-simple;³ in Missouri an estate-tail carries an estate for life, with a remainder to the children of the devisee or donee as tenants in fee-simple;⁴ in New Hampshire the statute of 1789 impliedly repealed the statute *De Donis*, and since that time entailed lands descend to the children of the tenant equally;⁵ in New Jersey, as early as 1784 and 1786, it was provided by statute that an estate-tail should become an estate in fee-simple after one descent; in 1799 the statute was repealed, and under the further statute of 1820 a gift or a devise in tail gives the first taker an estate for life, with a vested remainder in fee-simple in the heir;⁶ in New

¹ 2 Mich. Compl. L. 1871, c. CXLVII., § 3, p. 1325.

² Minn. Rev. Stat. (Bissell's ed.), § 3, p. 613.

³ Miss. Stat. 1871, § 2286.

See: *McKenzie v. Jones*, 39 Miss. 230;

Jordan v. Roache, 32 Miss. (3 George) 481.

⁴ Mo. Stat. 1886, p. 442.

⁵ N. H. Stats. 1789, pp. 76, 77.

See: *Jewell v. Warner*, 35 N. H. 176.

Before this decision it was not settled that estates-tail in New Hampshire were abolished.

See: *Dunning v. Wherren*, 19 N. H. 9;

Ladd v. Harvey, 21 N. H. (1 Fost.) 526;

Bell v. Seammon, 15 N. H. 381; s.c. 41 Am. Dec. 706;

Hall v. Chaffee, 14 N. H. 215;

Frost v. Cloutman, 7 N. H. 9; s.c. 26 Am. Dec. 723.

⁶ *Den d. Doremus v. Zabriskie*, 15 N. J. L. (3 J. S. Gr.) 404;

Den ex d. James v. Dubois, 16 N. J. L. (1 Harr.) 285, 287;

Den ex d. Spacius v. Spacius, 16 N. J. L. (1 Harr.) 172;

Morehouse v. Cotheal, 1 N. J. L. (Coxe) 480.

The Supreme Court of the United States say, in the case of *Croxall v. Sherrerd*, 72 U. S. (5 Wall.) 268; bk. 18 L. ed. 572, that the Legislature of the state of New Jersey has power to bar an entail by a private act, and divide the estate equally between the children in fee. Where all the parties interested consent thereto, no imputation of fraud is made, the partition is by disinterested commissioners, and their action is confirmed by mutual conveyances and releases.

By the present statute of New Jersey, in every case in which an estate-tail by the rules of the common law is created, the eleventh section of the New Jersey act of descents—abolishing fees-tail—applies; and this result would obtain if an estate-tail with a fee-simple expectant thereon should be created.

Redstrake v. Townsend, 39 N. J. L. (10 Vr.) 372.

York estates in tail were abolished by the statutes 1782 and 1786, and converted into fee-simple estates;¹ in North Carolina tenants of an estate-tail are deemed seized in fee-simple under the statute;² in Ohio, by statute, an estate-tail becomes an estate in fee-simple in

¹ See: *Nellis v. Nellis*, 99 N. Y.

505; s.c. 3 N. E. Rep. 59; 1 Cent. Rep. 296, 299;

Lott v. Wykoff, 2 N. Y. 355, affirming s.c. 1 Barb. (N. Y.) 565;

Lion v. Burtiss, 20 John. (N. Y.) 483;

Anderson v. Jackson, 16 John. (N. Y.) 382; s.c. 8 Am. Dec. 330;

Roosevelt v. Thurman, 1 John. Ch. (N. Y.) 220.

The New York act of 1786 applied to estates-tail in remainder equally with those in possession.

Wendell v. Crandall, 1 N. Y. 491;

Van Rensselaer v. Poucher, 5 Den. (N. Y.) 35;

Grout v. Townsend, 2 Den. (N. Y.) 366;

Vanderheyden v. Crandall, 2 Den. (N. Y.) 9;

Jackson v. Van Zandt, 12 John. (N. Y.) 169.

Van Rensselaer v. Kearney, 52 U. S. (11 How.) 297; bk. 13 L. ed. 703.

The Supreme Court of the United States say, in the case of *Van Rensselaer v. Kearney*, 52 U. S. (11 How.) 297; bk. 13 L. ed. 703, that the statute of New York of February 23, 1786, abolishing estates-tail, and providing that all persons who then were, or who, but for that statute, would thereafter, by virtue of any devise or conveyance, become seized in fee-tail of any real estate, should be deemed to be seized of the same in fee-simple, has been construed by the courts of New York to include estates-tail in remainder, as well as in possession, and their construction is followed by the courts of the United States.

Limitation over to survivors cut off.
—Where a testator, by his will, which took effect in 1801, devised his real estate to his four

sons and the heirs of their bodies, share and share alike; if any one of them should die without issue, his share was to go to the survivors, to be equally divided among them; and if all the sons should die without issue, the estate was to go to the children of the daughters; the court held: (1) That, by the primary devise to the sons, they took estates-tail, with contingent cross-remainders, which, by the New York statute of 1786, abolishing entails, were converted into absolute estates; (2) that the limitations over to the survivors among the sons, and to the children of the daughters, were cut off by that statute.

Lott v. Wykoff, 2 N. Y. 355; s.c. 1 Barb. (N. Y.) 565.

See: *Lion v. Burtiss*, 20 John. (N. Y.) 483.

² *Battle's Rev.* 1873, p. 383.

See: *Ross v. Toms*, 4 Dev. (N. C.) L. 376;

Sanders v. Hyatt, 1 Hawks. (N. C.) 247;

Wells v. Newbold, 1 Tayl. (N. C.) 166; s.c. C. & N. Conf. 375.

The act of North Carolina of 1784, c. 22, converted no estates-tail into estates in fee, but such whereof there was a person "seized or possessed," and confirmed only such alienations in fee as had been made by tenants in tail in possession since the year 1777. *Wells v. Newbold*, 1 Tayl. (N. C.) 166; s.c. C. & N. 375.

Under this statute a devise of lands to A for life, and after her death to be equally divided among the heirs of her body, and for want of such heirs then over, gives A an estate-tail in the land, which, by the act, is converted into a fee.

Ross v. Toms, 4 Dev. (N. C.) L. 376.

See *Sanders v. Hyatt*, 1 Hawks. (N. C.) 247.

the issue of the tenant in tail;¹ in Pennsylvania it is provided by a statute,² that when "by any gift, conveyance, or devise an estate-tail would be created according to the existing laws of the state, it shall be taken and construed to be an estate in fee-simple, and as such shall be inheritable and freely alienable;" in Rhode Island estates-tail are limited to the children of the first devisee;³ in Virginia an act was passed in 1776 abolishing all entails and converting them into fees-simple;⁴

¹ 1 S. & C. Rev. Stat. 550.

Under the Ohio entailment act of 1812, § 355,—providing that all estates given in tail shall be and remain an absolute estate in fee-simple, to the issue of the first devisee in tail,—where realty is devised to the children of A for life, and in case of death of one or more of said children, before the devise takes effect, leaving issue, then the share of such child to such issue for life, with remainder over for life to the issue of such issue, and in this manner down in entailment as far as may be allowed by the statute, the fee does not vest in the issue of the children of A, but in the issue of such issue; and in default of the issue of such issue, the property reverts to the heirs at law of the testator.

Gibson v. Moulton, 2 Disn. (Ohio) 158.

² Act April 27, 1855, § 1;

P. L. 368;

1 Prud. Dig., p. 620, pl. 8.

This act applied only to estates-tail created after its passage.

Reinhard v. Lantz, 37 Pa. St. 488, 491.

Descent of estates-tail in Pennsylvania.—Estates-tail descend in Pennsylvania as at common law.

See: Nicholson v. Bettie, 57 Pa. St. 384;

Reinhard v. Lantz, 37 Pa. St. 491;

Guthrie's Appeal, 37 Pa. St. 9.

Sale of estate-tail on execution.—A testator devised his dwelling to one for "his natural life, not to be sold or exchanged while he lives, and at his death to vest in his heirs as tenants in com-

mon;" but should he die without issue, then the said property to be equally divided among, and descend to, the surviving heirs of the testator. The devisee's interest having been sold by the sheriff, on case stated as to the title conveyed thereby, it was held, that the devisee took an estate-tail in the dwelling, which under the act of 15th April, 1859, became a fee-simple in the purchaser at sheriff's sale.

Curtis v. Longstreth, 44 Pa. St. 297.

³ R. I. Gen. Stats., c. 171, § 2, p. 313.

This statute has been held to continue an entailment through the life of the first devisee in tail, and then to enlarge the estate to a fee-simple in the children of the devisee.

Wilcox v. Heywood, 12 R. I. 196, overruling Lippit v. Huston, 8 R. I. 415, 424; s.c. 94 Am. Dec. 115.

See: Sutton v. Miles, 10 R. I. 348.

⁴ See: Tinsley v. Jones, 13 Gratt. (Va.) 289;

Eldridge v. Fisher, 1 Hen. & M. (Va.) 559;

Doe v. Craiger, 8 Leigh (Va.) 449;

Thomason v. Andersons, 4 Leigh (Va.) 118;

Bramble v. Billups, 4 Leigh (Va.) 90;

Jiggetts v. Davis, 1 Leigh (Va.) 368.

Ball v. Payn, 6 Rand. (Va.) 73.

Kendall v. Eyre, 1 Rand. (Va.) 288.

This act has been characterized as "a great general common recovery."

in West Virginia the law is the same as the law in Virginia;¹ in Vermont an estate-tail becomes a life estate in the first taker, with a remainder in fee-simple to the heir at common law;² in Wisconsin estates-tail are abolished, and all estates of inheritance are fees-simple absolute, in the absence of a limited estate carved out of the fee-simple.³

SEC. 552. **Equitable estates-tail.**—An equitable estate-tail may be barred in the same manner as an estate-tail at law,⁴ and a mere covenant with a remainderman will not prevent a bar of such an estate.⁵ The Supreme Court of the United States says in the case of *Croxall v. Sherrerd*,⁶ that a trust estate, like a legal estate, is descendible, devisable, alienable, and barrable by the act of the parties, and by matter of record. Generally, whatever is true at law of the legal estate is true in equity of the trust estate.⁷

See : *Orndoff v. Turman*, 2 Leigh (Va.) 200 ; s.c. 21 Am. Dec. 608.

¹ See : W. Va. Code 1868, 460.

² Vt. Gen. Laws 1862, p. 446.

³ Wis. Rev. Stat. 1878, c. 95, § 2027.

⁴ See : *Croxall v. Sherrerd*, 72 U. S. (5 Wall.) 268, 281 ; bk. 18 L. ed. 572.

⁵ *Doyle v. Mullady*, 33 Pa. St. 264.

⁶ 72 U. S. (5 Wall.) 268, 281 ; bk. 18 L. ed. 272, 277.

⁷ See : *Walton v. Walton*, 7 John. Ch. (N. Y.) 258 ; s.c. 11 Am. Dec. 456 ;

Doe v. Laning, 2 Burr. 1109 ;

Cholmondeley v. Clinton, 2 Jac. & W. 148.

Philips v. Brydges, 3 Ves. 127.

CHAPTER XVI.

ESTATES FOR LIFE.

- SECTION I. Nature and incidents of life estates.
- SECTION II. Duties incident to life estates, tenures, etc.
- SECTION III. Estate *pur autre vie*.
- SECTION IV. How estates for life created.
- SECTION V. Emblements.
- SECTION VI. Estovers.
- SECTION VII. Waste.

SECTION I.—NATURE AND INCIDENTS OF LIFE ESTATES.

- SEC. 553. Introductory.
- SEC. 554. Estate for life under feudal law
- SEC. 555. Same—Term of grant—Formal words of instrument.
- SEC. 556. Definition of a life estate.
- SEC. 557. Estate for life a freehold.
- SEC. 558. What constitutes an estate for life.
- SEC. 559. Kinds of estates for life.
- SEC. 560. Estates for life of the tenant.
- SEC. 561. Quasi tenants for life—Ecclesiastical persons.
- SEC. 562. Determinable estates for life.
- SEC. 563. Same—Special occupant.
- SEC. 564. Life estate by implication.
- SEC. 565. Same—What creates life estate by implication.
- SEC. 566. Same—Adding words of limitation.
- SEC. 567. Same—Absurd and superfluous expressions.
- SEC. 568. Same—Same—Reason for the rule.
- SEC. 569. Tenancy by the curtesy, etc.
- SEC. 570. Conditions attached to life estates.
- SEC. 571. Same—Liability for debts of tenant.
- SEC. 572. Enlargement of life estate to a fee.
- SEC. 573. Same—Power of disposition by will.
- SEC. 574. Nature of an estate for life.
- SEC. 575. Same—Possession of tenant possession of reversioner.
- SEC. 576. Same—Adverse title—Purchase by life tenant.
- SEC. 577. Same—Not entailable.
- SEC. 578. Rights and incidents of an estate for life—1. Right to possession and products.
- SEC. 579. Same—Same—Right of possession of title-deeds.
- SEC. 580. Same—2. Right to recover damages.

- SEC. 531. Same—Same—Rules of valuation of life estate.
 SEC. 532. Same—3. Right to estovers, etc.
 SEC. 533. Same—4. Right to work mines, quarries, etc.
 SEC. 534. Same—Same—Right to open new mines, pits, and shafts.
 SEC. 535. Same—Same—*Gaines v. Green Pond Iron Mining Co.*
 SEC. 536. Same—5. Right to lease.
 SEC. 537. Same—6. Right to rents and profits.
 SEC. 538. Same—Same—Apportionment of rent.
 SEC. 539. Same—7. Right to protection against sudden determination of estate.
 SEC. 540. Same—8. Right of alienation.
 SEC. 541. Same—Same—Restraint on alienation.
 SEC. 542. Same—Same—Same—Active trust—Pennsylvania doctrine.
 SEC. 543. Same—Same—Same—Withdrawing estate from creditors.
 SEC. 544. Same—Same—Must be made by deed.
 SEC. 545. Same—Same—How great an estate may be conveyed by life tenant.
 SEC. 546. Same—Same—Passes by assignment for benefit of creditors.

SECTION 553. **Introductory.**—An estate for life ranks next in importance to an estate in fee-simple because its duration is usually measured by a human life, and the estate is regarded as a freehold.¹ This estate embraces all freeholds not of inheritance, including, alike, estates held by a tenant for the term of his own life ; for the life or lives of another person or persons ; for an indefinite period that may endure for the life or lives of a person or persons in being, and not beyond the period of a life ;² and a general grant without defining the limits of the estate.³

¹ See : *Post*, § 557.

² *Hewlins v. Shippam*, 5 Barn. & C. 221, 228 ; s.c. 11 Eng. C. L. 437, 440.

Such as a grant or lease as long as the grantee shall dwell in a certain house (2 Co. Litt., 19th ed., 42a); continue vicar of the parish (*Brewer v. Hill*, 2 Anstr. 413 ; s.c. 3 Rev. Rep. 596); maintain salt-works on his own land (*Hurd v. Cushing*, 24 Mass., 7 Pick., 169), or a cheese factory on the land devised (*Warner v. Tanner*, 38 Ohio St. 118); or until the grantor makes B bailey of his manor (*Butler & Ridgeley*, H. 37 El.).

³ 2 Bl. Com. 121.

Grant for uncertain length of time—Freehold estate.—In the case of *Hewlins v. Shippam*, 5 Barn. & C. 221, 228 ; s.c. 11 Eng. C. L. 437,

440, the declaration claimed, as a license and authority granted of the plaintiff's landlords, their heirs and assigns, to make a drain, and have the foul water pass from their scullery through the drain across the defendant's yard. One of the counts claimed it indefinitely, without fixing any limits; others restricted it either to the time the defendant should continue possessed of his yard or house, or so long as it should be requisite for the convenient occupation of the plaintiff's house ; some stated, as part of the consideration, that defendant's landlords should do some repairs to the defendant's premises ; others did not. The court say : " Now, what is the interest these counts stated ? A

SEC. 554. **Estate for life under feudal law.**—Estates for life are the most interesting, if they are not the most ancient, class of estates in land. Under the feudal system, from which, as we have already seen,¹ our laws relating to and governing real property are derived, and to which they owe so much of their character, an estate for life was esteemed of higher dignity than the longest estate for years ; and was inalienable, unless the consent of the lord of whom the tenant held could be first obtained.²

SEC. 555. **Same—Term of grant—Formal words of instrument.**—By the feudal law a grant of lands to a person was considered a grant to him as long as he could hold them—that is, during his life—and no longer.³ The reason for this was because the feudal donations were taken strictly, and not extended beyond the precise terms of the gift by any presumed intent.⁴ On the tenant's death the lands granted reverted to the lord of the manor, who was the grantor, or to his heirs. Where it was intended that the descendants of the tenant should, on his decease, succeed to the tenancy, this intention was incorporated in the instrument by additional words of grant, and the gift was to the tenant “and his heirs,” or, in other words, expressive of the intention. The heir thus became a nominee in the original grant and took the

freehold interest. In Coke on Littleton, page 42, it is said : ‘ If a man grant an estate to a woman *dum sole*, etc., or as long as the grantee dwells in such a house, etc., or for any like uncertain time, which time, as Bracton saith, is *tempus indeterminatum*, in all these cases, if it be of lands or tenements, the lessee hath, in judgment of law, an estate for life determinable, if livery be made ; and if it be of rents, advowsons, or any other things that lie in grant, he hath a like estate for life by the delivery of the deed, and in court or pleading he shall allege the lease, and conclude that by force thereof he was seized generally for the term of his life.’ Lord Hale (note to 1 Co.

Litt., 19th ed., 42a) specifies two or three other instances, but adds, that in pleading, the limitation ought to be pleaded and continuance averred ; and Blackstone, in his Commentaries (vol. II., p. 121), lays it down that a general grant, without defining the limits of the estate, passes an estate for life ; and *Brewer v. Hill*, 2 Anstr. 413 ; s.c. 3 Rev. Rep. 596, is an authority to show that a lease from a vicar, so long as he should continue vicar, passes an estate for life.”

¹ See : *Ante*, § 148, *et seq.*

² 2 Bl. Com. 57 ;

Wright, Ten. 29.

³ Bract., lib. II., fol. 92b, par. 6.

⁴ Wright, Ten. 17, 152.

See : 2 Bl. Com. 121.

estate from the grantor and not from his ancestor. In such a case the ancestor and the heir took equally as a succession of usufructuaries, each of whom, during his life, enjoyed the beneficial, but none of whom possessed, or could lawfully dispose of, the direct or absolute dominion of the property.¹

SEC. 556. Definition of a life estate.—Strictly speaking, an estate for life is an interest in land which is limited to the life of the tenant, or to the life or lives of another person or persons than that of the tenant; but the term has been so extended as to include all freehold estates not of inheritance, the duration of which may be determined by the happening or not happening of an uncertain event.²

SEC. 557. Estate for life a freehold.—An estate for life denoted anciently an estate held by a freeman, independently of the mere will and caprice of the feudal lord; and the term was used in contradistinction to an estate for a term of years in lands held in villeinage or copyhold, which estates were originally liable to be determined at pleasure.³ Under the feudal law these estates were created by livery of seisin, and for that reason the tenants owed fealty to the lord, not homage, which was due only from the one who had the inheritance. Under our laws any estate of inheritance or for life in real property, whether it be a corporeal or an incorporeal

¹ 1 Co. Litt. (19th ed.) 191a, note 1.
See: *Burgess v. Wheate*, 1 Wm. Bl. 133.

² *Eldridge v. Preble*, 34 Me. 148, 151;

Hurd v. Cushing, 24 Mass. (7 Pick.) 169;

Hatfield v. Sneden, 54 N. Y. 280, 285;

Clark v. Owens, 18 N. Y. 434;

Roseboom v. Van Vechten, 5 Den. (N. Y.) 414;

Jackson v. Myers, 3 John. (N. Y.) 388; s.c. 3 Am. Dec. 504;

People ex rel. Norton v. Gillis, 24 Wend. (N. Y.) 201;

Garland v. Crow, 2 Bail. (S. C.) L. 24;

Dejarnatte v. Allen, 5 Gratt. (Va.) 499;

Foster v. Joyce, 3 Wash. C. C. 498;

Hewlins v. Shippam, 5 Barn. & C. 221, 228; s.c. 11 Eng. C. L. 437, 440;

2 Bl. Com. 121;

1 Co. Litt. (19th ed.) 42a.

Bracton says: "Ad tempus indeterminatum absque aliqua certa temporis præfinitione." Bract., lib. IV., c. 28, fol. 207.

Justinian's definition.—An estate for life is in most respects similar to the usufructus of the civil law, which is thus defined by Justinian in his Institutes: "Usufructus est jus alienis rebus utendi fruendi, salva rerum substantia."

³ 4 Kent Com. (13th ed.) 23, 27.

hereditament, may justly be termed a freehold. Under the ancient law a freehold interest brought to the owner certain valuable rights and privileges, which conferred upon him importance and dignity as a freeholder and freeman. Thus he became a suitor of the courts, and was entitled to sit as juror; he had the right to vote for members of Parliament, and to defend the title to his land; he was a necessary party in real actions, and had a right to call in the aid of the revisioner or the remainderman when the inheritance was demanded.¹

SEC. 558. **What constitutes estate for life.**—An estate will be regarded as an estate for life where there is a grant or devise to a person expressly for life,² or to him without words of limitation,³ or to him for the life or lives of another person or persons;⁴ or as long as he shall maintain salt-works,⁵ or a cheese-house,⁶ or keep a saw-mill and grist-mill doing business⁷ on the devised premises; or to a woman so long as she shall remain a widow,⁸ or to a man and wife during coverture, or to a man as long as he shall live in a certain house,⁹ or until the rental shall pay a specified sum,¹⁰ or a like uncertain period.¹¹ A life estate may be created by reservation as well as grant. Thus, where land is granted, reserving to the grantor the use and control of the lands during his natural life, the reservation creates a life estate in the land granted.¹²

To this rule as to the creation of life estates, by grant or devise, there is an exception in those cases where there is a devise of lands to executors in trust until the testator's debts are paid, such devises passing a chattel and not a freehold interest.

¹ 1 Prest. Est. 206–210.

² 1 Co. Litt. (19th ed.) 42a.

³ 2 Bl. Com. 121.

⁴ See: *Hewlins v. Shippam*, 5 Barn. & C. 221, 228; s.c. 11 Eng. C. L. 437, 440.

⁵ *Hurd v. Cushing*, 24 Mass. (7 Pick.) 169.

⁶ *Warner v. Tanner*, 38 Ohio St. 118.

⁷ *Sperry's Lessee v. Pond*, 5 Ohio 387; s.c. 24 Am. Dec. 296.

⁸ See: *Roseboom v. Van Vechten*, 5 Den. (N. Y.) 414.

⁹ 2 Co. Litt. (19th ed.) 42a.

¹⁰ See: *People ex rel. Norton v. Gillis*, 24 Wend. (N. Y.) 201.

¹¹ 2 Co. Litt. (19th ed.) 42a.

See: *Ante*, § 553.

¹² *Richardson v. York*, 14 Me. 216;

Webster v. Webster, 33 N. H. 18, 22; s.c. 66 Am. Dec. 705, 707.

SEC. 559. **Kinds of estates for life.**—The most manifest division of estates for life is into estates limited in duration to the term of the life of the tenant, or to the life or lives of another person or persons. In the latter case the estate is termed an estate *pur autre vie*.¹ Estates for life are again divided as to the method of their creation² into conventional life estates, or those created by the act of the parties themselves; and legal life estates, or those estates created by operation of the law.³ Of the latter class are tenancy by curtesy,⁴ tenancy by dower,⁵ tenancy in tail after possibility;⁶ and estates by marriage,⁷ homestead,⁸ and jointure.⁹

The following is thought to be a complete list of estates for life or lives:

1. An estate for the life of the tenant himself, including—

a. Estates by express limitation and by limitation by implication;

b. Estates of tenants in tail after the possibility of issue extinct;

c. Estates of tenants by the curtesy;

d. Estates of tenants in dower;

2. An estate for the life of another person or persons, or *pur autre vie*;

3. An estate for the joint life of several persons; and

4. An estate for the life of the longest liver of several persons.¹⁰

SEC. 560. **Estate for life of the tenant.**—In the estimation of the law, an estate for the life of the tenant him-

¹ Walker Am. L. 325, § 131.

See: *Post*, section III., this chapter.

² See: *Post*, section IV., this chapter.

³ 4 Kent Com. (13th ed.) 24.

⁴ See: *Post*, chapter XVII.

⁵ See: *Post*, chapter XVIII.

⁶ See: *Ante*, § 466.

⁷ See: *Post*, chapter XXIV.

⁸ See: *Post*, chapter on "Homesteads."

⁹ See: *Rountree v. Talbot*, 89 Ill. 246;

Estep v. Morton, 6 Ind. 489;

Slemmer v. Crampton, 50 Iowa

302;

Eldridge v. Preble, 34 Me. 151;

Millar v. Williamson, 5 Md. 219;

Cooper v. Adams, 60 Mass. (6 Cush.) 87;

Noe v. Miller's Executors, 31 N. J. Eq. (4 Stew.) 234;

Irwin v. Covode, 24 Pa. St. 162;

Brooks v. Brooks, 12 S. C. 422;

Holmes v. Bridgman, 15 Vt. 28, 37;

Dejarnatte v. Allen, 5 Gratt. (Va.) 499;

Reg. v. London, etc., Ry. Co., 3 Eng. L. & Eq. 345.

¹⁰ See: *Challis' Real Prop.* 273.

self is higher in quality and better in nature than any other estate that can be carved out of the fee; and it is said that in contemplation of law such an estate is equal to a purchase of seven years of the fee.¹ In England, when the monasteries flourished and times were turbulent and life itself uncertain, it was customary to limit estates for life to persons during their "natural" lives, to the end that their civil death might not determine the estate and put an end to the revenue derived therefrom; but in this country, where there is no forfeiture of property for felony, and attainder of treason does not work corruption of blood or forfeiture of property, except during the life of the person attainted,² this form of conveyance has never been observed.

SEC. 561. **Quasi tenants for life—Ecclesiastical persons.**—Under the English law, archbishops and bishops were formerly considered as tenants in fee-simple of the lands which they held in right of their churches. As to rectors, parsons, and vicars, Lord Coke says, that for the benefit of the church, and of their successors, they were in some cases esteemed in law to have a fee-simple qualified; but to do anything to the prejudice of their successors, in many cases the law adjudged them to have, in effect, but an estate for life. Since the several statutes by which all ecclesiastical persons and corporations are restrained from alienation, except by leases for three lives, or twenty-one years, they were generally considered as *quasi tenants* for life only.³ Consequently it was enacted by a statute of Henry VIII.,⁴ that in case any incumbent, before his death, hath caused any of his glebe lands to be manured and sown, at his own proper costs and charges, with any corn or grain, that then all the said incumbents may make and declare their testaments of all the profits of the corn growing upon the said glebe lands so manured and sown.⁵

SEC. 562. **Determinable estates for life.**—Estates for life

¹ *Garland v. Crow*, 2 Bail. (S. C.) L. 24.

² Co. Inst. (17th ed.) 343a-345a.

⁴ 28 Hen. VIII., c. 11, § 6.

³ U. S. Const., art. 3, § 3.

⁵ 1 Cruise, Real Prop. (4th ed.) 114, §§ 55-56.

³ 1 Co. Inst. (17th ed.) 44a, 341a & b;

may be made to depend upon a contingency, the happening or non-happening of which may determine the estate before the death of either the tenant, the donor, or the person for whose life the estate was given. Thus we have seen ¹ that a grant or devise, as long as the devisee shall maintain salt-works,² a cheese-house,³ a saw-mill and grist-mill⁴ on the premises devised or granted; or a devise or grant to a woman so long as she shall remain a widow;⁵ or to a person as long as he shall dwell in a certain house,⁶ or continue vicar of the parish,⁷ and the like, constitute a life estate that is determinable upon the happening of the event upon which the contingency is made to depend.⁸

SEC. 563. **Same — Special occupant.**—At common law, where an estate was held *pur autre vie*, and the tenant died during the life of the *cestui que vie*, the estate was thereby opened to any general occupant during the life of the *cestui que vie*; but if the grant was to a person and his heirs during the life of a third person, and the tenant died during the lifetime of such *cestui que vie*, the heir took as a special occupant. By a statute of Charles II.,⁹ such estates were made devisable, and if they were not devised by the tenant, the heir was made special occupant, and charged with the estate as assets by descent.¹⁰ During the reign of George II. a statute was passed¹¹ which provided that if there was no such special occupant named, and the land was not devised by the tenant for life, it should be administered as personal estate.¹²

SEC. 564. **Life estate by implication.**—An estate for life is frequently raised by implication, particularly in devises. Thus, where a testator devises land to his heirs after the death of B, B is held to take an estate for life

¹ See: *Ante*, § 558.

² *Hurd v. Cushing*, 24 Mass. (7 Pick.) 169.

³ *Warner v. Tanner*, 38 Ohio St. 118.

⁴ *Sperry's Lessee v. Pond*, 5 Ohio 387; s.c. 24 Am. Dec. 296.

⁵ *Roseboom v. Van Vechten*, 5 Den. (N. Y.) 414.

⁶ 2 Co. Litt. (19th ed.) 42a.

⁷ *Brewer v. Hill*, 2 Anstr. 413; s.c. 3 Rev. Rep. 596.

⁸ See: Bract., lib. IV., c. 28, § 1;

4 Kent Com. (13th ed.) 26.

⁹ 29 Char. II., c. 3.

¹⁰ 4 Kent Com. (13th ed.) 26.

¹¹ 14 Geo. II., c. 20.

¹² 4 Kent Com. (13th ed.) 27.

by necessary implication. The reason for this seems to be, because, under this form of devise, no one can take the estate except the heir, and he is postponed by the will until after B's death. It is said, however, that if the devise is to a stranger after the death of B, then the heirs of the testator will take by descent during the life of B.¹

SEC. 565. **Same**—What creates life estates by implication.—Any conveyance, otherwise valid and capable of taking effect, which nominates a grantee, but neither limits nor purports to limit any estate, will, in the absence of any further indication, operate by implication of law to pass an estate for the life of the grantee;² and the same is true where the limitation is “for term of life,” without saying for whose life.³ In the latter case, however, an estate for the life of the grantor will pass, if the grantor may rightfully grant that estate, but cannot rightfully grant for the life of the grantee.⁴ The implication of law upon which the estate arises is liable to be rebutted by the manifestation of a contrary intention. For example, if the estate by implication should arise in the premises of a deed, it may, by the habendum, be cut down to an estate for years, or at will; and this may happen even though the habendum itself be technically void as a limitation, and therefore not capable of taking effect otherwise than as a manifestation of intention.⁵

SEC. 566. **Same**—Adding words of limitation.—The addition to the name of the grantee of any words designed to serve as words of limitation, and not being such as by the common law are appointed to the limitation of a fee, will not pass an estate of inheritance; and in general will not pass any greater estate than would have passed by the mere nomination of the grantee. It has been recently held by the English Court of Exchequer that the addition to the name of the grantee of the words “his executors, administrators, and assigns,” in the premises of the deed, will, when the grantor has an estate for his own life, pass the whole estate of the grantor to the grantee,

¹ 1 Jarm. Wills, 466, 476.

² 2 Co. Litt. (19th ed.) 42a, 182a; Litt., § 28.

³ 1 Co. Litt. (19th ed.) 42a.

⁴ 1 Co. Litt. (19th ed.) 42a, 120b.

⁵ Buckler's Case, 2 Co. 55.

so as to make the habendum, if proper to grant a less or an impossible estate, void for the inconsistency.¹

SEC. 567. **Same—Absurd and superfluous expressions.**—In the case of *Boddington v. Robinson*,¹ the will, which purported to create a freehold *in futuro*, having been drawn by an incompetent draftsman, happened to contain some absurd and superfluous expressions. The court, being very desirous to escape from declaring the lease under consideration void, made use of these absurdities to impute to the instrument a legal operation which, in respect to the time of the term's commencement, was manifestly not the intention of the parties. In this case the material facts were as follows: A, being tenant for his own life of a house, by a deed, dated, and presumed to be delivered, on the 10th November, 1864, purported to grant, demise, and lease to B, his executors, administrators, and assigns, the house in question, to have and to hold the same from the 13th of November for the term of the aforesaid A, for the term of his natural life. This lease, therefore, purported to create, on the 10th November, 1864, an estate *pur autre vie*, to commence from the 13th day of some undefined month of November; but from certain circumstances connected with the dealings with the house which had taken place, the court inferred that the intended year was 1874. The principal question was, whether this was void, as being a freehold *in futuro* purporting to be created by what is for this purpose a common-law assurance. The court held that the words contained in the premises were sufficient expressly to pass the whole estate of A, and that they were not cut down by the words contained in the habendum importing the omission of the interval between the 10th November, 1864, and the 13th November, 1874. In the opinion of the court, it followed that the freehold created by the deed was an immediate freehold and not a freehold *in futuro*.

SEC. 568. **Same—Same—Reason for the rule.**—The reason—

¹ *Boddington v. Robinson*, L. R. 10

Exch. 270; s.c. 14 Moak's Eng. Rep. 559.

ing upon which this conclusion is based seems to consist of two propositions. The first imports that an express estate contained in the premises of a deed, and which is capable of taking effect by virtue of the deed without any such extraneous ceremony as livery of seisin, is not liable to be abridged or avoided by anything contained in the habendum—a proposition which has for a very long time past been settled beyond question. The second proposition—which is much more dubious—imports that the addition of the words, “his executors, administrators, and assigns,” to the name of a grantee, will, when the grantor has an estate for his own life, expressly convey the whole estate of the grantor to the grantee. This second proposition is thought to be a purely arbitrary proposition, unsupported by any shadow of authority, and seems to have been invented expressly to suit the exigencies of the particular case. The only reason alleged by the court in favor of the second proposition was, that the words, “his executors, administrators, and assigns,” are “proper words of limitation” for granting the whole of the estate of the grantor *in præsentî*. But this seems to the writer to be very arbitrary doctrine. There exists no authority to show that those words, unaccompanied by the words, “during the life of the grantor,” would have any such effect. And the last-mentioned words would have that effect, without any need for the mention of executors, administrators, or assigns. This was, in fact, a material part of the grounds upon which general occupancy was permitted by the common law; because the assignor or grantor, having parted with the whole estate during the life of the *cestui que vie*, had himself no better right to enter upon the lands, after the grantee’s death, than anybody else had.

SEC. 569. **Tenancy by the curtesy, etc.**—Tenancy by the curtesy is an estate for life, created by act of the law, as is also dower, homestead, jointure, and marriage estates,—all of which are fully treated in subsequent chapters.

SEC. 570. **The conditions attached to life estates.**—As we

have heretofore seen,¹ conditions may be attached to a gift or grant of a life estate, which may determine the estate upon the happening of a condition specified. Such conditions, however, must be clearly expressed, and in case of doubt the estate for life will be upheld.² Where these conditions are attached to an estate for life created by devise, the rule laid down for their construction is as follows: "The court is to collect the intention of the testator, whether his intention was that the life interest should not continue; and it is to collect the intention from the whole will, looking to the primary disposition for the purpose of seeing to what extent the interest is given, and to the ulterior disposition for the purpose of seeing to what extent and in what events the primary disposition is defeated. If, on the one hand, the court, upon this examination, finds that there is a limitation over, and that it meets the event which has occurred, it is plain that the testator did not intend the life estate to continue in that event, and it ceases accordingly; but if, on the other hand, the court, upon examination, finds that the limitation over does not meet the event which has occurred, there is no evidence of the testator's intention that the life interest should not continue in that event, and it therefore continues."³

SEC. 571. Same—Liability for debts of tenant.—It is thought that at common law a life estate was liable for the debts of the life tenant,⁴ and by statute in most of the states⁵ the estate of a life tenant is made subject to a levy on execution.⁶ Where it is sought to subject the estate of a life tenant to the payment of debts, any

¹ See: Ante, § 562.

² *Craig v. Watt*, 8 Watts (Pa.) 498.

³ *Rochford v. Hackman*, 9 Hare 481.

See: *Scruggs v. Murray*, 2 Lea (Tenn.) 44.

⁴ 1 Freem. Exc., § 172, p. 494.

⁵ Pennsylvania was formerly an exception to this rule.

Gordon v. Ingraham, 32 Pa. St. 214; s.c. 1 Grant (Pa.) 156.

See: *Kintz v. Long*, 30 Pa. St. 501, 502;

Commonwealth v. Allen, 30 Pa. St. 49;

Eyrick v. Hetrick, 13 Pa. St. 488;

Snively v. Wagner, 3 Pa. St. 275; s.c. 45 Am. Dec. 640;

Near v. Watts, 8 Watts (Pa.) 319;

Howell v. Wollfort, 2 U. S. (2 Dall.) 75; bk. 1 L. ed. 295.

See: *Mendenhall v. Randon*, 3 Stew. & P. (Ala.) 251;

Hitchcock v. Hotchkiss, 1 Conn. 470;

Boyce v. Waller, 2 B. Mon. (Ky.) 91;

Coombs v. Jordan, 3 Bland Ch.

levy upon the land in which the life estates subsist is regarded as a levy upon the estate itself.¹

SEC. 572. Enlargement of life estate to a fee.—In certain conditions of grant and relation of the parties, a life estate, upon the happening of a contingency, may be enlarged into a fee. Thus, where lands were devised to L and his heirs, in trust to permit and suffer A to take the rents and profits during A's life, "with this proviso, to pay" W out of the same an annuity for her life, and if A died before W, to permit W to enjoy the lands for her life; and after the deaths of A and W the lands were to go to the heirs male of A with remainder over. A and W both survived the devisor. A survived W, and the court held that, assuming L to have had a legal estate during W's life, that A was legal tenant in tail male after W's death.²

SEC. 573. Same—Power of disposition by will.—A general devise to a grantee and such person as he shall appoint, or to the grantee with full power of disposal, will raise an estate for life to a fee;³ but the grant of a simple power of disposal by will does not, of itself, enlarge an interest in the donee of the power beyond that which is expressly limited, although the power and life estates are granted by the same instrument;⁴ the rule in such cases being that where a devise is made to one expressly for life, and after his death to such person or persons as he shall appoint, the devisee does not take the fee.⁵ The

(Md.) 284; s.c. 22 Am. Dec. 236;

Fitzhugh v. Hellen, 3 Har. & J. (Md.) 206;

Westervelt v. People, 20 Wend. (N. Y.) 416.

¹ See: *Mechanics' Bank v. Williams*, 34 Mass. (17 Pick.) 438, 441;

Roberts v. Whiting, 16 Mass. 186.

Appraisement of estate.—When levied upon, the estate of a life tenant should be appraised the same as any other estate of freehold, and only so much thereof taken as, including the debtor's whole interest, will be sufficient to pay the debt.

Wheeler v. Gorham, 2 Root (Conn.) 328.

² *Adams v. Adams*, 6 Q. B. 860; s.c. 51 Eng. C. L. 860.

See: *Doe d. Davies v. Davies*, 1 Q. B. 430; s.c. 41 Eng. C. L. 611.

³ *Pepper's Estate*, 1 Pars. (Pa.) 436; *Shields v. Netherland*, 5 Leigh (Va.) 10, 193.

⁴ *Ward v. Armory*, 1 Curt. C. C. 419. See: *Bradley v. Westcott*, 13 Ves. 445, 452; s.c. 9 Rev. Rep. 207; *Nannock v. Horton*, 7 Ves. 391; *Croft v. Slee*, 4 Ves. 60.

⁵ See: *Denson v. Mitchell*, 26 Ala. 360, 371;

Dunning v. Vandusen, 47 Ind. 423; s.c. 17 Am. Rep. 709;

distinction between these cases is slight, but well established.¹ To enlarge the estate the power must be full, any restrictions upon its exercise being fatal to such enlargement. Thus where a devise was to a grantee for life, "and if he should want for his support to sell any part or the whole of it for his maintenance, my will is

Benesch v. Clark, 49 Md. 497;
Burleigh v. Clough, 52 N. H. 267;
s.c. 13 Am. Reg. 23;

Eaton v. Straw, 18 N. H. 320, 331;
Pepper's Estate, 1 Pars. (Pa.) 436;
Henderson v. Vaulx, 10 Yerg.
(Tenn.) 30;

Weir v. Smith, 62 Tex. 1;
Wimberly v. Bailey, 58 Tex. 225;
Orr v. O'Brien, 55 Tex. 154;
Philleo v. Halliday, 24 Tex. 38,
40;

Reynolds v. Lee, 12 Rep. 702;
Goodill v. Brigham, 1 Bos. & P.
197;

Doe ex d. Thorley v. Thorley, 11
East 438; s.c. 10 Rev. Rep.
352;

Liefe v. Saltingstone, 1 Mod. 189;
Tomlinson v. Dighton, 1 Pr.
Wms. 149; s.c. 1 Salk. 239.

The Virginia doctrine is thought to differ from the general current of decisions in this country.

See: *Missionary Society v. Calvert's Admr.*, 32 Gratt. (Va.) 357;

May v. Joyes, 20 Gratt. (Va.) 692.

Distinction between right of property and power of disposal.—In the case of *Burleigh v. Cluff*, 52 N. H. 267; s.c. 13 Am. Dec. 23, 26, the court say that there is an evident difference between a power of disposal and an absolute right of property (citing *Holmes v. Coghill*, 7 Ves. 406, 499; s.c. 6 Rev. Rep. 166; 4 Kent Com. (13th ed.) 335), and proceed to say that "a power, when conferred by will, is a bare authority derived from the will. It is not an estate, and has none of the elements of an estate. It is defined by Bouvier as 'an authority enabling a person, through the medium of the statute of uses, to dispose of an interest in real property, vested either in himself or in another person.' (See: *Williams' R. P.* 245; 2 Co. Litt. 271b, Butler's note, 231,

§ 3, pl. 4.) 'A power of authority enabling one person to dispose of the interest which is vested in another.' (BULLER, J., in *Goodill v. Brigham*, 1 Bos. & P. 197.) 'A general power of disposition, existing as a power, does not imply ownership; in fact, the existence of such a power, as a technical power, excludes the idea of an absolute fee-simple in the party who possesses the power.' (PERKER, C. J., in *Eaton v. Straw*, 18 N. H. 331.) In this case the appellants contend, in argument, that this will must be construed as devising a fee, because the power annexed to the devise was general, and not a mere power of appointment in favor of specified persons. She had, they say, an unqualified right to dispose of the whole property,—she was a free moral agent; and, because she could do with the property all that an owner in fee could, simply by executing the power, therefore she must be the owner in fee; and, by further consequence, the limitation over to Dennis is by way of executory devise, with which the right of disposition, given to Mrs. Hersey, is incompatible. The court say: 'It is quite obvious that such argument is the result of confounding the distinction between property and power. The estate given Mrs. Hersey is a property; the power of disposal, a mere authority, which Mrs. Hersey may exercise or not in her discretion.'"

¹ *Bradley v. Westcott*, 13 Ves. 445, 452; s.c. 9 Rev. Rep. 207, 211.

See: *Re Thomson's Estate*, 14 Ch. Div. 263; 49 N. J. L. 622; 43 L. T. 35;

Pennock v. Pennock, L. R. 13 Eq. 144; s.c. 41 L. J. Ch. 141; 25 L. T. 691.

that it should be at his disposal," the estate granted was held to be a life estate subject to be enlarged to a fee on the happening of the contingency named.¹

SEC. 574. *Nature of estate for life.*—Tenants for life hold of the grantors by fealty, and such other reservations as are contained in the instrument by which the estate is created. Where there is no reservation they hold by fealty only, this estate not being comprehended within the provisions of the statute *Quia Emptores*.² A tenant for life will forfeit his estate by disclaiming³ to hold of his lord, or by affirming or impliedly admitting that the reversion is in a stranger.⁴ This is upon the well-known feudal principle, that if the vassal denied the tenure, he forfeited his feud.⁵ This denial may be made when the tenant claims the reversion himself, or accepts a gift of it from a stranger, or acknowledges it to be in a stranger; for in one and all of these cases he denies that he holds his lands of the lord. Under the English law, as by the feudal law, the tenant must be convicted of his denial, and those acts which plainly amount to a denial must be done in a court of record in order to constitute them a forfeiture, because such act of denial appearing on record is equivalent to a conviction upon solemn trial.⁶ In this country, however, such disclaimer need not be made in a court of record, but may be by deed *in pais*.⁷

SEC. 575. *Same*—Possession of tenant possession of rever-

¹ Hull v. Culver, 34 Conn. 403.

² 1 Cruise (4th ed.) 103, § 9.

See: 1 Co. Litt. (19th ed.) 92a, § 132.

³ The disclaimer need not be made in a court of record, but may be made *in pais*.

Jackson ex d. Ten Eyck v. Richards, 6 Cow. (N. Y.) 617, 620;

Jackson ex d. Schaick v. Vincent, 4 Wend. (N. Y.) 633, 637.

⁴ Affirming the revision to be in a stranger by accepting his fine, attorning as his tenant, collusively pleading, and the like, amount to a forfeiture of the tenant's particular estate. Jackson ex d. Schaick v. Vincent,

4 Wend. (N. Y.) 633, 637;

2 Co. Litt. (19th ed.) 253a.

A parol disclaimer, with a declaration that the tenant had accepted a deed with warranty from a stranger, is a waiver of a formal demand of rent.

Jackson ex d. Van Rensselaer v. Collins, 11 John. (N. Y.) 1;

Jackson ex d. Schaick v. Vincent, 4 Wend. (N. Y.) 633, 637.

⁵ See: *Ante*, § 188; *Post*, § 613.

⁶ See: Butler's Case, 3 Co. 25.

⁷ Jackson ex d. Ten Eyck v. Richards, 6 Cow. (N. Y.) 617, 620-621;

Jackson ex d. Schaick v. Vincent, 4 Wend. (N. Y.) 633, 637.

sioner.—From the foregoing it is manifest that the possession of a tenant for life, like the possession of a tenant for a term of years, is not adverse to but consistent with the title of the reversioner in fee ;¹ and during the existence of the special estate the tenant for life cannot dispossess his reversioner by an adverse claim of title. Should the life tenant be dispossessed by a stranger, such disseisin will not affect the rights of the reversioner during the life of the tenant ; and he may recover possession of the property at any time within the statutory period of limitation after the death of the life tenant, at which time the statute begins to run.² Where a person enters upon the land under an agreement with the life tenant, his title will be no better than, or in any way different from, that of the life tenant ; and after the latter's death he will become a mere trespasser as to the reversioner,³ and may be dispossessed at any time within the statute as above pointed out. Any act on the part of the tenant for life by which he incurs a forfeiture of his estate does not affect the interest of the reversioner ;⁴ and in such event the reversioner is not bound to treat the estate as merged in his own and enter immediately, but may bring his action after the death of the tenant for life, within the statutory period.

¹ *Grout v. Townsend*, 2 Hill (N. Y.) 554, 557, aff'd 2 Den. (N. Y.) 336.

See: *Christie v. Gage*, 71 N. Y. 189, 193 ;

Bedell v. Shaw, 59 N. Y. 46, 50 ;

Wilson v. Wilson, 32 Barb. (N. Y.) 328, 344 ;

Buck v. Binninger, 3 Barb. (N. Y.) 391, 402 ;

Wilson v. Wilson, 20 How. (N. Y.) Pr. 41, 57 ;

Cleveland v. Crawford, 7 Hun (N. Y.) 616, 621 ;

Smith ex d. Teller v. Burtis, 9 John. (N. Y.) 174 ;

Roe v. Ferrars, 2 Bos. & P. 542.

² *Austin v. Stevens*, 24 Me. 520, 526 ;

Varney v. Stephens, 22 Me. 331, 334 ;

Archer v. Jones, 26 Miss. 583 ;

Foster v. Marshall, 22 N. H. (2 Fost.) 491 ;

Grout v. Townshend, 2 Hill (N. Y.) 554 ;

Jackson ex d. Hardenbergh v. Schoonmaker, 4 John. (N. Y.) 390 ;

Jackson ex d. McCrea v. Mancius, 2 Wend. (N. Y.) 357 ;

Guion v. Anderson, 8 Humph. (Tenn.) 298, 325 ;

McCorry v. King's Heirs, 3 Humph. (Tenn.) 267 ; s.c. 39 Am. Dec. 165.

See: *Jackson ex d. Swartwout v. Johnson*, 5 Cow. (N. Y.) 74 ; s.c. 15 Am. Dec. 433 ;

Bradford v. Caldwell, 2 Head (Tenn.) 496 ;

Woodson v. Smith, 1 Head (Tenn.) 276, 277 ;

Haynie v. Hall's Exec., 5 Humph. (Tenn.) 290 ; s.c. 42 Am. Dec. 427 ;

Williams v. Conrad, 11 Humph. (Tenn.) 412.

³ *Williams v. Castor*, 1 Stro bh. (S. C.) Eq. 130.

⁴ *Archer v. Jones*, 26 Miss. 583, 589.

SEC. 576. **Adverse title—Purchase by life tenant.**—A life tenant in possession will not be allowed to purchase an outstanding incumbrance or an adverse title and set it up against the reversioner or remainderman.¹ The purchase of such an incumbrance or title by such life tenant will be regarded as having been made for the joint benefit of himself and the reversioner or remainderman, and the law will not permit him to hold it for his own exclusive benefit if the reversioner or remainderman will contribute his share of the sum paid.²

A life tenant may, of course, at any time surrender his estate to the reversioner or remainderman, so long as that estate is kept intact; but if a life tenant has lost his estate by an adverse possession under the statute of limitations, he cannot by surrender of his interest to the reversioner or remainderman give to the latter an immediate right to recover the possession of the land.³

SEC. 577. **Same—Not entailable.**—An estate for life, not being an estate of inheritance, is not capable of being entailed under the statute *De Donis*; consequently, where an estate for life or lives is limited to a person and the heirs of his body, the latter words only operate as a description of the persons who shall take as special occupants during the life or lives for which the estate is held. In such a case the grantee will take the absolute property which he may dispose of by deed.⁴

SEC. 578. **Rights and incidents of an estate for life—1. Right to possession and products.**—There are certain rights and incidents attendant upon an estate for life, which are applicable alike to those estates which are expressly created by deed or devise and to those created by act and operation of the law. Among these are the right of the tenant for

¹ *Caufman v. Presbyterian Congregation of Cedar Springs*, 6 Binn. (Pa.) 59.

² *Whitney v. Salter*, 36 Minn. 103; s.c. 1 Am. St. Rep. 656; 30 N. W. Rep. 755.

If the life tenant in such case pays more than his proportionate share, he simply becomes a

creditor of the estate for that amount.

Daviess v. Myers, 13 B. Mon. (Ky.) 511.

³ *Moore v. Luce*, 29 Pa. St. 260; s.c. 72 Am. Dec. 629.

⁴ *Mogg v. Mogg*, 1 Mer. 654; *Ex parte Sterne*, 6 Ves. 156; *Low v. Burron*, 3 Pr. Wms. 262.

life to the possession and usufruct, or annual produce of the land,¹ during the continuance of his estate, without having the absolute property and inheritance of the land itself, which is vested in some other person ;² and where such possession is necessary for the full enjoyment of the estate, a court of equity will put the equitable life tenant into possession as against his trustee.³

SEC. 579. *Same—Same—Right to possession of title-deeds.*—Being entitled to the possession and profits of the estate, it follows as a natural sequence that the tenant for life is also entitled to those muniments of title by means of which that estate can be established or supported, and his rights protected ; hence we find that in England, where the preservation of title-deeds is a matter of much greater importance than in this country,⁴ the life tenant has been held, *prima facie*, entitled to the possession of the title-deeds of the estate ;⁵ and they will not be taken from his possession by a court of equity, unless there is evidence of spoliation on his part.⁶ Although it is a well-established rule, under the English law, that every person having a freehold interest has a right to the custody and control of the title-deeds, yet Lord HARDWICK says, in the case of *Burges v. Mawbey*,⁷ that it was the common practice for the Court of Chancery to direct the title-deeds to be taken from the tenant for life and deposited in court for the better security of the person entitled to the inheritance.

The question is of very little, if any, importance in this

¹ See : *Post*, section V., this chapter.

² *Eldridge v. Preble*, 34 Me. 148, 151.

A husband at common law had a life estate in land, of which his wife owned the fee, and such interest might be taken on execution for his debts.

Eldridge v. Preble, 34 Me. 148, 151 ;

Dejarnette v. Allen, 5 Gratt. (Va.) 499.

³ See : *Williamson v. Wilkins*, 14 Ga. 416.

⁴ 2 Bl. Com. 428.

⁵ See : *Ivie v. Ivie*, 1 Atk. 429 ;

Hicks v. Hicks, 2 Dick. 650 ;

Allwood v. Heywood, 1 Hurl. & C. 745 ;

Dryden v. Frost, 3 Myl. & C. 670 ; *Show v. Show*, 12 Price 163 ;

Bowles v. Stewart, 1 Sch. & L. 209, 223 ;

Burges v. Mawbey, 1 Turn. & R. 174 ;

Ford v. Peering, 1 Ves. Jr. 72 ;

Duncombe v. Mayer, 8 Ves. 320 ; 1 Sugd. Vend. 468.

⁶ *Smith v. Cooke*, 3 Atk. 378 ;

Crop v. Morton, 2 Atk. 74.

⁷ 1 Turn. & R. 174.

See : *Papillon v. Voice*, 2 Pr. Wms. 477 ;

Ivie v. Ivie, 1 Atk. 429, 431.

country, because, under the American system of registration, a certified copy of a registered deed is *prima facie* evidence,¹ and dispenses with the production of the original, except where a grantee relies on the immediate deed to himself; or where, from the nature of the conveyance, the deed is presumed to be in his own custody or power,² even where the grantee lives within the commonwealth,³ until a question of fraud is raised.⁴

SEC. 580. Same—2. Right to recover damages.—From the right of the tenant for life to the possession of products of the estate flows the right to maintain an action for any damage thereto which is detrimental to or in any way tends to diminish those rights. The tenant for life may defend his estate and have proceedings for damages done to such estate without joining the remainderman.⁵ In such an action the right of recovery will be limited

¹ See : Scanlan v. Wright, 30 Mass. (13 Pick.) 523; s.c. 25 Am. Dec. 344;

Hathaway v. Spooner, 26 Mass. (9 Pick.) 23.

Subscribing witness need not be called. —An office copy being *prima facie* evidence, this of course dispenses with the necessity of calling a subscribing witness.

Ward v. Fuller, 32 Mass. (15 Pick.) 185, 187;

Scanlan v. Wright, 30 Mass. (13 Pick.) 523; s.c. 25 Am. Dec. 344;

Hathaway v. Spooner, 26 Mass. (9 Pick.) 23;

Eaton v. Campbell, 24 Mass. (7 Pick.) 10, 12.

When the registered copy is duly admitted in evidence, the very register proves the execution, for the deed cannot be effectually registered without an acknowledgment before a magistrate.

Hathaway v. Spooner, 26 Mass. (9 Pick.) 23, 26.

See : Scanlan v. Wright, 30 Mass. (13 Pick.) 523; s.c. 25 Am. Dec. 344;

Ward v. Fuller, 32 Mass. (15 Pick.) 185, 187;

Eaton v. Campbell, 24 Mass. (7 Pick.) 10.

² Scanlan v. Wright, 30 Mass. (13 Pick.) 523, 527; s.c. 25 Am.

Dec. 344, 347.

³ Eaton v. Campbell, 24 Mass. (7 Pick.) 10.

⁴ Eaton v. Campbell, 24 Mass. (7 Pick.) 10.

See : Knox v. Silloway, 10 Me. (1 Fairf.) 201;

Kent v. Weld, 11 Me. (2 Fairf.) 459;

Hewes v. Wiswell, 8 Me. (8 Greenl.) 94;

Woodman v. Coolbroth, 7 Me. (7 Greenl.) 181;

Scanlan v. Wright, 30 Mass. (13 Pick.) 523; s.c. 25 Am. Dec. 344;

Burghardt v. Turner, 29 Mass. (12 Pick.) 534;

Hathaway v. Spooner, 26 Mass. (9 Pick.) 23;

Montgomery v. Dorion, 7 N. H. 475;

Southerin v. Mendum, 5 N. H. 420, 428;

Van Cortlandt v. Tozer, 17 Wend. (N. Y.) 338.

Maine doctrine.—In the case of Knox v. Silloway, 10 Me. (1 Fairf.) 201, it is said that the original deed may be received as evidence without proof of its execution, in all cases where an office copy may be used.

⁵ See : Railroad v. Boyer, 13 Pa. St. 497;

Ex parte Staples, 21 L. J. Ch. 251; s.c. 9 Eng. L. & Eq. 186.

by the damage sustained by the life estate.¹ But where, under the power of eminent domain, the land is condemned and taken, in whole or in part, for public purposes, the life tenant will be entitled to receive separate damages for injuries done to his life interest.² Such tenant for life may have his damages assessed alone,³ or he may join with those who are entitled to the remainder or reversion, and have the entire damages assessed in one action.⁴ When general damages are given the life tenant will be entitled to their use until the time of his death,⁵ and if they are assessed and paid to the reversioner or remainderman as owner, he will be liable to the life tenant in an action for money had and received.⁶

SEC. 581. **Same—Same—Rules for valuation of life estate.**—Where damages are assessed to the estate on the application of the tenant for life, it is proper for the court to lay down a rule as to the value of the life estate, as an independent estate entitled to damages; but the annual value of the premises damaged, multiplied by the years of the life tenant's expectancy of life, and reduced by calculation to the present cash value, is not a proper mode of determining the value of the life estate as compared with the value of the remainder in fee.⁷ In the case of a taking by a railroad, the true rule for valuing the damages as a whole is the difference between the value of the property before the building of the road and its value after the road is constructed, as affected by it, and of this difference the life tenant is entitled to the

¹ *Sagar v. Eckert*, 3 Ill. App. 412.

² See: *Joyner v. Conyers*, 6 Jones (N. C.) Eq. 78;

Pittsburgh, V. & C. R. Co. v. Bentley, 88 Pa. St. 178; s.c. 6 W. N. C. 289;

Harrisburg v. Crangle, 3 Watts & S. (Pa.) 460.

³ *Pittsburgh, V. & C. R. Co. v. Bentley*, 88 Pa. St. 178; s.c. 6 W. N. C. 289.

⁴ *Reading R. Co. v. Boyer*, 13 Pa. St. 497.

⁵ *Kansas City, S. & M. R. Co. v. Weaver*, 86 Mo. 473.

Apportionment of damages.—It is

said in the case of *Joyner v. Conyers*, 6 Jones (N. C.) Eq. 78, that where general damages are given for the taking of land, the general rule is that they belong to the life tenant and remainderman in proportion to the inconvenience suffered by each.

⁶ See: *Tamm v. Kellogg*, 49 Mo. 118; *Meginnis v. Nunamaker*, 64 Pa. St. 374.

⁷ *Pittsburgh, V. & C. R. Co. v. Bentley*, 88 Pa. St. 178; s.c. 6 W. N. C. 289.

proportion of the whole which the value of the life estate bears to the whole difference.¹

SEC. 582. **Same—3. Right to estovers, etc.**—The right of the life tenant to the possession and usufruct carries with it a right, in the absence of any agreement controlling, to take upon the land devised or granted reasonable estovers or *botes*.² The reason for this rule is the fact that the tenant has the full use and enjoyment of the land and all its profits during his estate therein;³ but he will not be permitted to cut timber, or to commit other waste upon the premises.⁴

SEC. 583. **Same—4. Right to work mines, quarries, etc.**—Where mines, quarries, clay-pits, gravel-pits, and the like have been opened on the premises and worked by a former owner of the fee, the tenant for life may continue to work them⁵ without restriction⁶ or limitation,⁷ for the reason that such mines have been made part of the profits of the land.⁸ If a mine or quarry has been worked for commercial profit, that must ordinarily be decisive of the right of the life tenant to continue working; but, on the other hand, it has been said that if mines have been worked or used for some definite purpose, that alone would not give the life tenant a right to continue the working.⁹

SEC. 584. **Same—Same—Right to open new mines, pits, and shafts.**—The life tenant, where he has a right to mine,

¹ *Pittsburgh, V. & C. R. Co. v. Bentley*, 88 Pa. St. 178.

² See: *Post*, this chapter, section VI., "Estovers."

³ 2 Bl. Com. 122.

⁴ See: *Post*, this chapter, section VII., "Waste."

⁵ *Billings v. Taylor*, 27 Mass. (10 Pick.) 460; s.c. 20 Am. Dec. 533;

Executors of Reed v. Reed, 16 N. J. Eq. (1 C. E. Gr.) 248;

Rockwell v. Morgan, 13 N. J. L. (2 Beas.) 384, 389;

Coates v. Cheever, 1 Cow. (N. Y.) 460, 474;

Lynn's Appeal, 31 Pa. St. 44;

Neel v. Neel, 19 Pa. St. 323, 324.

⁶ **Reasonable and necessary use and enjoyment.**—Under a statute providing that the tenant for life shall have "reasonable and necessary use and enjoyment" of the land, the right to work mines, quarries, etc., will not be limited or restrained.

See: *Westmoreland Coal Co.'s Appeal*, 85 Pa. St. 344;

Kier v. Petersen, 41 Pa. St. 357;

Irwin v. Covode, 24 Pa. St. 162.

⁷ *Crouch v. Puryear*, 1 Rand. (Va.) 258; s.c. 10 Am. Dec. 528.

⁸ *Gaines v. Green Pond Iron Mining Co.*, 32 N. J. Eq. (5 Stew.) 86.

⁹ *Elias v. Snowden Slate Quarries Co.*, L. R. 4 App. Cas. 454, 465.

in order to more advantageously pursue such work, may open new pits and sink new shafts.¹ But the operating of mines and the opening of new pits and shafts must be conducted and done on the tract of land already worked, and not upon a different tract of land and in a place where the mine or vein has never been opened or worked,² because a tenant for life has no right to open new mines, the opening of new mines forfeiting the estate where such tenant is punishable for waste.³ The American cases, however, have greatly modified the law of waste, so as to adapt it to the conveniences and requirements of a new and growing country, in order to encourage tenants for life to make a reasonable use of wild and undeveloped lands.⁴

SEC. 585. **Same—Same—Gaines v. Green Pond Iron Mining Co.**—In the case of *Gaines v. Green Pond Iron Mining Co.*,⁵ on the first hearing, it was said that there is a distinction to be made as to abandoned mines; that it does not follow from a life tenant's right to work and use opened mines, that he has a right to open mines that have been completely abandoned, or to open and use those which were unopened, though preparations were made therefor.⁶ The court held that those mines which have been abandoned merely for want of market for the time being for the minerals may be worked by the tenant for life, but where the abandonment has been long continued, and took place with a view to advantaging the estate thereby, that the life tenant cannot work them.⁷ The court said that the mere fact that ore was

¹ *Gaines v. Green Pond Iron Mining Co.*, 32 N. J. Eq. (5 Stew.) 86; *Crouch v. Puryear*, 1 Rand. (Va.) 258; s.c. 10 Am. Dec. 528.

See: *Clavering v. Clavering*, 2 Pr. Wms. 388.

² *Westmoreland Coal Co.'s Appeal*, 85 Pa. St. 344.

³ *Gaines v. Green Pond Iron Mining Co.*, 33 N. J. Eq. (6 Stew.) 603; *Coates v. Cheever*, 1 Cow. (N. Y.) 460, 474;

Viner v. Vaughan, 2 Beav. 466; *Whitfield v. Bewit*, 2 Pr. Wms. 242.

⁴ *Gaines v. Green Pond Iron Mining Co.*, 33 N. J. Eq. (6 Stew.) 603; *Ballentine v. Poyner*, 2 Hayw. (N. C.) 110;

Irwin v. Covode, 24 Pa. St. 162; *Neel v. Neel*, 19 Pa. St. 323;

Hastings v. Crunkleton, 3 Yeates (Pa.) 261;

Findlay v. Smith, 6 Munf. (Va.) 134; s.c. 8 Am. Dec. 733.

⁵ 32 N. J. L. (5 Stew.) 68.

⁶ *Viner v. Vaughan*, 2 Beav. 466.

⁷ The court cite on this point: *Bagot v. Bagot*, 32 Beav. 509; *Legge v. Legge*, 32 Beav. 515.

taken out by a former owner by digging will not of itself authorize the working of mines on the property, if it appears that such former owner never intended to open a mine, especially in a case where the digging ceased more than sixty years before the working by the life tenant began, although the law gives to the life tenant the right to pursue, by mining, the same means of deriving profits from the lands which were taken by the former owner, even though it be destructive of the substance of the estate itself ;¹ and that if it appears that the former owner never intended to mine at all, the life tenant will not have the right. When this case was brought before the Court of Errors and Appeals for review, it was held that the life tenant has a right to use a mine for his own profit where the owner of the fee, in his lifetime, opened it, even though he may have discontinued work upon it for a long period of years ; that a mere cessation of work, for however long a period, will not defeat the life tenant's right to work the mine, but that an abandonment for one day, with an executed intention to devote the land to some other use, will be fatal to the claim of the life tenant.²

SEC. 586. **Same—5. Right to lease.**—A tenant for life has the right and power to make under-leases for a term less than or equal to that of his own, and the under-tenant will have powers and privileges during his tenancy like to those incident to the tenant for life ;³ but at com-

¹ See : *Rockwell v. Morgan*, 13 N. J. Eq. (2 Beas.) 384.

² *Gaines v. Green Pond Iron Mining Co.*, 33 N. J. Eq. (6 Stew.) 603.

³ *Miles v. Miles*, 32 N. H. 147 ; s.c. 64 Am. Dec. 362 ;

Jackson ex d. Murphy v. Van Hoesen, 4 Cow. (N. Y.) 325.

Under-tenants or lessees had greater indulgences at common law, Blackstone declares, than their lessors, the original tenants for life. The same ; for the law of estovers and emblements, with regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place ; and greater, for in those cases where tenant for life shall not

have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. As in the case of a woman who holds *durante viduitate*, her taking husband is her own act, and therefore deprives her of the emblements ; but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act will not deprive the tenant of his emblements, who is a stranger and could not prevent her. The lessees of tenants for life had also at common law another most unreasonable advantage ; for at the death of their lessors, the

mon law a tenant for life, unless expressly authorized by the instrument creating the estate, could grant no lease which would have force after the termination of the life estate ; and if he desired to convey his whole interest in the estate he had to do so by deed.¹

SEC. 587. **Same—6. Right to rents and profits.**—Being entitled to the possession of the land the life tenant has an absolute right to the rents and profits of the land accruing during the term of his estate,² and on his death such rents and profits will go to his executors,³ even though the estate is held under a will providing that “none of the property shall be sold before the death of the life tenant, * * * * but the same, together with the increase thereof, shall be kept together.”⁴

SEC. 588. **Same—Same—Apportionment of rent.**—At common law where a tenant for life granted a lease for years, the rent to be paid on a fixed day, and died before the rent became due, the personal representative had no right of action for rent accruing between the last pay-day and the day of the life tenant's death.⁵ This rule of the common law was so strictly enforced that we are told in Peere Williams' reports⁶ of a case where the rent lacked one hour of falling due when the life tenant died, and the reversioner took the rent. But this rule of the common law has been remedied by statutory changes in England, and in this country in such cases the rent is

tenants for life, these under-tenants might, if they pleased, quit the premises and pay no rent to anybody for the occupation of the land since the last quarter-day, or other day assigned for the payment of rent.

2 Bl. Com. 123, 124 ;

Clun's Case, 10 Co. 127.

¹ Stewart v. Clark, 54 Mass. (13 Met.) 79 ;

Jackson ex d. McCrae v. Mancius, 2 Wend. (N. Y.) 357, 365.

² McCampbell v. McCampbell, 5 Litt. (Ky.) 92 ; s.c. 15 Am. Dec. 48 ;

Neel v. Neel, 19 Pa. St. 323 ; Brooks v. Brooks, 12 S. C. 422 ;

32

Forsey v. Luton, 2 Head (Tenn). 183.

³ See : Post, § 589.

⁴ Tatum v. McLellan, 56 Miss. 352,

⁵ Fitchburg Cotton Co. v. Melvin, 15 Mass. 268 ;

Perry v. Aldrich, 13 N. H. 343 ; s.c. 38 Am. Dec. 493 ;

Clun's Case, 10 Co. 128 ;

2 Bl. Com. 124.

See : Smith v. Shepard, 32 Mass. (15 Pick.) 147 ; s.c. 25 Am. Dec. 432.

⁶ Strafford v. Wentworth, 1 Pr. Ch. 555.

See : Rockingham v. Penrice. 1 Pr. Wms. 178.

apportioned between the life tenant and the reversioner or remainderman, giving to each his *pro rata* share according to the time the estate was enjoyed before and after the life tenant's death.¹

SEC. 589. **Same—7. Right to protection against sudden determination of estate.**—The determination of an estate for life being contingent and uncertain, a tenant for life is entitled to protection from its sudden ending, and he or his representatives will be entitled to the emblements or profit of the crops produced by his annual planting and culture.² This is because the estate was determined by the act of God, and it is a well-established rule that *actus Dei nemini facit injuriam*, the act of God does injury to no man ; in other words, no one shall be held responsible in damages for, or made to suffer in his rights because of, such happenings and events as grow out of, and result from, the constitution of nature, which are commonly denominated as “acts of God.”³

¹ See : Price v. Pickett, 21 Ala. 741 ;
Borie v. Crissman, 82 Pa. St. 125 ;
3 Kent Com. (13th ed.) 469, 470.

² **Fruits, the product of permanent roots,**
like grasses, the fruits of trees
and shrubs, and the like, are
not included.

Stewart v. Doughty, 9 John. (N. Y.) 108.

Mere preparation of the soil for crops,
without their having been actually planted when the estate terminates, will not give the tenant a right to emblements.

Price v. Pickett, 21 Ala. 741 ;

Stewart v. Doughty, 9 John. (N. Y.) 108 ;

Thompson v. Thompson, 6 Munf. (Va.) 514.

A tenant for the life of another on the death of the *cestui que vie*, or he on whose life the land is held, after the crop is sown, will be entitled to the emblements. The same is also the rule where a life estate is determined by the act of law.

² Bl. Com. 123.

Where an estate for life is determined by the tenant's own act, as by forfeiture for waste committed, or marriage,—where the estate

is given to a woman during widowhood,—and the like, the tenant, having thus determined the estate by his own act, will not be entitled to take the emblements.

Oland's Case, 5 Co. 116.

³ Chidester v. Consolidated Ditch Company, 59 Cal. 197 ;

Bradley v. Bailey, 56 Conn. 374 ;
s.c. 7 Am. St. Rep. 316 ; 15 Atl.

Rep. 746 ; 1 L. R. A. 427 ;

People v. Utica Cement Co., 22 Ill. App. 159 ;

Ogden v. Robertson, 15 N. J. Eq. (3 J. S. Gr.) 124, 125 ;

State v. Traphagen, 45 N. J. L. (16 Vr.) 134 ;

Smith v. Hance, 11 N. J. L. (6 Halst.) 244, 257 ;

Garretsie v. Van Ness, 2 N. J. L. (1 Penn.) 21, 34 ;

Blumfield's Case, 5 Co. 87a ;

Shelley's Case, 1 Co. 97b ;

Rex v. Edwards, 4 Taunt. 309 ;

Forward v. Pittard, 1 T. R. 27, 33 ;
s.c. 1 Rev. Rep. 142.

By the feudal law, if a tenant for life died between the beginning of September and the end of February, the lord of the manor, who was entitled to the rever-

SEC. 590. **Same—8. Right of alienation.**—One of the most important rights appertaining to a life estate, as well as to an estate in fee-simple,¹ is the power of alienation. While it is true that a tenant for life has merely a limited interest, and cannot, of course, make any disposition of the land to take effect after the determination of his estate, yet such tenant is regarded as the possessor of an independent estate, and unless restrained by the terms of his grant, or through covenant or agreement, may convey the whole estate, or cut it up into any number of small estates, so long as he does not exceed the interest he has in the land.²

SEC. 591. **Same—Same—Restraint on alienation.**—We have heretofore seen that general restraints on alienation of fee-simple estates are void at common law, since the passage of the statute *Quia Emptores* in the year 1290.³ The same rule applies to a general restraint on the alienation of a life estate, either voluntary by the donee or involuntary by process of law.⁴ It is thought that, upon principle, there is no ground upon which, by an arbitrary provision, the grantor or deviser can take away the natural incidents of the estate granted.⁵

sion, was also entitled to the profits of the whole year; but if the tenant died between the beginning of March and the end of August the heirs of the tenant received the whole crop.

2 Bl. Com. 122-123;

Feudal 2, t. 28.

¹ See : *Ante*, § 264, *et seq.*

² *Jackson ex d. Murphy v. Van Hoesen*, 4 Cow. (N. Y.) 325.

³ See : *Ante*, § 284, *et seq.*

⁴ See : *Ante*, §§ 289-291.

⁵ *McCleary v. Ellis*, 54 Iowa 311; s.c. 37 Am. Rep. 205; 6 N. W. Rep. 571;

Rona v. Meier, 47 Iowa 607; s.c. 29 Am. Rep. 493;

Mandlebaum v. McDonnell, 29

Mich. 78.; s.c. 18 Am. Rep. 61;

Hardenburgh v. Blair, 30 N. J. Eq. (3 Stew.) 42;

Anderson v. Carey, 36 Ohio St. 506; s.c. 38 Am. Rep. 602;

McCullough v. Gillmore, 11 Pa. St. 370;

Hooberry v. Harding, 10 Lea (Tenn.) 392;

Turley v. Messengill, 7 Lea (Tenn.) 353;

Davidson v. Chalmers, 33 Beav. 653;

Mildmay's Case, 6 Co. 40;

Stukeley v. Butler, Hob. 168;

Renaud v. Tourangeau, L. R. 2 P. C. 4;

Re Wolstenholme, 43 L. T. 752;

Pierce v. Win, 1 Vent. 321; s.c. Pollexf. 345;

Bradley v. Peixoto, 3 Ves. Jr. 324; s.c. 4 Rev. Rep. 7;

Re Dugdale, 38 Ch. D. 176; s.c. 57 L. J. Ch. 634;

Corbett v. Corbett, 14 P. D. 7; s.c. 57 L. J. P. 97.

In *Bradley v. Peixoto*, 3 Ves. Jr. 324; s.c. 4 Rev. Rep. 7, the Master of the Rolls says: "I have looked into the cases that have been mentioned, and find it laid down as a rule long ago established, that where there

SEC. 592. **Same—Same—Same—Active trust—Pennsylvania doctrine.**—Some of the American cases¹ go far toward upholding a provision prohibiting alienation. It is well settled in Pennsylvania, and perhaps in other states, that a benefactor has the power of restraining the enjoyment of his bounty, through the medium of the trustee, during the life of the beneficiary.² The courts hold that, wherever there is a trust of this nature, it is of necessity an active trust, requiring the legal estate to be vested in the trustee.³ Thus, where there is a devise to a trustee for a life or lives, imposing upon him certain active and continuous duties which are necessary to be performed for the preservation of the remainder, or of the estate granted against the husband or creditors of the donee, or against the improvidence of children, and requiring such trustee to hold the property, and to collect and pay to the beneficiary or otherwise apply the rents and profits, the trust carries with it the legal estate in the lands;⁴ but where the trust imposed consists simply in a direction to permit a third person to receive the rents and

is a gift with a condition inconsistent with and repugnant to such gift, the condition is wholly void."

See, also: *Brandon v. Robinson*, 18 Ves. 429.

¹ See: *Rife v. Geyer*, 59 Pa. St. 393; s.c. 98 Am. Dec. 351; *White v. White*, 30 Vt. 338.

² *Dodson v. Ball*, 60 Pa. St. 492, 496; 100 Am. Dec. 586, 590;

Rife v. Geyer, 59 Pa. St. 593; s.c. 98 Am. Dec. 351;

Girard Life Insurance and Trust Company v. Chambers, 46 Pa. St. 485; s.c. 86 Am. Dec. 513;

Barnett's Appeal, 46 Pa. St. 392; s.c. 86 Am. Dec. 502;

Fisher v. Taylor, 2 Rawle (Pa.) 33;

Holdship v. Patterson, 7 Watts (Pa.) 547;

Vaux v. Parke, 7 Watts (Pa.) 19;

Ashhurst v. Given, 5 Watts & S. (Pa.) 323.

³ *Rife v. Geyer*, 59 Pa. St. 393; s.c. 98 Am. Dec. 351;

Fisher v. Taylor, 2 Rawle (Pa.) 33.

See: *Shankland's Appeal*, 47 Pa. St. 113;

Barnett's Appeal, 46 Pa. St. 399;

s.c. 86 Am. Dec. 502;

Kay v. Scates, 37 Pa. St. 31, 37;

s.c. 78 Am. Dec. 399.

⁴ See: *Locke v. Barbour*, 62 Ind. 577, 584;

Goehring's Appeal, 81* Pa. St. 283;

Ogden's Appeal, 70 Pa. St. 501;

Wells v. McCall, 64 Pa. St. 207, 213;

Sheets' Estate, 52 Pa. St. 257, 267;

Shanklan's Appeal, 47 Pa. St. 113;

Keyser v. Nicholas, 7 Phila. (Pa.) 151;

Cridland's Estate, 7 Phila. (Pa.) 58;

Clarke's Estate, 6 Phila. (Pa.) 163.

Discretion of trustee—Vesting of profits.—It is said by the Supreme Court of Pennsylvania, in the case of *Keyser v. Mitchell*, 67 Pa. St. 473, that where in a trust the direction for payment of rents and profits permits such payments to be made or not, in the trustee's discretion, such rents and profits until paid do not vest in the beneficiary so as to be subject to attachment or execution.

profits, the trust does not carry the legal title, and the estate will vest immediately in the beneficiary.¹

SEC. 593. Same—Same—Same—Withdrawing estate from creditors.—A provision that an equitable fee shall not be subject to the claims of creditors is void;² but a limitation over on alienation or attempt at alienation by the grantee or donee, or on his becoming a bankrupt, is valid,³ and will be more fully discussed hereafter, when we come to treat of trust estates.

SEC. 594. Same—Same—Must be made by deed.—A life estate is a freehold, and all freehold estates can be conveyed only by deed properly executed⁴ and duly sealed.⁵ Calling an instrument a deed and delivering and treating it as such is of no avail, unless it be sealed.⁶

SEC. 595. Same—Same—How great an estate may be conveyed by life tenant.—A life tenant being regarded as possessing a separate estate, as already pointed out,⁷ is entitled to convey the whole or any portion of the estate

¹ Tappan's Appeal, 55 N. H. 317, 321.

² Taylor v. Harwell, 65 Ala. 1; Gray v. Obear, 59 Georgia 675; Gray v. Obear, 54 Georgia 231; Keyser's Appeal, 57 Pa. St. 236.

³ Ancona v. Waddell, 10 Ch. Div. 157; s.c. 26 Moak's Eng. Rep. 594;

Rochford v. Hackman, 9 Hare 475; s.c. 21 L. J. (N. S.) Ch. 511; 10 Eng. L. & Eq. 64;

Craven v. Brady, L. R. 4 Ch. 296; Cox v. Fonblanque, L. R. 6 Eq. 482;

Roffey v. Bent, L. R. 3 Eq. 759; Oldham v. Oldham, L. R. 3 Eq. 404;

White v. Chitty, L. R. 1 Eq. 372.

⁴ See: Stewart v. Clark, 54 Mass. (13 Met.) 79; Jackson ex d. Gouch v. Wood, 12 John. (N. Y.) 73;

People ex rel. Norton v. Gillis, 24 Wend. (N. Y.) 201;

Jackson ex d. McCrea v. Mancius, 2 Wend. (N. Y.) 357, 365.

⁵ Barger v. Hobbs, 67 Ill. 592; Pile v. McBratney, 15 Ill. 314;

McCable v. Hunter, 7 Mo. 355; Underwood v. Campbell, 14 N.

H. 393;

Goodyear v. Vosburgh, 57 Barb. (N. Y.) 243; s.c. 39 How. Pr. 377;

Jackson ex d. Wadsworth v. Wendell, 12 John. (N. Y.) 355;

Jackson ex d. Gouch v. Wood, 12 John. (N. Y.) 73;

People ex rel. Norton v. Gillis, 24 Wend. 201.

⁶ Deming v. Bullitt, 1 Blackf. (Ind.) 241;

State v. Peck, 53 Me. 284, 299; Mill Dam Foundry v. Hovey, 38 Mass. (21 Pick.) 417;

Bradford v. Randall, 22 Mass. (5 Pick.) 496;

Alexander v. Polk, 39 Miss. 737; Davis v. Brandon, 2 Miss. (1 How.) 154;

Atlantic Dock Company v. Leavitt, 54 N. Y. 35;

Mackay v. Bloodgood, 9 John. (N. Y.) 285;

Warren v. Lynch, 5 John. (N. Y.) 239;

Wadsworth v. Wendell, 5 John. Ch. (N. Y.) 224;

Taylor v. Glazer, 2 Serg. & R. (Pa.) 502.

⁷ See: *Ante*, § 590.

which he possesses.¹ If the tenant for life should attempt to create a greater estate than he himself possesses—as to convey by deed in fee-simple—the instrument must necessarily be void, upon the principle that *nemo dat quod habet*. If the party entitled to the inheritance should join in the deed with the tenant for life, however, the instrument will convey the entire inheritance. Under the English common law, if a tenant for life conveyed a greater estate than he was by law entitled to, such conveyance worked a forfeiture of his estate to the next person entitled in remainder or reversion ; for the reason that by such conveyance the tenant for life put an end to his original interest, and the act, in its nature, tended to divert the expectant estate in the remainder or reversion.²

SEC. 596. **Same—Same—Passes by assignment for benefit of creditors.**—A proviso in a deed or bequest, that the property shall not be subject to the debts or contracts of the grantee or legatee, he being of full age and competent to contract debts, but that the same shall remain in his possession for his sole use during his life, with remainder over, is void ;³ and such a life estate will pass by assignment under insolvent laws.⁴

SECTION II.—DUTIES INCIDENT TO LIFE ESTATES, TENURES, ETC.

SEC. 597. Duties of tenants of life estates—1. To defend title—Praying in aid.

SEC. 598. Same—2. To pay taxes—a. Ordinary taxes.

SEC. 599. Same—Same—b. Betterments.

SEC. 600. Same—3. To make repairs.

SEC. 601. Same—Same—Exception to the rule

SEC. 602. Same—4. To keep down interest.

SEC. 603. Same—Same—Former rule.

SEC. 604. Same—Same—Rule as to widows.

SEC. 605. Same—5. To pay incumbrances.

SEC. 606. Same—Same—Apportionment of incumbrances.

SEC. 607. Same—Same—Rule where widow is life tenant.

SEC. 608. Same—6. To insure.

¹ Jackson ex d. Murphy v. Van Hoesen, 4 Cow. (N. Y.) 325.

² See : Post, § 614.

³ See : Ante, §§ 591, 592.

⁴ See : Verdier v. Youngblood, Rich. (S. C.) Eq. Cas. 220 ; s.c. 24 Am. Dec. 417.

- SEC. 609. Tenure of estate for life.
- SEC. 610. Permanent improvements—Rights of parties.
- SEC. 611. Same—Exceptions to the rule.
- SEC. 612. Partition by life tenant.
- SEC. 613. Forfeiture of life estate.
- SEC. 614. Same—1. By conveying in fee.
- SEC. 615. Same—2. By adverse possession.
- SEC. 616. Same—3. By waste.
- SEC. 617. Valuation of life estate.
- SEC. 618. Same—English rule.
- SEC. 619. Same—American rule.
- SEC. 620. Merger of life estates.
- SEC. 621. Same—Estates *pur autre vie*.
- SEC. 622. Termination of life estate.
- SEC. 623. Same—Exception to the rule.
- SEC. 624. Same—Presumption of death.

SECTION 597. Duties of tenants of life estates—1. To defend title—Praying in aid.—There are certain duties incumbent upon the tenant of a life estate, among which is that of defending the title of the estate, when it is attacked in any of the real actions at common law which concluded the title. The reason for this is because the interests of the reversioner or remainderman might be affected by the judgment rendered in such an action against the tenant for life. At common law, in all real actions, a tenant for life might call for the assistance of the persons entitled to the inheritance to assist him in the defense of his title; because the tenant for life is generally presumed to have in his custody the muniments of title and evidences necessary to establish the right to the inheritance.¹ This was technically called “praying in aid.” The life tenant was not obliged to “pray in aid,” but being in law the proper tenant of the *præcipe*, might go on and defend without resorting to or calling in the aid of the owner of the inheritance, except those whose estates were dependent on the result of the action.²

The custom of “praying in aid” formerly existed in this country, as in Massachusetts, where it has been dis-

¹ See : Scanlan v. Wright, 30 Mass. (13 Pick.) 523 ; s.c. 25 Am. Dec. 344 ;

Hathaway v. Spooner, 26 Mass. (9 Pick.) 23 ;

2 Bl. Com. 428 ;
Booth's Real Act. 60.

² See : 1 Prest. Est. 207, 208 ;
Stern's Real Act. 99 ;
Termes de la Ley, “Aid.”

continued by the abolition of the writs of right;¹ and in England the custom passed away with the abolition of the real actions.²

SEC. 598. Same—2. To pay taxes—a. Ordinary taxes.—Another duty of the tenant of a life estate is to pay and keep down the ordinary taxes assessed upon the land during the continuance of his estate.³ Should the tenant of the life estate neglect or refuse to pay the ordinary taxes assessed against the land during his life, the remainderman or reversioner may make application to a court and have a receiver appointed to collect the rents and income, and apply so much thereof as may be necessary to the payment of such taxes and costs.⁴ In some of the states, as in Ohio, non-payment of taxes by a life tenant works a forfeiture of the estate.⁵ Where the life tenant neglects or refuses to pay the taxes, and suffers the land to be sold therefor, and buys it in at the sale, he will not be allowed to set up the tax title against

¹ See: Mass. Pub. Stat., c. 173, § 1; Stern's Real Act. 103.

² See: 1 Prest. Est. 207; 1 Spence Eq. Jur. 207.

³ See: *Prettyman v. Walston*, 34 Ill. 175, 192;

Fox v. Long, 8 Bush (Ky.) 551;

Johnson v. Smith, 5 Bush (Ky.) 102;

Varney v. Stevens, 22 Me. 331;

Plympton v. Boston Dispensary, 106 Mass. 544, 547;

Pierce v. Burroughs, 34 N. H. 304;

Jonas v. Hunt, 40 N. J. Eq. (13 Stew.) 660;

Cadmus v. Combes, 37 N. J. Eq. (10 Stew.) 264;

Thomas v. Evans, 105 N. Y. 601, 612; s.c. 59 Am. Rep. 519; 12 N. E. Rep. 571; 7 Cent. Rep. 804;

25 Cent. L. J. 77;

Deraismes v. Deraismes, 72 N. Y. 154;

Cairns v. Chabert, 3 Edw. Ch. (N. Y.) 312;

Fleet v. Dorland, 11 How. Pr. (N. Y.) 489;

Wade v. Malloy, 16 Hun (N. Y.) 226;

Re Miller's Estate, 1 Tuck. (N. Y.) 346;

McDonald v. Heylin, 4 Phila. (Pa.) 73;

Piper's Estate, 2 W. N. C. 711;

Jewell's Estate, 1 W. N. C. 404;

Phelan v. Boylan, 25 Wis. 686;

Patrick v. Sherwood, 4 Blatchf. C. C. 112;

Newby v. Brownlee, 23 Fed. Rep. 320;

Pike v. Wassell, 94 U. S. 711; bk. 24 L. ed. 307, 310;

Fontaine v. Pellet, 1 Ves. Jr. 337.

⁴ See: *Sidenberg v. Ely*, 90 N. Y. 257, 264; s.c. 11 Abb. N. C. (N. Y.) 358; *

Cairns v. Chabert, 3 Edw. Ch. (N. Y.) 312.

⁵ See: *Lessee of McMillan v. Robbins*, 5 Ohio 28.

* This case is partially reported in 43 Am. Rep. 163, but the editor in his superior wisdom has cut out, as unimportant, all the matter relating to this point, and simply gives that portion of the opinion which deals

with the right of a mortgagee to pay taxes and add the amount to the mortgage debt where the mortgagor refuses and neglects to do so, and there is no provision in the mortgage giving such a power.

the reversioner or remainderman,¹ because that would be allowing him to take advantage of his own fraud,² which is not permissible. Under such circumstances courts will presume that the life tenant made the purchase for the joint benefit of himself and the reversioner or remainderman.³

SEC. 599. **Same—Same—b. Betterments.**—The rule that the tenant for life must keep down taxes does not apply to extraordinary assessments for permanent improvements or betterments of the land, such as an assessment levied upon the laying out of a road;⁴ although such assessment is a tax, yet it is an extraordinary assessment for betterments laid upon the premises, in view of the permanent increased value of the estate by reason of the improvement.⁵ For this reason the assessment must be treated, as between the tenant for life and the remainderman or reversioner, as an incumbrance on the whole estate, to which the tenant for life must contribute to the extent of interest on the amount paid during his life, and at his death the remainderman to bear the charge of the principal. Equity apportions the burden upon the land between the tenant who has the present enjoyment of the property and the remainderman whose right of enjoyment is postponed until the death of the life tenant.⁶

¹ See : *Ante*, § 576.

² *Patrick v. Sherwood*, 4 Blatchf. C. C. 112.

³ See : *Prettyman v. Walston*, 34 Ill. 175, 192 ;

Varney v. Stevens, 22 Me. 331, 334 ;

Whitney v. Salter, 36 Minn. 103 ; s.c. 1 Am. St. Rep. 656 ; 30 N. W. Rep. 755.

⁴ It is said in the case of *Peck v. Sherwood*, 56 N. Y. 615, that a municipal assessment for the flagging of sidewalks is not in the nature of an annual tax, to be paid entirely by a tenant for life of the premises assessed. Nor is it such a permanent improvement as that he should not contribute to its payment, but it should be apportioned between him and the remainderman.

Sec : *Thomas v. Evans*, 105 N.

Y. 601, 612 ; s.c. 59 Am. Rep. 519 ; 12 N. E. Rep. 571 ; 7 Cent. Rep. 804 ; 26 Cent. L. J. 77 ;

Peck v. Sherwood, 56 N. Y. 615 ; *Stillwell v. Doughty*, 2 Bradf. (N. Y.) 311 ;

Fleet v. Dorland, 11 How. Pr. (N. Y.) 489 ;

Dewitt v. Cooper, 18 Hun (N. Y.) 67 ;

Gunning v. Carman, 3 Redf. (N. Y.) 69 ;

Estate of Miller, 1 Tuck. (N. Y.) 346.

⁵ See : *Plympton v. Boston Dispensary*, 106 Mass. 544, 547 ; *Codman v. Johnson*, 104 Mass. 491 ; *Harvard College v. Alderman of Boston*, 104 Mass. 470.

⁶ *Peck v. Sherwood*, 56 N. Y. 615 ; *Cairns v. Chabert*, 3 Edw. Ch. (N. Y.) 312 ;

King v. King, 9 Jones & S. (N. Y.) 516.

But this rule as to contribution between the life tenant and the remainderman or reversioner must be confined to such assessments as are for permanent improvements ; consequently in those cases where the improvement is required by a local ordinance or statute, and from its nature is of such a character that it will require frequent renewals, the expense of making the improvement is to be paid by the life tenant alone.¹

SEC. 600. **Same—3. To make repairs.**—Another duty incumbent upon a life tenant is to keep the property in repair so far as may be necessary to prevent its running to decay and ruin.² He must keep the premises in as good repair as he received them ;³ if a roof is needed, he is bound to put it on ; if paint wears off, he is bound to repaint.⁴ If the life tenant receives a house in a state of dilapidation, which can be rendered habitable by repairs, he is bound to make them,⁵ if it can be done without expending an extraordinary sum ;⁶ and if the house is in such a state as not to be repairable, or in such dilapidation that the expenses of repairs would be beyond the value of the house, the life tenant is not bound to repair, and may leave the house or other building to its natural destruction.⁷

SEC. 601. **Same—Same—Exception to the rule.**—To the general rule, stated in the preceding section, that if a new roof is needed the life tenant is bound to put it on,

See: *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231 ;

Fleet v. Dorland, 11 How. Pr. (N. Y.) 489 ;

Bloodgood v. Clark, 4 Paige Ch. (N. Y.) 574.

¹ *Hitner v. Ege*, 23 Pa. St. 305.

See: *Whyte v. Mayor of Nashville*, 2 Swan (Tenn.) 364, in which this distinction seems to have been overlooked.

² *Executors of Kearney v. Kearney*, 17 N. J. Eq. (2 C. E. Gr.) 59 ; Id. 504 ;

Clemence v. Steere, 1 R. I. 272 ; s.c. 53 Am. Dec. 621 ;

Cochran v. Cochran, 2 Des. (S. C.) 521 ;

Brough v. Higgins, 2 Gratt. (Va.) 408.

³ **Natural wear and tear not excepted**, say the New Jersey Court of Chancery.

In re Steele, 19 N. J. Eq. (4 C. E. Gr.) 120.

⁴ *In re Steele*, 19 N. J. Eq. (4 C. E. Gr.) 120.

See: *Wilson v. Edmonds*, 24 N. H. (4 Post.) 517 ;

Piper's Estate, 2 N. W. C. 711.

⁵ *Clemence v. Steere*, 1 R. I. 272 ; s.c. 53 Am. Dec. 621.

⁶ *Wilson v. Edmonds*, 24 N. H. 517 ; *Brooks v. Brooks*, 12 S. C. 422.

Clemence v. Steere, 1 R. I. 272 ; s.c. 53 Am. Dec. 621 ;

Wilson v. Edmonds, 24 N. H. (4 Post.) 517 ;

Brooks v. Brooks, 12 S. C. 422.

there is an exception in those cases where the estate consists of a room or rooms, in a dwelling or other building, which are not located in juxtaposition to the roof ; neither will the tenant be liable to contribute toward the expense of making such repairs.¹ The reason for this is because such life tenant and the other owners or occupiers of the dwelling are simply adjoining tenants, with as essentially separate and distinct interests as if they were one by the side of the other.² Thus in the case of *Wiggin v. Wiggin*,³ it was held that a tenant for life of lower rooms of a house and chambers above is not obliged to share in the expenses of repairing the roof of the building, unless incurred at his request. In this case the will gave to the plaintiff, to use an occupancy during her life, all the westerly lower room in the testator's house, the chamber over it, and the northerly front lower room. The defendant was the owner of the reversion, and also of the rest of the house. It was claimed by counsel that the plaintiff and defendant were like tenants in common, and that the plaintiff was bound to repair her part of the house. The court say : "If this were so we find no authority that would sanction the making of the repairs by one tenant, without the request of the other, and the recovery of a share of the expenses in assumpsit. In such case the remedy at common law is by writ *de reparatione facienda*.⁴ So where one's house is ruinous and likely to fall on his neighbor's house, the same remedy is said to exist,⁵ and an action on the case will lie for the neglect to repair by reason of which his neighbor

¹ *Cheeseborough v. Green*, 10 Conn.

318 ; s.c. 26 Am. Dec. 396 ;

Ottumwa Lodge v. Lewis, 34

Iowa 67 ; s.c. 11 Am. Rep. 135 ;

Loring v. Bacon, 4 Mass. 575.

See : *Adams v. Marshall*, 138 Mass.

228, 238-9 ; s.c. 52 Am. Rep.

271 ;

Culvert v. Aldrich, 99 Mass. 74 ;

s.c. 96 Am. Dec. 693 ;

Wiggin v. Wiggin, 43 N. H. 561 ;

s.c. 80 Am. Dec. 192.

² *Cheeseborough v. Green*, 10 Conn.

318 ; s.c. 26 Am. Dec. 396 ;

McCormick v. Bishop, 28 Iowa

233, 237 ;

Stockwell v. Hunter, 52 Mass.

(11 Met.) 448 ; s.c. 45 Am. Dec.

220, 222 ;

Proprietors of Meeting-house v.

City of Lowell, 42 Mass. (1 Met.)

541 ;

Loring v. Bacon, 4 Mass. 575.

³ 43 N. H. 561 ; s.c. 80 Am. Dec.

192.

⁴ See : *Bowles' Case*, 11 Co. 79, 82 ;

Tenant v. Goldwin, 1 Salk. 360 ;

1 Co. Litt. (19th ed.) 54b ; 2 Id.

200b ;

4 Kent Com. (13th ed.) 370.

⁵ 1 Co. Litt. (19th ed.) 56b.

is injured ;¹ but here the parties are not tenants in common at all, but the plaintiff is seized of certain rooms and the defendant of the remainder of the house ; and in legal contemplation each has a distinct dwelling-house, although they are adjoining ; and no authority is cited or found that would sustain an action at law, by one against the other, to recover for repairs made without request. In *Loring v. Bacon*,² the defendant was seized of a lower room and cellar under it, and the plaintiff of the chamber above and the remainder of the house ; and repairs to the roof being necessary, the defendant, on request, refused to join in making them ; whereupon the plaintiff made them and brought assumpsit for a share of the expense. It was held, upon full examination of the authorities, that the action would not lie, and that the defendant was not bound to contribute to the expense ; but that the case stood like that of owners of separate but contiguous houses or mills, where the appropriate remedy, in case one suffers his building to become ruinous and to endanger or injure the other, is by writ *de reparatione facienda*, or action on the case. So in *Cheeseborough v. Green*,³ where the plaintiff owned and occupied the foundation and the first and second stories of a building, and the defendant the third story and roof, which had become leaky and ruinous, whereby the plaintiff's goods were injured, it was held that an action on the case would not lie, but the remedy must be sought in equity."⁴

SEC. 602. **Same—4. To keep down interest.**—Another duty charged by equity upon the life tenant is that of keeping down, during the continuance of the estate, the interest upon any incumbrance affecting the inheritance, which incumbrance existed at the time of entering upon the estate.⁵ This doctrine arises from a reasonable rule

¹ 1 Co. Litt. (19th ed.) 56b, note 2 ;
Fitzh. N. B. 127, note a.

² 4 Mass. 575.

³ 10 Conn. 319 ; s.c. 26 Am. Dec. 396.

⁴ See, also : *Campbell v. Mesier*, 4 John. Ch. (N. Y.) 334 ; s.c. 8 Am. Dec. 570 ;

Kent's Com. 371-412.

⁵ *Barnum v. Barnum*, 42 Md. 251 ;
Thomas v. Thomas, 17 N. J. L. (2 Harr.) 356 ;

Moseley v. Marshall, 22 N. Y. 200 ;
rev'g s.c. 27 Barb. (N. Y.) 42 ;
Cogswell v. Cogswell, 2 Edw. Ch. (N. Y.) 231 ;

in equity, the object of which is to make every part of the ownership of real estate bear a ratable part of all incumbrances thereon, and to apportion the burden equitably between the parties.¹ The tenant for life contributes only during the time he enjoys the estate,² and must keep down the interest during that time even though to do this the rents and profits of the estate be exhausted.³ But the life tenant will not be required to pay towards the interest on the incumbrance anything beyond the amount of the rents accruing, and should he do so he will be a creditor of the estate to the amount of such excess.⁴ And if the profits of a property given for life, and then over, are taken for payment of debts, the tenant for life may claim, from the remaindermen or reversioners, a contribution, in proportion to their respective interests.⁵ The interest of the tenant for life is ascertained according to the common life tables.⁶ The incumbrance, however, must be a substantial claim during the existence of the life estate; consequently where a

Jones v. Sherrard, 2 Dev. & B. (N. C.) Eq. 179;

McDonald v. Heylin, 4 Phila. (Pa.) 73;

Jewell's Estate, 1 W. N. C. 404;

Hunt v. Watkins, 1 Humph. (Tenn.) 498;

White v. White, 4 Ves. 24; s.c. 4 Rev. Rep. 61; on appeal, 9 Ves. 554; s.c. 4 Rev. Rep. 175;

Penrhyn v. Hughes, 5 Ves. 99.

¹ 4 Kent Com. (13th ed.) 74.

² The former English rule was that the rents and profits of an estate for life should be applied not only in payment of all interest due during the possession of the tenant for life, but also all interest due before the commencement of that estate.

See: *Tracy v. Hereford*, 2 Bro. C. C. 128;

Penrhyn v. Hughes, 5 Ves. 99.

The later English decisions, however, have held that where the estate, subject to a charge bearing interest, is limited to several persons in succession as tenants for life, each tenant for life is liable only for the interest for his own time; but that to liquidate the arrears

during his own time, he must furnish, if necessary, all the rents during the whole of his life.

Caulfield v. Maguire, 2 Jones & La T. (Ir. Ch.) 141.

³ See: *Caulfield v. Maguire*, 2 Jones & La T. (Ir. Ch.) 141;

4 Kent Com. (13th ed.) 74, 75.

⁴ See: *Doane v. Doane*, 46 Vt. 485; *Kensington v. Bouverie*, 7 DeG. M. & G. 134.

⁵ See: *Chesson v. Chesson*, 8 Ired. (N. C.) Eq. 141.

⁶ See: *Barnum v. Barnum*, 42 Md. 251;

Wade v. Malloy, 16 Hun (N. Y.) 226;

Hunt v. Watkins, 1 Humph. (Tenn.) 498;

Foster v. Hilliard, 1 Story C. C. 77;

Casborne v. Scarfe, 1 Atk. 606;

Tracy v. Hereford, 2 Brown C. C. 128;

Burges v. Mawbey, Turn. & R. 167;

Penrhyn v. Hughes, 5 Ves. 99;

Amesbury v. Brown, 1 Ves. Sr. 477, 480;

Revel v. Watkinson, 1 Ves. 93.

debt which is a charge upon the land is not established until after the death of the life tenant, his estate cannot be called upon to contribute to the payment of either principal or interest.¹

If a mortgage or other incumbrance is called in by the mortgagee, or other incumbrancer, the reversioner or remainderman must pay his just proportion.² If the life tenant is required to contribute toward the payment of a part of the principal, he will be entitled to a credit for the amount of money so paid by him, as against the remainderman or reversioner,³ with the qualification of not receiving interest during his life.⁴

SEC. 603. **Same—Same—Former rule.**—The old rule was that the life estate was to bear one-third part of the entire indebtedness on the land in addition to the annual interest, and the remainderman the residue;⁵ but Sir RICHARD PEPPER ARDEN, Master of the Rolls, in the case of *White v. White*,⁶ denounced this doctrine to be a most absurd rule, and declared the annual interest alone, arising during the tenant's estate, his just proportion.

SEC. 604. **Same—Same—Rule as to widows.**—The rule in equity above referred to,⁷ the object of which is to make every part of the ownership of real estate bear a ratable part of the incumbrances upon such estate, requires a widow holding a dower interest in encumbered lands, to keep down one-third part of the accruing interest,⁸ because she has the present possession and enjoyment of the estate in but one-third of the land.⁹ And where the

¹ *Poindexter's Exrs. v. Green's Exrs.*, 6 Leigh (Va.) 504.

² *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231.

³ *Hunt v. Watkins*, 1 Humph. (Tenn.) 498.

⁴ See: *Earl of Buckinghamshire v. Hobart*, 3 Swanst. 186, 199.

⁵ See: *Faulkner v. Daniel*, 3 Hare 199, 217;

Ballet v. Sprainger, Prec. in Ch. 62;

Rives v. Rives, Prec. in Ch. 21;

Rowel v. Walley, 1 Rep. in Ch. 219;

County of Shrewsbury v. Earl of

Shrewsbury, 1 Ves. Jr. 227, 233.

4 Ves. 24, 32; s.c. 4 Rev. Rep. 161, 169.

⁷ See: *Ante*, § 602.

⁸ *House v. House*, 10 Paige Ch. (N. Y.) 158, 164.

⁹ *Swaine v. Perine*, 5 John. Ch. (N. Y.) 482; s.c. 9 Am. Dec. 318.

See: *McMahon v. Russell*, 17 Fla. 698, 705;

Gibson v. Crehore, 22 Mass. (5 Pick.) 146;

Pollard v. Noyes, 68 N. H. 185; s.c. Atl. Rep. ;

Norris v. Morrison, 45 N. H. 490;

mortgage is given for purchase money of the property in which the dower estate is held, when the mortgage is required to be paid off, the widow must contribute towards such payment a sum which will be equal to the then value of an annuity of the amount of one-third of the interest upon the sum unpaid at her husband's death for the residue of her life.¹

SEC. 605. **Same—5. To pay incumbrances.**—Although a tenant for life is charged with the important duty of keeping down the interest of any incumbrance on the land during the continuance of the estate, he is not required to pay off the principal, or any part of it; that is to be done by the owner of the inheritance,² otherwise the life estate might not only be of no value, but even a burden. If the life tenant, however, pays off the incumbrance of his own accord, he will be presumed to have done so for the benefit of himself and the reversioner or remainderman, who is bound to contribute his portion, and for which contribution the life tenant has a lien on the land;³ but if he is compelled to pay off the incumbrance, or to contribute thereto, he will become the creditor of the estate to the amount of the incumbrance paid or contribution made,⁴ less the interest he would have been required to pay during his term as tenant for life.⁵

SEC. 606. **Same—Same—Apportionment of incumbrances.**—

- Woods v. Wallace, 30 N. H. (10 Fost.) 384; ³ Daviess v. Meyers, 13 B. Mon. (Ky.) 511.
Hastings v. Stevens, 29 N. H. (9 Fost.) 564; ⁴ Mosely v. Marshall, 27 Barb. (N. Y.) 42; s.c. 22 N. Y. 200;
Rossiter v. Cossit, 15 N. H. 38; Cogswell v. Cogswell, 2 Edw. Ch. (N. Y.) 231;
Cass v. Martin, 6 N. H. 25; Jones v. Sherrard, 2 Dev. & B. (N. C.) Eq. 179.
Denton v. Nanny, 8 Barb. (N. Y.) 618, 621; Compare: King v. Morris, 2 B. Mon. (Ky.) 99, 104;
Gunning v. Carman, 3 Redf. (N. Y.) 69, 71. Hunt v. Watkins, 1 Humph. (Tenn.) 498;
House v. House, 10 Paige Ch. (N. Y.) 158, 166. Wainright v. Hardisty, 2 Beav. 363.
See: Bell v. New York, 10 Paige Ch. (N. Y.) 49.
² House v. House, 10 Paige Ch. (N. Y.) 158. ⁵ Mosely v. Marshall, 27 Barb. (N. Y.) 42; s.c. 22 N. Y. 200;
See: Mosely v. Marshall, 22 N. Y. 200; Warley v. Warley, 1 Bailey (S. C.) Eq. 397;
Warley v. Warley, 1 Bail. (S. C.) Eq. 397. Saville v. Saville, 2 Atk. 463;
4 Kent Com. (13th ed.) 76.

Where the incumbrance on the land subject to a life estate is paid off, the amount of money required for that purpose will be apportioned. Formerly, as we have before seen,¹ the life estate was required to bear one-third, and the inheritance two-thirds, of the burden ; but this has been discarded as unreasonable, and the general rule which prevails in this country at the present time in regard to the apportionment of the contribution toward paying off incumbrances, between the life tenant and the remainderman or the reversioner, is that the life tenant shall contribute in proportion to the benefit he receives from the liquidation of the debt.²

SEC. 607. Same—Same—Same—Rule where widow the life tenant.—Where a widow is the life tenant the question is how she is to contribute ratably to the discharge of the mortgage, if the estate in fee, in one equal third part of the premises, ought to pay the one equal third part of the mortgage debt and interest, then what proportion ought the widow's life estate in that one-third part to pay ? This question is fully discussed by Chancellor KENT, in the case of *Swaine v. Perine*,³ where it is said that as she "has only a life interest in the dower, and payment of the entire one-third of that debt would be unjust, it would be making her pay for a life estate equally as if it was an estate in fee. The more accurate rule would appear to be, that she should keep down one-third of the interest of the mortgage debt, by paying, during her life, to the defendant, to be computed from the date of such payment ; but as it would be inconvenient and embarrassing to charge her with such annuity, then let the value of such an annuity from the plaintiff (her age and health considered) be ascertained by one of the masters of the court, and be deducted from the amount of the rents and profits so coming to her ; and if that value should exceed the amount of the rents and profits so coming to her, that then the residue of such

¹ See : *Ante*, § 603.

² *Whiting v. Salter*, 36 Minn. 103 ;

s.c. 1 Am. St. Rep. 656 ; 30 N. W. Rep. 755.

See : 1 Story Eq. Jur. (13th ed.) 487.

³ 5 John. (Ch. (N. Y.) 482 ; s.c. 9 Am. Dec. 318, 324.

value be deducted from the dower to be assigned to her, out of the house and land mentioned in the bill."

SEC. 608. **Same—6. To insure.**—While a life tenant has an insurable interest in the buildings on the land to which the life estate attaches, yet it is no part of his duty to procure insurance thereon for the benefit of the remainderman or reversioner.¹ But if he neglects to do so and buildings are destroyed through his carelessness, he will be required to rebuild. Where insurance is desirable each party should pay for the insurance of his respective estate;² and where such insurance has been taken out, and there is a partial loss, either the life tenant or the remainderman or reversioner has the right to require that the money received in payment for the loss sustained shall be applied to the repair of the property.³ Where such property has been insured and there is a total loss, the insurance money takes the place of the property, and the life tenant will be entitled to the interest during his life, and after his death the remainderman or reversioner will take the principal.⁴

SEC. 609. **Tenure of estate for life.**—We have already seen that tenants for life hold of their grantors by fealty,⁵ and that the possession of the tenant for life, like the possession of the tenant for a term of years, is considered the possession of the reversioner or remainderman,⁶ so far as to prevent the raising of an adverse estate;⁷ but the statute of limitation does not begin to run against the reversioner or remainderman during the existence of the particular estate.⁸ No acts or laches on the part of the

¹ As to insurance, see: *Kearney's Exrs. v. Kearney*, 17 N. J. Eq. (2 C. E. Gr.) 59; *Id.* 504; *Peck v. Sherwood*, 56 N. Y. 615, 618; *Graham v. Roberts*, 8 Ired. (N. C.) Eq. 99; *Brough v. Higgins*, 2 Gratt. (Va.) 408.

² *Kearney's Exrs. v. Kearney*, 17 N. J. Eq. (2 C. E. Gr.) 59; *Id.* 504.

³ *Brough v. Higgins*, 2 Gratt. (Va.) 408.

⁴ See: *Graham v. Roberts*, 8 Ired. (N. C.) Eq. 99;

Haxall's Exrs. v. Shippen, 10 Leigh (Va.) 536; s.c. 34 Am. Dec. 745.

⁵ See: *Ante*, § 574.

⁶ *Grout v. Townsend*, 2 Hill (N. Y.) 554.

⁷ See: *Ante*, § 575.

⁸ *McCorry v. King's Heirs*, 3 Humph. (Tenn.) 267; s.c. 39 Am. Dec. 165.

See: *Jackson ex d. Swartwout v. Johnson*, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433;

Bradford v. Caldwell, 2 Head (Tenn.) 496;

tenant for life can affect the interest of the party entitled in reversion or remainder ;¹ consequently a forfeiture of the estate by the act of the tenant for life will not affect the interest of the reversioner or remainderman, who will not be bound to enter until the natural terminus of the life estate.²

SEC. 610. Permanent improvements—Rights of parties.—While a tenant for life is bound to keep the premises in repair, yet he has no right or power to make repairs or permanent improvements at the expense either of the remainderman, reversioner, or the inheritance ;³ and if the remainderman or reversioner makes improvements of a permanent character on the land during the existence of the life estate, such improvements become real estate, and inure to the benefit of the life tenant.⁴

SEC. 611. Same—Exceptions to the rule.—To the general rule above stated, however, there are exceptions. Thus, where the donor of a life estate has commenced an improvement permanently beneficial to the estate, and the life tenant goes on and completes it, the remainderman or reversioner may be required to contribute to the expenses thereof,⁵ and the expense of putting into tenantable repair an estate for life is chargeable on the estate at large, while the keeping of it in repair after putting in tenantable condition is chargeable on the life tenant,⁶

- Woodson *v.* Smith, 1 Head (Tenn.) 276, 277 ;
 Williams *v.* Conrad, 11 Humph. (Tenn.) 412 ;
 Jackson *ex d.* Erwin *v.* Moore, Cow. (N. Y.) 706, 727 ; s.c. 7 Am. Dec. 398 ;
 Jackson *ex d.* McCrea *v.* Mancius, 2 Wend. (N. Y.) 357, 369 ;
 Fogal *v.* Pino, 10 Bosw. (N. Y.) 113.
¹ Jackson *ex d.* Hardenbergh *v.* Schoonmaker, 4 John. (N. Y.) 390.
² Jackson *ex d.* McCrea *v.* Mancius, 2 Wend. (N. Y.) 357.
³ Sohler *v.* Eldridge, 103 Mass. 345, 351 ;
 Thurston *v.* Dickinson, 2 Rich. (S. C.) Eq. 317 ; s.c. 46 Am. Dec. 56.
 See : Austins *v.* Stevens, 24 Me. 520 ;
 Merritt *v.* Scott, 81 N. C. 385 ;
 Thompson *v.* Bostick, McMull (S. C.) Eq. 75 ;
 Dellet *v.* Whitmere, Chev. (S. C.) Eq. 213.
Compare : Ex parte Palmer, 2 Hill (S. C.) Eq. 215.
⁴ Cooper *v.* Adams, 60 Mass. (6 Cush.) 87.
 See : Poor *v.* Oakman, 104 Mass. 309, 317.
⁵ Sohler *v.* Eldridge, 103 Mass. 345.
 See ; Parsons *v.* Winslow, 16 Mass. 361 ;
Ex parte Palmer, 2 Hill (S. C.) Eq. 215, 217.
⁶ Parsons *v.* Winslow, 16 Mass. 361 ;
 Sohler *v.* Eldridge, 103 Mass. 345, 351.

and where the life tenant has made an improvement for the benefit of himself and the remainderman or reversioner, and the property is subsequently sold to promote the interest of both, the life tenant is entitled to be allowed the value of the improvement at the time of the sale.¹

SEC. 612. *Partition by tenant for life.*—A tenant for life as well as for years, both in law and in equity, can compel a partition, but he cannot compel the reversioner or remainderman to join him, neither can he occasion a compulsory partition binding after the terminus of his estate.² The statutes of the various states of the Union uniformly provide that partition may be made on the application of a tenant for life.³ In Indiana the owner of a life estate in a moiety of lands may compel a partition and, if necessary, a sale of such lands.⁴

SEC. 613. *Forfeiture of life estates.*—At common law, estates for life may be forfeited because of certain acts done or omitted to be done by the tenant;⁵ as where the tenant undertakes to convey by feoffment and livery of seisin an estate in fee-simple,⁶ because this act constitutes a renunciation of the feudal connection between the life tenant and his lord, and the person in remainder or reversion could enter for the forfeiture.⁷ At common law, if the tenant for life levied a fine or suffered a common recovery, this worked a forfeiture of his estate;⁸ and this

¹ *Gambril v. Gambril*, 3 Md. Ch. 259.

² *Boal v. Mix*, 17 Wend. (N. Y.) 119; s.c. 31 Am. Dec. 285;

Gaskell v. Gaskell, 6 Sims. 643;

Austin v. Rutland R. Co., 45 Vt. 215;

Wills v. Slade, 6 Ves. 498;

Baring v. Nash, 1 Ves. & B. 551.

See: *Doe v. Exrs. of Dungan*, 8 Ohio 87; s.c. 31 Am. Dec. 432.

³ See: *Ackerly v. Dygert*, 33 Barb. (N. Y.) 176, 189;

Van Arsdale v. Drake, 2 Barb. (N. Y.) 599, 600.

⁴ *Shaw v. Beers*, 84 Ind. 528.

⁵ 2 Co. Litt. (19th ed.) 251;

2 Bl. Com. 274.

See: *Stump v. Findlay*, 2 Rawle

(Pa.) 168; s.c. 19 Am. Dec. 632;

Ackland v. Lutley, 9 Ad. & E. 879; s.c. 36 Eng. C. L. 457.

⁶ See: *French v. Rollins*, 21 Me. 372;

Jackson ex d. McCrea v. Mancius, 2 Wend. (N. Y.) 357;

Redfern v. Middleton, 1 Rice (S. C.) L. 459.

⁷ See: *Gil. Ten.* 38; *Wright, Ten.* 203.

⁸ *Grant v. Chase*, 17 Mass. 446; s.c. 9 Am. Dec. 161;

Stump v. Findlay, 2 Rawle (Pa.) 168; s.c. 19 Am. Dec. 632.

See: *Salmon v. Claggett*, 3 Bland. Ch. (Md.) 125, 172;

Dawson v. Dawson, 1 Rice (S. C.) L. 243;

is the case whether the common recovery were valid or void.¹

SEC. 614. **Same—1. By conveying in fee.**—The common-law doctrine respecting forfeiture of a life estate by attempting to convey a greater estate than the tenant held, which had its origin and reason in the feudal system, has never been adopted in this country;² and there is no good reason for maintaining it under our system of government;³ consequently a deed of conveyance by a tenant for life purporting to convey the title in fee passes the life estate, the largest estate the tenant could lawfully grant,⁴ but does not forfeit the estate to the reversioner or remainderman,⁵ the rule being that a deed by the tenant for life, purporting to give a greater estate than that of which he is seized, passes the estate that he possesses, and is void as to the residue;⁶ this is on the principle that *nemo dat quod non habet*. A life tenant not being able to transfer more or a greater estate than he has,⁷ it follows that a conveyance by a life tenant in fee will not affect remainders, though in form contingent.⁸ In a case where the husband becomes seized of an estate by the curtesy, and during the life of his wife assumes to convey the fee of the land, and puts his grantee in possession, the conveyance of the husband is a valid transfer

Pelham's Case, 1 Co. 15;
Stump v. Findlay, 2 Rawle (Pa.)
108; s.c. 19 Am. Dec. 632, 637.

¹ Smith v. Packhurst, 3 Atk. 135.

² It seems that in some of the original thirteen states conveyance by feoffment, with livery to seizement, worked forfeiture.

See: Grout v. Townsend, 2 Hill (N. Y.) 554;

Jackson ex d. McCrea v. Mancius,
2 Wend. (N. Y.) 357;

Pendleton v. Vandevier, 1 Wash.
(Va.) 381.

³ Koltenbrock v. Cracraft, 36 Ohio
St. 584, 590;

Carpenter v. Denoon, 29 Ohio St.
379, 398.

See: Rogers v. Moore, 11 Conn.
553;

Martin v. Sterling, 1 Root (Conn.)
210;

Robinson v. Miller, 1 B. Mon.
(Ky.) 88, 94;

Quimby v. Dill, 40 Me. 528;

Griffin v. Fellows, 81* Pa. St. 114;

McKee v. Pfout, 3 U. S. (3 Dal.)
486; bk. 1 L. ed. 690.

⁴ See: Rogers v. Moore, 11 Conn.
553, 557;

Robinson v. Miller, 1 B. Mon.
(Ky.) 88, 94;

Quimby v. Dill, 40 Me. 528;

Griffin v. Fellows, 81* Pa. St. 114;

McKee v. Pfout, 3 U. S. (3 Dal.)
486; bk. 1 L. ed. 690.

⁵ Carpenter v. Denoon, 29 Ohio St.
379.

⁶ McCorry v. King's Heirs, 3 Humph.
(Tenn.) 267; s.c. 39 Am. Dec.
165.

⁷ Davis v. Whitesides, 1 Bibb (Ky.)
510, 512;

Jackson ex d. McCrea v. Mancius,
2 Wend. (N. Y.) 537;

Pendleton v. Vandevier, 1 Wash.
(Va.) 381.

⁸ Smith v. Cooper, 59 Ala. 494.

to the extent of his estate,¹ and if he survives his wife the statute of limitations does not commence to run against her heirs until the termination of his life estate.²

SEC. 615. **Same.—2. By adverse possession.**—A tenant for life may forfeit his estate by permitting an adverse possession thereon for the statutory period, in which case he can neither recover the land himself nor by transfer of his claim enable any one else to do so before the termination of his life estate, because adverse possession for the period prescribed by the statute of limitations gives a perfect title.³

¹ *Koltenbrock v. Cracraft*, 36 Ohio St. 584, 589.

² See : *Van Arsdall v. Fauntelroy*, 7 B. Mon. (Ky.) 401 ;
Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74 ;
Koltenbrock v. Cracraft, 36 Ohio St. 584, 589 ;
Denny v. McCabe, 35 Ohio St. 576, 578 ;
Carpenter v. Denoon, 29 Ohio St. 398 ;
Clark v. Clark, 20 Ohio St. 128 ;
Lessee of Thompson v. Green, 4 Ohio St. 217 ;
Lessee of Borland v. Marshall, 2 Ohio St. 308 ;
Lessee of Canby v. Porter, 12 Ohio 81 ;
King v. Nutall, 7 Baxt. (Tenn. 221, 226 ;
Gillespie v. Worford, 2 Cald. (Tenn.) 641.

³ *Moore v. Luce*, 29 Pa. St. 260 ; s.c. 72 Am. Dec. 629 ;
Hole v. Rittenhouse, 19 Pa. St. 306 ;
Pederick v. Searle, 5 Serg. & R. (Pa.) 236, 240 ;
Watson v. Gregg, 10 Watts (Pa.) 295 ; s.c. 36 Am. Dec. 176.
 See : *Beverly v. Burke*, 9 Ga. 440 ; s.c. 54 Am. Dec. 351 ;
Moody v. Fleming, 4 Ga. 115 ; s.c. 48 Am. Dec. 210 ;
Fitzhugh v. Crighan, 2 J. J. Marsh. (Ky.) 429 ; s.c. 19 Am. Dec. 139 ;
Trotter v. Cassidy, 3 A. K. Marsh. (Ky.) 365 ; s.c. 13 Am. Dec. 183 ;
Taylor v. Buckner, 2 A. K. Marsh. (Ky.) 18 ; s.c. 12 Am. Dec. 354 ;
Webbs v. Hynes, 9 B. Mon. (Ky.)

388 ; s.c. 50 Am. Dec. 515 ;
Berthelemy v. Johnson, 3 B. Mon. (Ky.) 90 ; s.c. 38 Am. Dec. 179 ;
School District v. Benson, 31 Me. 381 ; s.c. 52 Am. Dec. 618 ;
Stump v. Henry, 6 Md. 201 ; s.c. 61 Am. Dec. 300 ;
Alexander v. Walter, 8 Gill (Md.) 239 ; s.c. 50 Am. Dec. 688 ;
Jackson v. Pixley, 63 Mass. (9 Cush.) 490 ; s.c. 57 Am. Dec. 64 ;
Stevenson's Heirs v. McReary, 20 Miss. (12 Smed. & M.) 9 ; s.c. 51 Am. Dec. 102 ;
Strimpfler v. Roberts, 18 Pa. St. 283 ; s.c. 57 Am. Dec. 606 ;
Brown v. McKinney, 9 Watts (Pa.) 565 ; s.c. 36 Am. Dec. 139 ;
University of Vermont v. Reynolds's Exrs., 3 Vt. 542 ; s.c. 23 Am. Dec. 234.

The question of adverse possession is one for the jury and not for the court.

Beverly v. Burke, 9 Ga. 440 ; s.c. 54 Am. Dec. 351, 356 ;
Graham v. Cammamm, 2 Cai. (N. Y.) 168, 169 ;
Foot v. Wiswall, 14 John. (N. Y.) 304, 307 ;
Jackson v. Wood, 12 John. (N. Y.) 242 ; s.c. 7 Am. Dec. 315 ;
Springstein v. Schermerhorn, 12 John. (N. Y.) 357 ;
Jackson ex d. Gillespy v. Woolsey, 11 John. (N. Y.) 446 ;
Jackson v. McCall, 10 John. (N. Y.) 377, 380 ; s.c. 6 Am. Dec. 343 ;
Smith d. Teller v. Lorillard, 10 John. (N. Y.) 338 ;
Jackson v. Price, 10 John. (N. Y.) 414, 417 ;
Doe ex d. Clinton v. Campbell, 10 John. (N. Y.) 475 ;

SEC. 616. *Same*—3. *By waste*.—The forfeit of a life estate by permissive waste is a matter that will be fully discussed later on in section seven of this chapter.

SEC. 617. *Valuation of life estate*.—It is sometimes important to ascertain the value of a life estate, to the end that the proceeds arising from the sale of the land to which the life estate attaches may be divided equitably between the life tenant and the remainderman, or that an incumbrance or burden upon the land may be properly apportioned.¹ While it is impossible to ascertain the absolute value of the life estate until after the death of the life tenant, yet that value can be approximated by taking into consideration all the contingencies and surrounding circumstances.

SEC. 618. *Same*—English rule.—The ascertaining and fixing of the value of a life estate came before the English Court of Chancery at an early date, and they valued the life estate at one-third and the remainder at two-thirds of the fee.² This rule was adhered to by that court until the year 1718,³ with the single exception of *James v. Hales*,⁴ in which case a decree apportioning the burden of paying off an incumbrance directed that the life tenant pay two-fifths and the remainderman three-fifths of the amount. These were purely arbitrary rules formed

Smith d. Teller v. Burtis, 9 John. (N. Y.) 174 ;

Jackson ex d. Jadwin v. Joy, 9 John. (N. Y.) 102 ;

Frier v. Jackson ex d. Van Allen, 8 John. (N. Y.) 490 ;

Jackson ex d. Stoutenburgh v. Murray, 7 John. (N. Y.) 5 ;

Van Gordon v. Jackson, 5 John. (N. Y.) 440, 467 ;

Jackson ex d. Jones v. Striker, 1 John. Cas. (N. Y.) 284, 289 ;

Wallace v. Duffield, 2 Serg. & R. (Pa.) 527 ; s.c. 7 Am. Dec. 660 ;

Brenton v. Cannon, 1 Bay (S. C.) 482 ;

Armstrong v. Toler, 24 U. S. (11 Wheat.) 258, 267 ; bk. 6 L. ed. 468, 471 ;

Hinde's Lessee v. Longworth, 24 U. S. (11 Wheat.) 199, 209 ; bk. 6 L. ed. 454, 456 ;

Dunlop v. Ball, 6 U. S. (2 Cr.) 180, 184 ; bk. 2 L. ed. 246, 248 ;

Etting v. Bank of the United States, 24 U. S. (11 Wheat.) 59,

75 ; bk. 6 L. ed. 419, 422 ;

Bright v. Eynon, 1 Burr. 397 ;

Doe d. Fishar v. Prosser, 1 Cowp. 217 ;

Mayor of Kingston v. Horner, 1 Cowp. 103.

¹ See : *Ante*, § 606.

² *Rowel v. Walley*, 1 Ch. Rep. 219.

³ See : *Cornish v. Mew*, 1 Cas. Ch. 271 ;

Flud v. Flud, Freem. Ch. 210 ;

Ballet v. Spranger, Prec. Ch. 62 ;

Lock v. Lock, 2 Vern. 666 ;

Thynn v. Duvall, 2 Vern. 117 ;

Clyat v. Batteson, 1 Vern. 404 ;

Brent v. Best, 1 Vern. 69.

⁴ 2 Vern. 267.

without taking into consideration the condition and health of the life tenant and other circumstances which would affect the tenant and value of the life estate. A rule based upon the probability of the life tenant was formulated in the case of *Freemoult v. Dedire*,¹ which was followed until the year 1879, when the one-third rule was put aside as unjust and most absurd.² The present rule is greatly aided by the use of the standard life tables.³

SEC. 619. Same—American rule.—The courts of this country have resorted to various methods by which to determine the value of a life estate,⁴ but the prevailing rule requires that regard must be had to all the surroundings and circumstances of the case in estimating the value of a life estate; such as the age, health, and habits of the life tenant, the rental value of the land, and the probable amount of taxes and cost of repairs.⁵ One trouble attending the ascertaining of the value of the life

¹ 1 Pr. Wms. 429.

² *White v. White*, 4 Ves. 24, 32; s.c. 4 Rev. Rep. 161, 169; *Nightingale v. Lawson*, 1 Bro. C. C. 440.

³ See: *Stone v. Theed*, 2 Bro. C. C. 243; *Heathcote v. Paignon*, 2 Bro. C. C. 167; *Griffith v. Spratley*, 1 Cox 389; *Penrhyn v. Hughes*, 5 Ves. 107; *White v. White*, 4 Ves. 24; s.c. 4 Rev. Rep. 161.

⁴ **Seven years' rule.**—In an early South Carolina case the court declared a life estate to be worth seven years' purchase, and to arrive at its value, directed the interest to be computed on the value of the whole fee for seven years, and said that interest on the several sums of annual interest from the time the estimation was made should be deducted; and with the rate of interest at seven per cent., that the present value of an estate for life is a fraction more than thirty-five per cent. of the value of the absolute estate.

See: *Garland v. Executors of Crow*, 2 Bailey (S. C.) 24.

Probabilities rule.—In the early Maryland cases the court took into consideration the probab-

ilities and had regard for the age and health of the widow as ingredients in fixing the valuation of her life estate.

Cassanave v. Brooke, 3 Bland. Ch. (Md.) 267, note;

Greenwood v. Clarke, 3 Bland. Ch. (Md.) 268, note.

Sliding scale valuation.—In some of the states, as in Maryland, a sliding scale of valuation in life estates has been adopted by the courts varying from the case of a healthy person under 30 years of age, whose estate is valued at half of the fee, to that of a healthy person over 77, whose estate is valued at three-twentieths of the fee.

See: *Williams' Case*, 3 Bland. Ch. (Md.) 186, 221.

⁵ *Sagar v. Eckert*, 3 Ill. App. 412; *Greer v. Mayor of New York*, 1 Abb. Pr. (N. Y.) N. S. 206; *Swaine v. Perine*, 5 John. Ch. (N. Y.) 482; s.c. 9 Am. Dec. 318;

Gunning v. Carman, 3 Redf. (N. Y.) 69;

Jones v. Sherrard, 2 Dev. & B. (N. C.) Eq. 179;

Shippen's Appeal, 80 Pa. St. 391; *Carnes v. Polk*, 5 Heisk. (Tenn.) 244.

estate is the fluctuation in the price of land¹ and the unauthoritativeness of the mortality tables. In fixing the valuation of an estate the value should be taken as at the time when the burden fell upon the estate, or the land was sold.

SEC. 620. **Merger of life estates.**—An estate for life is subject to merger in the inheritance. This merger takes place whenever the life estate and the inheritance unite in one and the same person in the same rank, without any intermediate estate.² This rule at law is inflexible; but where the interest of the parties, or the rights of strangers, not parties to the act that would otherwise work an extinguishment of the particular estate, require it, the estate will still have a separate continuance in contemplation of law.³ Merger is not favored in equity, and will not take place where the continuance of the life estate is necessary to the protection of the owners of the inheritance, though there would be a merger in law.⁴ The question is usually regarded in equity as depending on the intention of the parties in whom the interests are united. An intention to merger will not be presumed in the absence of evidence, if such merger is against the interest of the party owing the inheritance.⁵

When a tenant for life acquires the absolute property or inheritance of the lands to which the life estate attaches, his estate becomes merged or drowned in the

¹ See: *Atkins v. Kron*, 8 Ired. (N. C.) Eq. 1;

Sagar v. Eckert, 3 Ill. App. 412;

Greer v. Mayor of New York, 1

Abb. Pr. (N. Y.) 206;

Gunning v. Cannon, 3 Redf. (N. Y.) 69;

Shippen's Appeal, 80 Pa. St. 391.

² *Allen v. Anderson*, 44 Ind. 395;

Fox v. Long, 8 Bush (Ky.) 551;

James v. Moorey, 2 Cow. (N. Y.)

246; s.c. 14 Am. Dec. 475;

Moore v. Luce, 29 Pa. St. 260;

s.c. 72 Am. Dec. 629;

Pratt v. Bank of Bennington, 10

Vt. 293; s.c. 33 Am. Dec. 201.

³ *Huebsch v. Scheel*, 81 Ill. 281;

Edgerton v. Young, 43 Ill. 464;

Purdy v. Huntington, 42 N. Y.

334;

Bascom v. Smith, 34 N. Y. 320;

Champney v. Coope, 32 N. Y. 543;

Skeel v. Spraker, 8 Paige Ch. (N. Y.) 182;

Millspaugh v. McBride, 7 Paige

Ch. (N. Y.) 509;

Moore v. Luce, 29 Pa. St. 260;

s.c. 72 Am. Dec. 629.

⁴ *Dougherty v. Jack*, 5 Watts (Pa.)

456; s.c. 30 Am. Dec. 335.

⁵ *Huston v. Wickersham*, 8 Watts

(Pa.) 523;

Dougherty v. Jack, 5 Watts (Pa.)

456; s.c. 30 Am. Dec. 335;

Penington v. Coats, 6 Whart.

(Pa.) 283;

Helmbold v. Man, 4 Whart. (Pa.)

422;

Richards v. Ayers, 1 Watts & S.

(Pa.) 485, 487.

fee-simple ;¹ and where the remainderman acquires, by lease or otherwise, the preceding life estate, the life estate is merged in the inheritance, and he becomes the absolute owner in fee.²

SEC. 621. **Same—Estates pur autre vie.**—An estate *pur autre vie*³ is also subject to merger in an estate for a man's own life, the latter being to him the more valuable, and in legal contemplation the greater estate. Thus where an estate is limited to a person for the life of another, with remainderman to himself for his own life, the first estate is merged.⁴

SEC. 622. **Termination of life estate.**—An estate for life in this country terminates only with the natural death of the person,⁵ there being no such thing in this country as the civil death of the English law. Monastic seclusion does not exist in this country, bills of attainder are prohibited by the constitution, and no crime works corruption of blood or the forfeiture of an estate.⁶

SEC. 623. **Same—Exception to the rule.**—While a life estate will, generally speaking, endure as long as the life for which it was granted, there are cases where estates for life may determine upon future contingencies, before the life for which they are created expires.⁷ Thus where an estate is granted to another so long as certain salt-works shall be maintained thereon,⁸ or as long as the grantee shall keep a furnace and buildings on the land,⁹ or until the rents and profits shall discharge certain claims,¹⁰ or to a widow *durante viduitate*,¹¹ or to a man and woman during coverture,¹² or as long as they shall

¹ 1 Co. Inst. 338b.

² *Pynchon v. Stearns*, 52 Mass. (11 Met.) 312 ; s. c. 45 Am. Dec. 210.

³ See: *Post*, section III. of this chapter.

⁴ *Bowles' Case*, 11 Co. 83b ;
Abbot of Bury v. Bokenham,
Dyer 7, 10b.

⁵ *Williams v. Caston*, 1 Strobb. (S. C.) L. 130.

⁶ See: *Walker Am. Law* (9th ed.) 326.

⁷ 2 Bl. Com. 121.

⁸ *Hurd v. Cushing*, 24 Mass. (7 Pick.) 169, 174.

⁹ *Cook v. Bisbee*, 35 Mass. (18 Pick.) 527.

¹⁰ *People ex rel. Norton v. Gillis*, 24 Wend. (N. Y.) 201 ;
1 Co. Litt. (19th ed.) 42a ;
4 Kent Com. (13th ed.) 26.

¹¹ *Roseboom v. Van Vechten*, 5 Den. (N. Y.) 414, 424.

¹² *Jackson v. Myers*, 3 John. (N. Y.) 388 ; s. c. 3 Am. Dec. 504.

live in a certain house ;¹ in all of which cases the grantee takes an estate for life, determinable upon the happening of the event on which the contingency is made to depend.²

SEC. 624. **Same—Presumption of death.**—A presumption of the death of the person to whom an estate is granted for life arises from the absence of the person from the state, without being heard from, for seven years.³ Such absence merely furnishes ground for presuming the party to be dead, and absence for a shorter period is not sufficient to raise that presumption.⁴ The only presumption arising from such absence is that the party is dead, if he has not been heard of in seven years ; not that he died at any time within the seven years, not even on the last day ;⁵ the time of the death, whenever a material matter, is a fact subject to distinct proof.⁶ A mere fail-

¹ *Jackson v. Myers*, 3 John. (N. Y.) 388 ; s.c. 3 Am. Dec. 504.

² 2 Bl. Com. 121 ;

1 Co. Litt. (19th ed.) 42a ;

4 Kent Com. (13th ed.) 26.

³ *Ashbury v. Sanders*, 8 Cala. 62 ; s.c. 68 Am. Dec. 300 ;

Rockland v. Morrill, 71 Me. 457 ;

Stevens v. McNamara, 36 Me. 176 ;

s.c. 58 Am. Dec. 740 ;

Commonwealth v. Thompson, 88 Mass. (6 Allen) 591 ;

Loring v. Steineman, 42 Mass. (1 Met.) 204, 211 ;

Newman v. Jenkins, 27 Mass. (10 Pick.) 515 ;

McCartee v. Campbell, 1 Barb. Ch. (N. Y.) 455 ;

Lewis v. Mobely, 4 Dev. & B. (N. C.) L. 323 ; s.c. 34 Am. Dec. 379 ;

State ex rel. Spencer v. Moore, 11 Ired. (N. C.) L. 160 ; s.c. 53 Am. Dec. 401 ;

Hershey v. Shenk, 58 Pa. St. 382, 385 ;

Holmes v. Johnson, 42 Pa. St. 159, 164 ;

Miller v. Bates, 3 Serg. & R. (Pa.) 490 ; s.c. 8 Am. Dec. 658 ;

Burr v. Sim, 4 Whart. (Pa.) 150 ; s.c. 33 Am. Dec. 50.

Civil and canon law rule.—Under the civil law death is never presumed from mere absence, because an absentee is presumed

to live until the contrary is proved, or until he has attained the age of one hundred years ; that is to say, the most remote period of the ordinary life of man.

Hayes v. Berwick, 2 Mart. (La.) 138 ; s.c. 5 Am. Dec. 727 ;

1 Denisart 13, "Verbo Absens." The same rule prevailed by the canon law.

Whart. Conf. L., § 133.

Hall v. Commonwealth, Hard. (Ky.) 479 ;

Spurr v. Taimble, 1 A. K. Marsh. (Ky.) 278 ;

Newman v. Jenkins, 27 Mass. (10 Pick.) 515 ;

Wainbourn v. Schank, 2 N. J. L. (1 Penn.) 229 ;

McCombe v. Wight, 5 John Ch. (N. Y.) 263 ;

Innis v. Campbell, 1 Rawle (Pa.) 373 ;

Woods v. Woods, 2 Bay (S. C.) L. 476 ;

Batin v. Bigelow, 1 Pet. C. C. 452 ;

Doe d. Knight v. Nepean, 5 Barn. & Ad. 86 ; s.c. 27 Eng. C. L. 45.

⁵ *McCartee v. Camel*, 1 Barb. Ch. (N. Y.) 455, 462 ;

State ex rel. Spencer v. Moore, 11 Ired. (N. C.) L. 160 ; s.c. 53 Am. Dec. 401.

⁶ *Smith v. Smith*, 49 Ala. 156 ;

ure to hear from an absent person for seven years, where such person is known to have a fixed place of residence abroad, is not sufficient to raise the presumption of his death, unless due inquiry has been made at his place of residence abroad without getting information respecting him.¹

SECTION III.—ESTATES PUR AUTRE VIE.

- SEC. 625. Definition of the estate.
 SEC. 626. Quantum of the estate.
 SEC. 627. Nature of interest in the estate.
 SEC. 628. Methods by which estate created.
 SEC. 629. Rights of tenants—Alienation, devise, and entail.
 SEC. 630. Same—Right to estovers.
 SEC. 631. Occupancy—1. Corporeal hereditaments—a. General occupancy.
 SEC. 632. Same—Same—Same—Abolition by statute.
 SEC. 633. Same—Same—b. Special occupancy.
 SEC. 634. Same—Same—Same—Who may be special occupants.
 SEC. 635. Same—2. Incorporeal hereditaments.
 SEC. 636. Termination of estate.

SECTION 625. **Definition of the estate.**—An estate for life is granted either for a person's own life or for the life or lives of another person or persons. Where the estate is held for the life of another person it is technically called an estate *pur autre vie*,² and the person for whose life

McDowell v. Simpson, 1 Houst. (Del.) 467;
 Doe v. Flanagan, 1 Ga. 538;
 Whiting v. Nicholl, 46 Ill. 230, 234;
 Spurr v. Taimble, 1 A. K. Marsh. (Ky.) 278;
 Stevens v. McNamara, 36 Me. 176; s.c. 58 Am. Dec. 740;
 Flynn v. Coffee, 94 Mass. (12 Allen) 133;
 Loring v. Steineman, 42 Mass. (1 Met.) 204;
 Lancaster v. Washington Life Insurance Company, 62 Mo. 121;
 Hancock v. American Life Insurance Company, 62 Mo. 26;
 Smith v. Knowlton, 11 N. H. 191;
 McCartee v. Camel, 1 Barb. Ch. (N. Y.) 455;
 Stouvenel v. Stephens, 2 Daly (N. Y.) 319;

Spencer v. Roper, 13 Ired. (N. C.) L. 333;
 State ex rel. Spencer v. Moore, 11 Ired. (N. C.) L. 160; s.c. 53 Am. Dec. 401;
 Gibbes v. Vincent, 11 Rich. (S. C.) L. 333;
 Priinn v. Stewart, 7 Tex. 178;
 Davie v. Briggs, 97 U. S. 628; bk. 24 L. ed. 1086;
 Montgomery v. Bevans, 1 Sawy. D. C. 653.
¹ Wentworth v. Wentworth, 71 Me. 74;
 Stevens v. McNamara, 36 Me. 176; s.c. 58 Am. Dec. 740.
² 2 Bl. Com. 120, 259;
 Belts' Sup. to Ves. Sr., vol. II., p. 41;
 1 Co. Litt. (19th ed.) 42a;
 10 Viner Abr. 296.

the estate is granted is technically called the *cestui que vie*.¹ This estate is derived from the estate for life by being signed over to another person ; and though it probably arose from, or was suggested by, the assignment of the estate for life, at common law it did not necessarily arise by assignment, but admitted of being created *de novo* by express limitation. This estate is terminated by the death of the *cestui que vie*, and not by that of the grantee or donee. At common law where an instrument creating an estate did not provide for the disposition of the estate in case of the death of the tenant before the *cestui que vie*, the remaining portion of the term did not descend to the heir or personal representative, but to the first taker, to the exclusion not only of such heir and personal representative but also of the remainderman.² Such estates were frequent under the common law, but are seldom met with in this country. Now and then, however, a case occurs where a tenant for life disposes of his estate for the full remainder of his term.

SEC. 626. **Quantum of the estate.**—As regards the *quantum* of estates *pur autre vie* they may be limited to endure—

1. During the life of a single person ;
2. During the joint lives of several persons ; or
3. During the life of the longest liver of several persons.

SEC. 627. **Nature of interest in the estate.**—Estates *pur autre vie* are regarded as the lowest estates of freehold, not of inheritance, a man can have, being estimated of less value than estates for a man's own life,³ because of the possibility one man may have of outliving another. An estate *pur autre vie* has been said to be a descendible estate, but this is questioned by Chancellor Kent.⁴ The estate is merely a freehold interest *sub modo*, or for certain purposes, and partakes of the nature of personal

¹ 2 Bl. Com. 258, 259 ;

1 Co. Litt. (19th ed.) 42a.

² See : *Post*, §§ 631–633.

³ 2 Bl. Com. 120 ;

1 Co. Litt. (19th ed.) 42a ;

4 Kent Com. (13th ed.) 26.

⁴ See : 4 Kent Com. (13th ed.) 27.

estates in all other respects.¹ In some of the states, as in New York,² estates *pur autre vie*, whether limited to heirs or otherwise, are admitted to be freeholds only during the life of the grantee or devisee, and after his death are regarded and treated as chattels real.³

SEC. 628. **Methods by which estate created.**—An estate *pur autre vie* may be created in three different ways, to wit: (1) By express limitation either to a grantee or devisee simply during the life of the *cestui que vie*, or to a grantee or devisee and his heirs during such life; (2) by an assignment to another person of an existing estate for life, whether there is an express limitation either to the grantee simply, or to him and his heirs during the life of the *cestui que vie*; or (3) by operation of law, as under the common law where an estate for the term of the life of an attainted traitor, who was entitled to an estate for his own life, was by forfeiture cast upon the king, or where a limitation was simply to a man during the life of the *cestui que vie*, upon the death of such tenant the possession was cast upon the general occupant,⁴ as is hereinafter most specifically pointed out.⁵

SEC. 629. **Rights of tenants—Alienation, devise, and entail.**—At common law a tenant *pur autre vie* had an absolute right to alienate *inter vivos*, whether his heir was entitled as special occupant or not, and if the heir was entitled as special occupant, the estate of the assignee was not affected by the death of the assignor;⁶ but such tenant could not devise the property by will, and if he attempted to do so the heirs of his body took as special occupants, by virtue of the gift that created the life estate, in preference to the devisee of such tenant.⁷ Neither could an estate *pur autre vie* be entailed by

¹ Mosher v. Yost, 33 Barb. (N. Y.) 277;

Doe v. Laxton, 6 Durnf. & E. (6 T. R.) 289.

² N. Y. Rev. St. (8th ed.) 2431, § 6; 3 Rev. St., Codes & L. 2526, § 73. See: Reynolds v. Collin, 3 Hill (N. Y.) 441, 442.

³ Reynolds v. Collin, 3 Hill (N. Y.) 441, 442.

⁴ See: Challis' Real Prop. 286.

⁵ See: Post, § 630.

⁶ Challis' Real Prop. 290.

⁷ See: Dillon v. Dillon, 1 Ball & B. 95;

Allen v. Allen, 2 Dreu. & W. 307;

Gray v. Mannock, 2 Edn. 341;

Campbell v. Sandys, 1 Sch. & Lef. (Irish) 281.

virtue of the statute *De Donis*, not being a hereditament;¹ but such estates are susceptible of limitation in the nature of a *quasi* entail, which, if not destroyed by the act of some *quasi* tenant in tail, give rise to a *quasi* descent resembling the descent of an estate-tail.²

SEC. 630. **Same—Right to estovers.**—At common law every tenant *pur autre vie* had the same right to estovers as a tenant for his own life;³ but such tenant holding under a settlement had no rights of user, or power to deal with the land, other than those possessed by the lessee *pur autre vie* holding merely under a lease of rent.⁴

SEC. 631. **Occupancy—1. Corporeal hereditaments—a. General occupancy.**—By the common law, where a tenant *pur autre vie* died during the life of the *cestui que vie*, the estate did not go to his executors, because it was a freehold and not a chattel interest; it did not descend to his heir, because the estate was not one of inheritance; and it did not go to the reversioner, because the previous estate had not yet expired. Consequently the first person who entered on the land, after the death of the tenant, might lawfully retain the possession thereof as long as the *cestui que vie* lived, by right of occupancy. Such a tenant was called a “general occupant.”⁵ Where the king had the reversion, however, the right of occupancy was not allowed; for if the king’s title and a subject’s concurred, the king was always preferred against the subject, and for that reason there could be no prior occupant.⁶

SEC. 632. **Same—Same—Same—Abolition by statute.**—The right of general occupancy was practically abolished in England by the statutes of Charles II.⁷ and of George

¹ See: *Gray v. Mannock*, 2 Edn. 339.

² *Mogg v. Mogg*, 1 Mer. 654.

³ 1 Co. Litt. (19th ed.) 41b.

⁴ *Challis’ Real Prop.* 286.

⁵ 2 Bl. Com. 258;

1 Co. Litt. (19th ed.) 41b;

Williams’ Exrs. 570.

⁶ 2 Bl. Com. 259;

1 Co. Litt. (19th ed.) 41b.

See: *Geary v. Bearcroft*, O.

Bridg. 484.

⁷ 29 Char. II., c. 3, § 12, which provided that any estate *pur autre vie* shall be devisable by will, and if no such devise thereof be made, the same should be chargeable by the heir, for it shall come to him by reason of special occupancy, as assets by descent, as in case of lands in

II.;¹ and the provisions of these statutes of Charles II. and George II. have been re-enacted in several of the United States. In those states where no express provision is found on the subject, these estates seem to be regarded as real estate of the deceased tenant, and go in the course of distribution.²

SEC. 633. **Same—Same—b. Special occupancy.**—At common law the right of general occupancy could be exercised only where there were no persons designated in the grant who could take as special occupants. There were many cases at common law where persons became special occupants of land under circumstances growing out of the relation of such occupants to the estate, and for that reason took it to the exclusion of any general occupant or mere strangers. Thus where a grant was to a man and his heirs, or the heirs of his body during the life of another person, no general right of occupancy could arise, for the reason that the heir or heirs of the body might, and still may, on the death of the ancestor, enter and hold the possession as special occupants, having exclusive right by the term of the original contract to occupy the lands during the residue of the estate granted.³ And where the tenant *pur autre vie* made a lease of the estate at will, the tenant under such being in possession at the death of his lessor held as a species of special occupant, as against a general occupant, though he would be required to yield possession to the special occupant who was also the heir of the tenant.⁴

fee-simple, and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands.

¹ 14 Geo. II., c. 20, § 9, which, after reciting the statute of Charles II. above given, and that doubts had arisen where no devise had been made of such estate, to whom the surplus of such estate should belong, enacted, "that such estate *pur autre vie*, in case there be no special occupant thereof, of which

no devise shall have been made according to the said act, or so much thereof as shall not have been so devised, shall go, to be applied, and distributed in the same manner as the personal estate of intestate."

² See: 2 Kent Com. (18th ed.) 26, 27; Walker's Am. L. (9th ed.) 275.

³ Doe ex d. Jeff v. Robinson, 8 Barn. & C. 296; s.c. 15 Eng. C. L. 150;

Atkinson v. Baker, 4 Durnf. & E. (4 T. R.) 229, 231; s.c. 2 Rev. Rep. 366, 368;

2 Bl. Com. 259, 260.

⁴ 1 Co. Litt. (19th ed.) 41b;

SEC. 634. **Same—Same—Same—Who** may be special occupants.—It is thought that although the heir of an estate *pur autre vie* takes as special occupant by the nomination of the grantor and not by inheritance, that the heir, and not the executor or administrator, could be named as special occupant in the grant ;¹ however, if the heir and executor are both named in the grant, the heir has the special occupancy.² Where the heirs of the body are named as special occupants in the body of the grant, the naming of them affects the *quantum* of the estate, which is less than the *quantum* of a similar estate limited to the heirs general. Thus, if a tenant for his own life makes a lease to the immediate reversioner and the heirs of his body during the life of the tenant for life, this will be no surrender.³ The possibility that there may be a failure of the heirs of the reversioner's body, by his death without issue during the lifetime of a tenant for life, gives to the latter a reversion upon his own grant, so that the last-mentioned grant is only the grant of an under-lease, which is therefore incapable of merger in the reversioner's estate.⁴ Since the passage of the statute of frauds, the question whether personal representatives may be named as special occupants has no importance so far as freehold lands are concerned, because if there is no special occupant, such special representatives take the estate as a freehold by force of the statute.⁵

SEC. 635. **Same—2. Incorporeal hereditaments.**—At common law things which lie in grant, and of which, therefore, no possession could be taken, there could be no

Com. Dig., tit. "Estates by Grant," f. 1.

¹ *Campbell v. Sandys*, 1 Sch. & Lef. (Ir.) 281, 289 ;
1 Co. Litt. (19th ed.) 41b, Harg. n. 4 ;

Com. Dig., tit. "Estates by Grant," f. 1.

Compare : 1 Sug. Pow. (7th ed.) 233, note.

² *Atkinson v. Baker*, 4 Durnf. & E. (4 T. R.) 229, 231 ; s.c. 2 Rev. Rep. 366, 368.

³ 3 Prest. Conv. 22.

⁴ Challis' Real Prop. 289.

⁵ *Oldham v. Pickering*, 2 Salk. 464 ;

s.c. Carth. 376.

Before the case of *Ripley v. Wentworth*, 7 Ves. 425, an idea that personal representatives might be named as special occupants seems to have appeared by way only of casual surmise (3 Atk. 466 ; 2 Ven. 719).

In this case Lord Eldon inclined toward the same opinion, but as the question was not involved in the discussion, his opinion was *obiter dictum*. Since the passage of the statute of frauds, the question is purely one of historical criticism.

general occupancy;¹ consequently an administrator could not be a special occupant of a rent, advowson, or the like,² but of such things there might be at common law, and still may be, special occupancy.³

SEC. 636. **Termination of estate.**—An estate *pur autre vie* is terminated not by the death of the grantee, but by that of the *cestui que vie*, which may be established in the same manner as the death of a person to whom an estate is granted for his own life.⁴ In the case of *Clark v. Owens*,⁵ the lease was for the longest of three lives, and provided that if the lessor after reasonable search and inquiry could not find any of the lives named to continue in existence, he might re-enter after a year's notice thereof, unless the tenant should within that period produce evidence of the continuance of the life before a judge of the Court of Common Pleas. In discussing the question of what is evidence of the death of the *cestui que vie*, the court held it to be a question of fact, whether, under the circumstances, reasonable search and inquiry had been made by the lessor; and said that reputation among the family and relatives of the person on whose life the term depended was admissible to prove his death.

SECTION IV.—HOW ESTATES FOR LIFE CREATED.

- SEC. 637. Conventional and legal estates.
- SEC. 638. Estates for life by implication.
- SEC. 639. Creation by deed.
- SEC. 640. Same—Words of limitation.
- SEC. 641. Same—What creates life estate.
- SEC. 642. Created by devise.
- SEC. 643. Same—Words which carry life estate.
- SEC. 644. Same—Same—Raised by implication.
- SEC. 645. Same—Enlarging estate to a fee.
- SEC. 646. Same—Same—Devise with power of disposition.
- SEC. 647. Same—Same—Words in preamble.

SECTION 637. Conventional and legal estates.—Estates for

¹ 1 Co. Litt. (19th ed.) 41b.

² *Salter's Case*, Cro. Eliz. 901; s.c. Yelv. 9.

³ Challis' Real Prop. 290.

⁴ See: *Ante*, §§ 622, 623, 624.

⁵ 18 N. Y. 434.

life are either conventional or legal estates ;¹ that is, they have been created either by the acts of the parties, as by deed or devised by will ; or by operation of the law, as the husband's right to curtesy, the wife's right to dower, and estates-tail after possibility of issue is extinct. Where an estate for life is created by an act of the parties, it arises in one of the following ways :

1. By express limitation to a grantee during his life ;
2. By the assignment of an estate *pur autre vie* to *cestui que vie* ; or
3. By implication of law.

SEC. 638. **Estates for life by implication.**—Estates for life will arise by implication where a grant is made to a grantee by name, either in words of limitation or accompanied by words intended to take effect as words of limitation, but not in law capable of so taking effect as to limit any greater estate. Any conveyance otherwise capable of taking effect, which nominates a grantee, but neither limits nor purports to limit an estate, will, in the absence of any further indication, by implication of law, pass an estate for the life of the grantee ;² and the same is true where the limitation is “for term of life,” without saying for whose life.³ In the latter case, however, an estate for the life of the grantor will pass, for he might rightfully grant such an estate, though he could not rightfully grant for the life of the grantee.⁴ But the implication of law upon which an estate for life arises is liable to be rebutted by the manifestation of a contrary intention. Thus if the estate by implication should arise in the terms of the deed, it may be cut down by the habendum to an estate for years or at will, and this is true even though the habendum itself be technically void as a limitation, and therefore not capable of taking effect otherwise than as a manifestation of intention.⁵

SEC. 639. **Creation by deed.**—A life estate, being a free-

¹ 2 Bl. Com. 120 ;

⁴ Kent Com. (13th ed.) 25.

² 1 Co. Litt. (19th ed.) 42a ; 2 Id. ³ 1 Co. Litt. (19th ed.) 42a.

⁵ See : Buckler's Case, 2 Co. 55.

⁴ 1 Co. Litt. (19th ed.) 42a, 183a.

182a, *et seq.*

hold interest in land, cannot be created or conveyed by parol, but must be by deed duly executed, or by devise.¹ Such an estate may be created by express words of disposition for the life of the grantee or devisee, or for the life of any other person, or for more lives than one.² A life estate may also be created by a general disposition, without defining or limiting a specific estate, as where land is limited without specifying the term of duration and without words of limitation.³

SEC. 640. **Same—Words of limitation.**—At common law no words of limitation were necessary to create an estate for life ; because an estate granted was construed to be for the life of the grantee, unless there was an express limitation.⁴ In many of the states of the Union, however, statutes have been passed, under which a fee passes without words of inheritance, and an intention to create an estate for life must be clearly expressed. In these states it is necessary to limit the estate for the life of the grantor in express words. By the common law under a grant of land to a man, his executors, administrators, and assigns, without the use of the word “heirs,” gave to the grantee only a life estate in the premises.⁵ Thus

¹ *Stewart v. Clark*, 54 Mass. (13 Met.) 79, 80 ;

Garritt v. Clark, 5 Oreg. 464.

² See: *Hewlins v. Shippam*, 5 Barn. & C. 221 ; s.c. 11 Eng. C. L. 437 ;

2 Bl. Com. 120 ;

1 Co. Litt. (19th ed.) 41b.

³ 2 Bl. Com. 121 ;

1 Co. Litt. (19th ed.) 42a ;

4 Kent Com. (13th ed.) 25.

⁴ 1 Co. Litt. (19th ed.) 42a ;

2 Bl. Com. 121.

⁵ *Clearwater v. Rose*, 1 Blackf. (Ind.) 137 ;

Morrall v. Sutton, 4 Beav. 478.

See : *Patterson v. Moore*, 15 Ark. 222 ;

Edwardsville R. Co. v. Sawyer, 92 Ill. 377 ;

Merritt v. Disney, 84 Md. 344 ;

Sedgwick v. Laffin, 92 Mass. (10 Allen) 420 ;

Hogan's Heirs v. Welcker, 40 Mo. 177 ;

Reaume v. Chambers, 22 Mo. 36 ;

Session v. Donnelly, 36 N. J. L. (7 Vr.) 432 ;

Adams v. Ross, 30 N. J. L. (1 Vr.)

505 ; s.c. 82 Am. Dec. 237 ;

Jackson ex d. Ludlow v. Meyers, 3 John. (N. Y.) 388 ; s.c. 3 Am. Dec. 504 ;

Den d. Roberts v. Forsythe, 3 Dev. (N. C.) L. 26 ;

Hileman v. Bouslaugh, 18 Pa. St. 344 ; s.c. 53 Am. Dec. 474.

It was held in the case of *Bodington v. Robinson*, L. R. 10 Ex. 270 ; s.c. 14 Moak's Eng. Rep. 559, that the addition to the name of the grantee of the words “his executors, administrators, and assigns,” in the premises of a deed, will, when the grantor has an estate for his own life, expressly pass the whole estate of the grantor to the grantee, so as to make the habendum, if purporting to grant a less, or an impossible, estate, void for the inconsistency.

a conveyance to a man "and his generation, to endure as long as the waters of the Delaware shall run," has been held to pass a life estate only ;¹ so also a bargain and sale of land to A, "to hold the same for A in trust for B and C, their respective heirs and assigns forever, in fee-simple," has been said to create only a life estate in A, and that at his death the legal estate reverts to the heirs of the grantor, and that B and C must resort to a court of equity for an enforcement of the trust.²

SEC. 641. **Same—What creates life estate.**—A devise to a man simply creates but a life estate ;³ and the same is true of a grant for an indefinite time, as one *quamdiu se bene gesserit*,⁴ or to a man and his generation as long as the water of the Delaware river shall flow ;⁵ to a man and his children ;⁶ to a man and his executors, administrators, and assigns ;⁷ to a man and his successor,⁸ or successors and assigns ;⁹ to a husband and wife during coverture ;¹⁰ or until a contingency happens.¹¹ A conveyance to a man for the use of his wife and children creates a life estate only in the wife.¹² A life estate passes by an assignment under the insolvent debtor's acts,¹³ and by a quit-claim deed from one tenant in common to his co-tenant.¹⁴

SEC. 642. **Created by devise.**—A devise of land without

¹ *Foster v. Joice*, 3 Wash. C. C. 498.

² *Jackson ex d. Ludlow v. Meyers*, 3 John. (N. Y.) 388 ; s.c. 3 Am. Dec. 504.

³ Thus in *King v. Barnes*, 30 Mass. (13 Pick.) 24, a deed granted one-half of certain property to each, his heirs and assigns, with a habendum to each, his heirs and assigns, and then provided that, "and after my and my wife's decease, each shall have the other half ;" and the court held that each took a life estate in the last mentioned half, which would not be enlarged by construction to a fee, by the fact that the first half was granted in fee.

⁴ 1 Co. Litt. (19th ed.) 56a.

⁵ *Foster v. Joice*, 3 Wash. C. C. 498.

⁶ *Adams v. Ross*, 30 N. J. L. (1 Vr.) 505 ; s.c. 82 Am. Dec. 237.

⁷ *Clearwater v. Rose*, 1 Blackf. (Ind.) 137 ;

Taylor v. Chary, 29 Gratt. (Va.) 448.

⁸ *Wheeler v. Kirtland*, 24 N. J. Eq. (9 C. E. Gr.) 552.

⁹ *Buffum v. Hutchinson*, 83 Mass. (1 Allen) 58 ;

Miles v. Fisher, 10 Ohio 1 ; s.c. 36 Am. Dec. 61 ;

4 Kent Com. (13th ed.) 6.

¹⁰ 1 Co. Litt. (19th ed.) 42a.

¹¹ *Id.*

¹² *White v. Williamson*, 2 Grant (Pa.) 249.

¹³ *Verdier v. Youngblood*, 1 Rich. (S. C.) Eq. 220 ; s.c. 24 Am. Dec. 417.

¹⁴ *McKinney v. Stocks*, 6 Heisk. (Tenn.) 284.

words of perpetuity, where there is nothing in the will from which a fee can be raised by implication,¹ vests only a life estate in the devisee,² for we have already seen³ that the general rule of law is that a devise of real estate, without words of limitation superadded, passes simply a life estate. No technical words are necessary.⁴ Thus the word "heirs" is not required, as in a deed,⁵ and if used may be read in another sense as "children,"⁶ or "sons."⁷

SEC. 643. **Same—Words which carry life estate.**—A devise to a person and his heirs, and in the event of his dying without heirs, then over, creates a life estate.⁸ It has been held that a devise to a person and his children, there being a child or children living at the time of the devise, creates a life estate in the devisee with remainder in fee in the living children and such children as he may subsequently have born unto him.⁹ A devise to a husband and wife and the survivor, the estate being subject to be

¹ See : *Ante*, § 638.

² *Jackson ex d. Newkirk v. Embler*, 14 John. (N. Y.) 198 ; *Jackson v. Wells*, 9 John. (N. Y.) 223 ;

Fox v. Phelps, 20 Wend. (N. Y.) 437, 445 ;

Barheydt v. Barheydt, 20 Wend. (N. Y.) 576, 580 ;

Burr v. Sim, 1 Whart. (Pa.) 252 ; s.c. 29 Am. Dec. 48 ;

Witherspoon v. Dunlop, 1 McC. (S. C.) 546 ;

Denn v. Gaines, Cowp. 657 ;

Doe v. Allen, 8 Durnf. & E. (8 T. R.) 497, 502, 503 ;

Frogmorton v. Wright, 3 Wills. 414.

³ See : *Ante*, § 349.

⁴ *Fox v. Phelps*, 20 Wend. (N. Y.) 437, 445.

⁵ See : *Ante*, § 350.

⁶ *Bunnell v. Evans*, 26 Ohio St. 409.

⁷ *Lyles v. Diggie's Lessee*, 6 Har. & J. (Md.) 364.

⁸ *Wilson v. O'Connell*, 147 Mass. 17 ; *Jones Exrs. v. Stiles*, 19 N. J. Eq. (4 C. E. Gr.) 324 ;

Harris v. Potts, 3 Yeates (Pa.) 141 ;

Hill v. Thomas, 11 S. C. 346.

See : *Jones v. Barmbelt*, 2 Ill. 276 ;

Norris v. Beyea, 13 N. Y. 273 ;

Hatfield v. Sneden, 42 Barb. (N. Y.) 615.

Devise of an improvement, followed by a devise over, carries a life estate only.

Bowers v. Porter, 21 Mass. (4 Pick.) 198.

See : *Wilmarth v. Bridges*, 113 Mass. 407.

Intention to create an estate for life.

—Where deducible from the expressions in the will, the estate cannot be enlarged by construction, although it be burdened with payments or duties.

Bowers v. Porter, 21 Mass. (4 Pick.) 198, 203 ;

Moor v. Denn, 2 Bos. & P. 247.

Devise over after a precedent life estate does not necessarily carry the fee ; thus it has been said that the devise of a plantation to a person subject to the life estate of the devisee's mother will secure the devisee a life estate only.

Calhoun v. Cook, 9 Pa. St. 226.

⁹ *Hannah v. Osborn*, 4 Paige Ch. (N. Y.) 336 ;

Reeder v. Shearman, 6 Rich. (S. C.) Eq. 88.

divided equally among their children, and in the default of children, then over, carries a life estate;¹ a devise to a wife "forever and during her life" carries only a life estate;² a devise to a wife and children creates a life estate in the wife with remainder to the children, rather than a joint estate in all of them;³ a devise to a wife for life, coupled with a power of sale, with remainder over to children, creates in the wife only a life estate;⁴ a devise to a designated person, with a provision that in case he die before his wife, the estate shall return to the legatees of the grantor, but if he survives his wife, then the estate shall be his in fee, creates but a life estate in the devisee.⁵ A devise declaring "I lend" to a designated devisee described premises, and in case the devisee shall arrive at manhood and beget heirs lawfully, then to him and his heirs forever, otherwise over, gives a life estate only.⁶ A devise of the right to occupy, possess, or enjoy lands for life gives a life estate.⁷ A devise giving the right to occupy and enjoy lands for an indefinite length of time, at the option of the devisee, confers a life estate.⁸ In those states where fee-tails have been converted into estates for life in the first taken in tail by statute, a devise of an estate in tail gives a life estate with remainder over.⁹

SEC. 644. **Same—Same—Raised by implication.**—A life estate may be raised by implication without words of direct

¹ *Self's Admr. v. Tune*, 6 Munf. (Va.) 470.

² *Sheafe v. Cushing*, 17 N. H. 508.

³ *König v. Kraft*, 87 Ky. 95; s.c. 12 Am. St. Rep. 463; 7 S. W. Rep. 622; 9 Ky. L. Rep. 945.

See: *Foster v. Shreve*, 6 Bush (Ky.) 519;

Crockett v. Crockett, 2 Phila. (Pa.) 553;

In re Harris, L. R. 7 Ex. 344;

French v. French, 11 Sim. 256.

⁴ *Whitmore v. Russell*, 80 Me. 297; s.c. 6 Am. St. Rep. 200.

See: *Green v. Hewitt*, 7 Ill. 113; s.c. 37 Am. Rep. 102;

Stuart v. Walker, 72 Me. 146; s.c. 39 Am. Rep. 311;

Copeland v. Barron, 72 Me. 206; *Warren v. Webb*, 68 Me. 133;

Areson v. Areson, 3 Den. (N. Y.) 458;

Patrick v. Morehead, 85 N. C. 62; s.c. 39 Am. Rep. 684;

Oyster v. Oyster, 100 Pa. St. 538; s.c. 45 Am. Rep. 388.

⁵ *Den v. Crawford*, 8 N. J. L. (3 Halst.) 90.

⁶ *Dougherty v. Moriott's Lessee*, 5 Gill & J. (Md.) 459.

⁷ See: *Kearney v. Kearney*, 17 N. J. Eq. (2 C. E. Gr.) 59; *Id.* 504;

Winsthoff v. Dracourt, 3 Watts (Pa.) 240.

⁸ See: *Succession of Law*, 31 La. An. 456;

Piper's Estate, 2 W. N. C. 711.

⁹ *Balir v. Van Blarcum*, 71 Ill. 290; *Chiles v. Bartleson*, 21 Mo. 344.

gift. Thus it has been held that a devise, "after my death and the death of my wife I give B," etc., creates a life estate in the land in the wife in case she survives the testator ;¹ and the same is true of a devise of land to be divided equally among the children of a designated person, he to enjoy the benefit while he lives.²

SEC. 645. **Same—Enlarging estate to a fee.**³—Where the will contains some provision inconsistent with an estate for life only, the estate granted will be enlarged to a fee ;⁴ but where the intention to create a life estate is deducible from the expressions of the will, the estate cannot be enlarged by construction,⁵ although it is burdened with payments or duties ;⁶ and an express devise for life will not be enlarged to a fee by a charge upon the premises.⁷ A devise of lands in words restraining the devisee from encumbering or selling, in the absence of evidence of a contrary intention in the face of the will, conveys but a life estate ; and will not be raised by construction to a fee.⁸ A direction that land devised be equally divided among designated persons will not be enlarged by construction to more than a life estate.⁹ In those states where, by reason of statute or otherwise, it is held that words of perpetuity are not necessary to carry a fee in a devise, where a fee is given by implication, it will not by construction be enlarged to a fee without such words.¹⁰

SEC. 646. **Same—Same—Devise with power of disposition.**—We have already discussed the effect of a devise with

¹ *Barry v. Shelby*, 4 Hayw. (Tenn.) 229.

² *Haskins v. Tate*, 25 Pa. St. 249.

³ For a full discussion of the enlargement of a devise, see : *Ante*, §§ 368–385, 572.

⁴ *Wheaton v. Address*, 23 Wend. (N. Y.) 452.

⁵ See : *Pickering v. Langdon*, 22 Me. 413 ;

McLellan v. Turner, 15 Me. 436.

⁶ *Bowers v. Porter*, 21 Mass. (4 Pick.) 198 ;

Moor v. Denn, 2 Bos. & P. 247.

⁷ *Moore v. Dimond*, 11 R. I. 121.

⁸ *Grim's Appeal*, 1 Grant (Pa.) 209.

And this is true even where there is a provision for the descent of the land to children.

O'Byrne v. Feeley, 61 Ga. 77.

⁹ *Edwards v. Bishop*, 4 N. Y. 61.

"To be equally divided" goes to the quality and not to the limitation of the estate.

Jackson ex d. Hunt v. Luquiere, 5 Cow. (N. Y.) 221 ;

Jackson v. Ball, 10 John. (N. Y.) 148 ; s.c. 6 Am. Dec. 321 ;

Van Alstyne v. Spraker, 13 Wend. (N. Y.) 578.

Fuller v. Bates, 8 Paige Ch. (N. Y.) 325, 331.

power of disposition,¹ and its effect to raise the estate granted to a fee ; but where a devise is in terms for life, with power of disposition, the estate will not become a fee in the hands of the devisee,² and on failure to exercise the power, reverts to the heirs of the donor on the death of the devisee.³

SEC. 647. **Same — Same — Words in preamble.** — We have already seen⁴ that the words of the preamble may be resorted to in order to ascertain the intention of a testator, but the words of the preamble are never allowed to so control the words of a devise as to convert a plain life estate into a fee-simple.⁵ Words in the preamble of a will, showing an intention to dispose of the whole estate of the testator, will not enlarge a life estate to a fee unless there is some connection between the preamble and the devising clause of the will ;⁶ and it is well settled that a general intent to dispose of the whole of the property cannot authorize a court to destroy or disregard an expressed intent to give a life estate only.⁷

¹ See : *Ante*, § 359.

² *McLellan v. Turner*, 15 Me. 436.

³ *Denson v. Mitchell*, 26 Ala. 360 ;

Fairmon v. Beal, 14 Ill. 244 ;

Denning v. Van Dusen, 47 Ind. 243 ;

Frasur v. Hurey, 43 Ind. 310 ;

Collins v. Carlisle's Heirs, 7 B. Mon. (Ky.) 13 ;

Show v. Hussey, 41 Me. 495 ;

Ramsdell v. Ramsdell, 21 Me. 288 ;

Benesch v. Clark, 49 Md. 497 ;

Cummings v. Show, 108 Mass. 159 ;

Hale v. Marsh, 100 Mass. 468 ;

Stevens v. Winslop, 18 Mass. (1 Pick.) 318 ;

Andrews v. Brumfield, 32 Miss. 107 ;

Rail v. Dotson, 22 Miss. (14 Smed. & M.) 176 ;

Troy v. Troy, 1 Win. (N. C.) Eq. 77 ;

Pulbam v. Byrd, 2 Strobb. (S. C.) Eq. 134 ;

Henderson v. Vaulx, 10 Yerg. (Tenn.) 30.

⁴ See : *Ante*, § 373.

⁵ *Sheaf v. Cushing*, 17 N. H. 508 ;

Provoost v. Clay, 62 N. Y. 545, 549 ;

Vanderzee v. Vanderzee, 31 N.

Y. 231 ; s.c. 30 Barb. (N. Y.) 331.

See : *Butler v. Little*, 3 Me. 239 ;

Beall v. Holmes, 6 Har. & J. (Md.) 210 ;

Hogan v. Andrews, 23 Wend.

(N. Y.) 452 ;

Barheydt v. Barheydt, 20 Wend.

(N. Y.) 576 ;

Fox v. Phelps, 17 Wend. (N. Y.) 393 ;

Jackson ex d. Harris v. Harris, 8 John. (N. Y.) 141 ;

Harvey v. Olmstead, 1 N. Y. 483 ; s.c. 1 Barb. (N. Y.) 102 ;

Rupp v. Eberly, 73 Pa. St. 141 ;

McIntyre v. Ramsey, 23 Pa. St. 317 ;

Cassell v. Coake, 8 Serg. & R. (Pa.) 268 ; s.c. 11 Am. Dec. 610 ;

Leppitt v. Hopkins, 1 Gall. C. C. 455 ;

Lessee of Ferguson v. Zepp, 4 Wash. C. C. 645.

⁶ *Beale v. Holmes*, 6 Har. & J. (Md.) 205 ;

Jackson ex d. Wells v. Wells, 9 John. (N. Y.) 222 ;

Hall v. Goodwin, 2 Nott & McC. (S. C.) 383.

⁷ *Pickering v. Langdon*, 23 Me. 413.

SECTION V.—EMBLEMENTS.

SEC. 648. Definition of emblements.

SEC. 649. Life tenant entitled to.

SEC. 650. Crop must be planted by the tenant.

SEC. 651. Where estate determined by tenant.

SEC. 652. Ingress, egress, and regress.

SECTION 648. **Definition of emblements.**—All annual products of the earth which do not grow spontaneously, but depend upon the labor and industry of man in cultivating the soil, are known as emblements. The term emblements includes all those products known as *fructus industriales*,¹ as contra-distinguished from such products as are known as *fructus naturales*.² The term emblements includes the different cereals and vegetables, and tubers, wheat, corn, beans, hay, flax, potatoes, and the like, but does not include grasses and fruits,³ or trees,⁴ or anything that grows from the perennial root, except hops,⁵ which depend upon the labor and manurance of man for their value.

SEC. 649. **Life tenant entitled to.**—Where a tenant for life dies before the crop is harvested, his representatives are entitled to the emblements not yet severed from the land, which are the immediate fruits of his labor, as a return for the expense of plowing and sowing the ground.⁶ The doctrine of emblements, which rests partly upon an idea of compensation, but more generally upon

¹ Reiff v. Reiff, 64 Pa. St. 137.See : *Ante*, § 53.² See : *Ante*, § 55.³ Evans v. Iglehart, 6 Gill & J. (Md.) 188 ;

Reiff v. Reiff, 64 Pa. St. 137 ;

Evans v. Iglehart, 6 Gill & J. (Md.) 171, 189 ;

Putney v. Day, 6 N. H. 430 ; s.c. 25 Am. Dec. 470 ;

Warren v. Leland, 2 Barb. (N. Y.) 613 ;

Reiff v. Reiff, 64 Pa. St. 134 ;

Evans v. Roberts, 5 Barn. & C. 829 ; s.c. 11 Eng. C. L. 700 ;

Scovell v. Boxall, 1 Y. & J. 396.

A growing crop of grass, even if grown from seed, and though ready to be cut for hay, cannot

be taken as emblements, because the improvements are not distinguishable from what is a natural product, although it may be increased by cultivation.

Reiff v. Reiff, 64 Pa. St. 137.

⁴ Except nursery stock, which is regarded as in the nature of an emblement.⁵ See : Stewart v. Doughty, 9 John. (N. Y.) 108.⁶ Poindexter v. Blackburn, 1 Ired. (N. C.) Eq. 286 ;

Perry v. Tollier, 1 Dev. & B. (N. C.) Eq. 441 ;

Hunt v. Watkins, 1 Humph. (Tenn.) 498.

the policy of encouraging husbandry by assuring the benefit of his labor to one who cultivates the soil,¹ owes its existence entirely to the uncertainty of the termination of the estate;² consequently, where the termination of an estate is certain, there exists no title to emblements.³

SEC. 650. **Crop must be planted by tenant.**—To entitle a life tenant or his representatives to emblements, he must have planted the crops himself. If the crops were planted by another, no matter how much care or attention he may have bestowed upon them, he will not be entitled thereto.⁴ Thus if a person seized in fee of lands already sown and planted in grain grants them to another for life, remainder over to a third, and the first grantee dies without severance, the person in remainder will be entitled to the emblements, and not the personal representative of the first grantee.⁵

SEC. 651. **Where estate determined by tenant.**—The general rule of law is that when a tenant of land has an uncertain interest, which is determined either by the act of God or by the act of another, then he shall have the emblements; but it is otherwise where the tenancy is determined by his own act.⁶ Thus if an estate is granted

¹ *Stewart v. Doughty*, 9 John. (N. Y.) 107.

² *Wilmarth v. Cutting*, 10 John. (N. Y.) 360, 361.

³ *Wilmarth v. Cutting*, 10 John. (N. Y.) 360, 361.

See: *Barn v. Clark*, 10 John. (N. Y.) 424;

Kingsbury v. Collins, 4 Bing. 202; s.c. 13 Eng. C. L. 467;

Davies v. Connop, 1 Price 53;

1 Co. Litt. (19th ed.) 55a.

⁴ *Price v. Pickett*, 21 Ala. 471; *Haslett v. Glenn*, 7 Har. & J. (Md.) 17;

Stewart v. Doughty, 9 John. (N. Y.) 108;

Gee v. Young, 1 Hayw. (N. C.) 17;

Thompson v. Thompson, 6 Munf. (Va.) 514;

Grantham v. Hawley, 1 Hob. 132.

⁵ *Haslett v. Glenn*, 7 Har. & J. (Md.) 17;

Grantham v. Hawley, 1 Hob. 132.

In the case of *Haslett v. Glenn*, *supra*, lands already sown and planted in grain were conveyed in trust for husband and wife, and the survivor of them. The husband died before the crop was gathered, and the court held that the crops survived to the wife, and did not go to the husband's representative; but that if the husband had sown the ground the crop would have gone to his representative, and not to his widow.

⁶ *Rowell v. Kline*, 44 Ind. 290;

Chesley v. Welch, 37 Me. 106;

Chandler v. Thurston, 27 Mass. (10 Pick.) 210;

Debow v. Titus, 10 N. J. L. (5 Halst.) 128;

Wilmarth v. Cutting, 10 John. (N. Y.) 361;

Hawkins v. Skeggs, 10 Humph. (Tenn.) 81;

to a husband and wife during coverture, and after the husband has sown the lands to grain, they are divorced, *causa præcontractus*, the husband will be entitled to the emblements; for although the suit is the act of the parties, yet the judgment dissolving the marriage is the act of the law, and in presumption of law the judgment is against inclination.¹ But where a woman holds lands *durante viduitate*, which is an estate for life, sows them to grain, and afterwards marries, she will not be entitled to emblements, for the reason that the estate was determined by her own act.² Yet it seems that if a widow, having an estate during her widowhood, leases the premises, and after the lessee has planted it to crops the widow marries, the tenant will be entitled to the emblements.³

SEC. 652. **Ingress, egress, and regress.**—The right to emblements does not give a right to the exclusive possession of all the lands, but only the right of ingress, egress, and regress so far as is needful for due attention to and gathering the crops.⁴ We have already seen that one of the incidents of a life estate is the power of making leases, or a conveyance of a portion or the whole of a life estate,⁵ and where such lease or conveyance has been made, the lessee or grantee has the same rights and privileges, during the continuance of the estate, as are incident to the life tenant;⁶ consequently, where such a lease or conveyance has been made, and the life tenant

McLean v. Bovee, 24 Wis. 295 ;

Bulwer v. Bulwer, 2 Barn. & Ald. 470 ;

Richard v. Liford, 10 Co. 151.

¹ Gould v. Webster, 1 Tyl. (Vt.) 409 ;

Oland's Case, 5 Co. 116 ;

2 Co. Litt. (19th ed.) 248b, 314b.

² Oland v. Hardwicke, Cro. Eliz. 461 ;

Bulwer v. Bulwer, 2 Barn. & Ald. 470 ;

Wickes v. Jordon, 2 Bulst. 213 ;

Debow v. Colfax, 10 N. J. L. (5 Halst.) 128 ;

Hawkins v. Skeggs, 10 Humph. (Tenn.) 31 ;

Hunter v. Watkins, 1 Humph. (Tenn.) 498 ;

Oland's Case, 5 Co. 116.

³ Beavans v. Briscoe, 4 Har. & J. (Md.) 139.

Compare : Debow v. Colfax, 10 N. J. L. (5 Halst.) 128 ;

Bettinger v. Baker, 29 Pa. St. 70 ;

Bulwer v. Bulwer, 2 Barn. & Ald. 470 ;

Davis v. Eyton, 7 Bing. 154 ; s.c. 20 Eng. C. L. 77 ;

Oland's Case, 5 Co. 116.

⁴ Humphries v. Humphries, 3 Ired. (N. C.) Eq. 362 ;

Forsythe v. Price, 3 Watts (Pa.) 282.

⁵ See : *Ante*, §§ 586, 590, *et seq.*

⁶ Miles v. Miles, 32 N. H. 147 ; s.c. 64 Am. Dec. 362.

dies during the term, his lessee or vendee will have the right of ingress, egress, and regress for the purpose of cultivating and harvesting the crops,¹ but such lessee or grantee will not have a right to the exclusive occupation of the premises for such purposes.²

SECTION VI.—ESTOVERS.

- SEC. 653. Definition of estovers.
- SEC. 654. Kinds of estovers.
- SEC. 655. Life tenant entitled to.
- SEC. 656. Same—Where tenant a widow.
- SEC. 657. What may be taken—Effect of exceeding right.
- SEC. 658. Same—English and American doctrines.
- SEC. 659. When to be taken.
- SEC. 660. For what purposes taken.
- SEC. 661. Where to be taken from.
- SEC. 662. Where to be used.
- SEC. 663. Common of estovers

SECTION 653. Definition of estovers.—The wood and timber necessary to be used on the estate for the purpose of building, burning, plowing and fencing, and other agricultural purposes, are called estovers.³ The word estovers is derived from the French *estoffer*, to furnish or maintain materials. In the Saxon such supplies were termed *botes*.

SEC. 654. Kinds of estovers.—Estovers are divided into the following general classes, to wit : (1) House-botes, or timber sufficient for repairing the house ; (2) fire-botes, or wood sufficient to be burnt in one's house ; (3) plow-botes or car-botes, that is, timber sufficient for making and repairing instruments of husbandry ; and (4) hay-botes or hedge-botes, that is, timber sufficient for making and repairing fences and hedges.⁴

¹ *Stewart v. Doughty*, 9 Johns. (N. Y.) 107 ;

Humphries v. Humphries, 3 Ired. (N. C.) L. 362 ;

Forsythe v. Price, 8 Watts (Pa.) 282 ; s.c. 34 Am. Dec. 465 ;

Hawkins v. Skeggs, 10 Humph. (Tenn.) 31, 35.

² *Beavans v. Briscoe*, 4 Har. & J.

(Md.) 139 ;

Beavan v. Delahay, 1 H. Black. 5 ;

Griffith v. Puleston, 13 Mee. & W. 357.

³ *Heyden's Case*, 13 Co. 68 ;

4 Kent Com. (13th ed.) 73.

⁴ *Anderson's L. Dict.* 132 ;

2 Bl. Com. 35.

SEC. 655. **Life tenant entitled to.**—We have already seen¹ that it is the duty of the life tenant to keep the premises in repair during the continuance of his estate.² By the common law, as a compensation for this duty, every life tenant and his lessee or assignee³ has, incident to his estate, and without an express grant, the right to take, in reasonable measure, estovers for himself and family residing upon the land,⁴ for fuel and repair,⁵ unless restrained from taking them by special covenant.⁶ The rule as to estovers is not as strictly enforced in this country as in England, where the timber is more scarce and valuable. As a rule, the right to take fire-bote will embrace a right to take fuel, not only for the house of the life tenant, but also for the use of a servant or farmer who cultivates the land for the life tenant,⁷ even though such servant resides on an adjoining tract,⁸ where it can be done without injury to the inheritance. But it is said in *Sarles v. Sarles*,⁹ that a life tenant of a farm of one hundred and sixty-five acres is not entitled to fire-bote for the dwelling-house of a farmer or laborer, in addition to fire-bote for the principal dwelling-house or mansion, and that a custom allowing it to be taken is unreasonable and invalid.

SEC. 656. **Same—Where tenant a widow.**—Where the life tenant is a widow, in order to entitle her to take firewood, there must be a house upon the land when it is assigned

¹ See : *Ante*, § 600.

² *Matter of Steele*, 19 N. J. Eq. (4 C. E. Gr.) 120.

³ See : *Cook v. Cook*, 77 Mass. (11 Gray) 123 ;

Roberts v. Whiting, 16 Mass. 186 ;

Smith v. Jewett, 40 N. H. 533 ;

Fuller v. Wason, 7 N. H. 341.

White v. Cutler, 34 Mass. (17 Pick.) 248 ;

Smith v. Jewett, 40 N. H. 530 ;

Webster v. Webster, 33 N. H. 18 ;
s.c. 66 Am. Dec. 705 ;

Miles v. Miles, 32 N. H. 147 ; s.c.
64 Am. Dec. 362 ;

Fuller v. Wason, 7 N. H. 341 ;

Folsom v. Chesley, 2 N. H. 432 ;

Elliot v. Smith, 2 N. H. 430 ;

Smith v. Poyas, 2 Des. (S. C.) Eq.
65.

⁵ See : *Clemence v. Steere*, 1 R. I.
272 ; s.c. 53 Am. Dec. 621 ;

Johnson v. Johnson, 2 Hill (S.
C.) Eq. 277 ; s.c. 29 Am. Dec.
72.

⁶ 1 Co. Litt. (19th ed.) 41b.

Where there was such a covenant in the instrument creating the estate, it did not make the cutting of estovers waste, but only rendered the tenant liable in damages on the covenant.

Dy. 198b, pl. 53.

⁷ *Smith v. Jewett*, 40 N. H. 530.

See : *Webster v. Webster*, 33 N.
H. 18 ; s.c. 66 Am. Dec. 705.

⁸ *Gardiner v. Derring*, 1 Paige Ch.
(N. Y.) 573.

⁹ 3 Sandf. Ch. (N. Y.) 601.

to her as dower ; the tenant can use the wood only in such house, and if she takes the wood herself, or permits any one else to take it, to be used elsewhere, it will be accounted waste.¹ In the case of *Fuller v. Wason*,² RICHARDSON, C. J., in delivering the opinion of the court, said that every tenant in dower has a right, incident to the estate, to take firewood, if there be a house assigned to her on the land ; to take timber for the repairing of fences and buildings upon the land ; and to take timber to make plows, etc., if there be tillage ; but that she has only a special property in the wood, to use it for those purposes upon the land, and cannot sell it ; that she cannot take timber from the land to build a new house or new fences, where there were none before. In *White v. Cutler*,³ after dower had been assigned to a widow, in a dwelling-house and the land connected therewith, consisting in part of woodland, all of which was occupied by the husband as one farm, she removed from the land and resided in another family at board, where she was supplied with fuel. The house, having become untenable, was taken down with the consent of all parties. The court held that neither the widow nor the lessee of the dower estate had a right to cut the wood thereon for fuel, and that the reversioner would have a right to take such wood if it should be severed by them.⁴

SEC. 657. **What may be taken—Effect of exceeding right.**—A tenant for life or his assign is entitled to take reasonable estovers ;⁵ that is, to cut trees and timber for fuel, fences, and the repairing of buildings, such as may be necessary for the temporary enjoyment of the estate ;⁶ if more timber is cut than is necessary for such enjoyment of his estate,

¹ *Phillips v. Allen*, 89 Mass. (7 Allen) 115, 117 ;
Cook v. Cook, 77 Mass. (11 Gray) 123 ;
Fuller v. Wason, 7 N. H. 341 ;
Elliot v. Smith, 2 N. H. 430.
 See : *White v. Cutler*, 34 Mass. (17 Pick.) 248.
² 7 N. H. 341.
³ 34 Mass. (17 Pick.) 248.
⁴ *Blaker v. Anscombe*, 4 Bos. & P. 25 ; s.c. 8 Rev. Rep. 746.
⁵ *Cook v. Cook*, 77 Mass. (11 Gray) 123 ;
Miles v. Miles, 32 N. H. 147 ; s.c. 64 Am. Dec. 362.
 See : *White v. Cutler*, 34 Mass. (17 Pick.) 252.
⁶ See : *Clemence v. Steere*, 1 R. I. 272 ; s.c. 53 Am. Dec. 621 ;
Johnson v. Johnson, 2 Hill (S. C.) Eq. 277 ; s.c. 29 Am. Dec. 72 ;
Heyden's Case, 13 Co. 68.

it will be waste, and he will be liable therefor to the remainderman or reversioner.¹ The extent of a life tenant's right in this matter does not in all cases depend on necessities,² and the precise extent to which he may go in exercising his rights under the general rule is not yet well settled.³ It is well settled, however, that for the purpose of fuel, the life tenant is bound to take the dead, dry, fallen, and perishing wood.⁴ The tenant must cut only so much of the standing timber as may be necessary for fuel, or for making and repairing fences and buildings ;⁵ and he may not cut more for this purpose than is actually needed at the time ; thus he may not cut two years' fuel in one and the same year, but must take it year by year.⁶

SEC. 658. **Same -- English and American doctrines.**—In England the rule governing estovers is very strictly applied as to the amount of wood and timber to be taken, the age and qualities of the trees to be cut ; and a ten-

¹ *Johnson v. Johnson*, 2 Hill (S. C.) Eq. 277 ; s.c. 29 Am. Dec. 72.

Assent of the reversioner, however, to the cutting and sale estops him from claiming a forfeiture on their account, and if the estate is by will charged with the comfortable support of the tenant, and the wood cut and sold went for the tenant's support, the fact is to be considered in determining the question of assent.

Clemence v. Steere, 1 R. L. 272 ; s.c. 53 Am. Dec. 621.

² *Robertson v. Meadors*, 73 Ind. 43.

³ *Miles v. Miles*, 32 N. H. 147 ; s.c. 64 Am. Dec. 362, 364.

The American doctrine on the subject is more enlarged than the English, and better accommodated to the circumstances of a new and growing country, where timber is neither so scarce nor so valuable.

Miles v. Miles, 32 N. H. 147 ; s.c. 64 Am. Dec. 362, 364 ;

4 Kent Com. (13th ed.) 73, 76.

⁴ *Jackson ex d. Church v. Brownson*, 7 John. (N. Y.) 227, 256 ; s.c. 5 Am. Dec. 258, 263 ;

Simmons v. Norton, 7 Bing. 640 ; s.c. 20 Eng. C. L. 286.

Waste question for jury.—To what extent wood may be cut before

the tenant is guilty of waste is a matter that must be left to the sound discretion of the jury under the directions of the court. It seems that a single tree cut down without justifiable cause is waste (*Jackson ex d. Church v. Brownson*, 7 John. (N. Y.) 227 ; s.c. 5 Am. Dec. 258) as effectually as if a thousand were cut down ; and the reason is this, that such trees belong to the owner of the inheritance, and the tenant has only a qualified property in them for shade and shelter, etc. *Jackson ex d. Church v. Brownson*, 7 John. (N. Y.) 227, 236 ; s.c. 5 Am. Dec. 258, 263.

See : *McGregor v. Brown*, 10 N. Y. 114.

⁵ *White v. Cutler*, 34 Mass. (17 Pick.) 248 ;

Van Deusen v. Young, 29 N. Y. 9, 30 ;

Jackson ex d. Church v. Brownson, 7 John. (N. Y.) 227, 236 ; s.c. 5 Am. Dec. 258, 263 ;

Gorges v. Stanfield, 2 Cro. Eliz. 593 ;

Dunn v. Bryan, 7 Ir. Reports Eq. 143.

⁶ *White v. Cutler*, 34 Mass. (17 Pick.) 248 ;

Fuller v. Wason, 7 N. H. 341.

ant's rights are very limited indeed, unless he holds without impeachment for waste. Indeed it has been held that the felling of oak-trees along the avenue of a park, or the cutting of trees not of proper growth, is waste, forfeiting the estate.¹ In America regard must be had to the circumstances of a new and unsettled country.² Timber in this country being neither so scarce nor so valuable, the rule is not so strictly applied as in England. Many things may be done by a tenant for life here that if done in England would be accounted waste.³ This is because of the requirements of the country, and of the necessity, in many instances, of clearing the land for agricultural purposes.⁴

SEC. 659. **When to be taken.**—A tenant for life, in taking estovers for fuel or fencing or repairs, must exercise ordinary care and discretion to cut the timber at seasonable times,⁵ so as not to injure or impair the estate.

SEC. 660. **For what purposes taken.**—The general rule regulating estovers allows them to be taken for those purposes necessary to the complete temporary enjoyment of the estate ; that is, the wood and timber necessary for the purpose of burning, building, fencing, and repairing. This right to estovers will include also the right to cut timber to be used in working mines already opened on the estate.⁶ But a life tenant has no right to cut down timber for any other purpose, or to sell it ; because when the life tenant cuts wood or timber for

¹ See : *Packington's Case*, 3 Atk. 216 ;

Simmons v. Norton, 7 Bing. 640 ;
s.c. 20 Eng. C. L. 286 ;

Gorges v. Stanfield, 2 Cro. Eliz. 593 ;

Abraham v. Buff, Freem. Chan. 54 ;

Vane v. Barnard, 2 Vern. 738 ;

Tamworth v. Ferrers, 6 Ves. 419 ;

Aston v. Aston, 1 Ves. Sr. 264.

² *Findlay v. Smith*, 6 Munf. (Va.) 134 ;
s.c. 8 Am. Dec. 733.

³ *Crockett v. Crockett*, 2 Ohio St. 180, 184 ;

Williard v. Williard, 56 Pa. St. 129 ;

Lynn's Appeal, 31 Pa. St. 44 ; s.c. 72 Am. Dec. 721.

⁴ See : *Pyncheon v. Stearns*, 52 Mass.

(11 Met.) 304 ; s.c. 45 Am. Dec. 207, 210 ;

Morehouse v. Cotheal, 22 N. J. L. (2 Zab.) 521 ;

Jackson ex d. Church v. Brownson, 7 John. (N. Y.) 227 ; s.c. 5 Am. Dec. 258 ;

Winship v. Pitts, 3 Paige Ch. (N. Y.) 259.

⁵ *Harde v. Harde*, 26 Barb. (N. Y.) 409 ;

Gardner v. Derring, 1 Paige Ch. (N. Y.) 573.

⁶ *Neel v. Neel*, 19 Pa. St. 323.

See : *Den v. Kinney*, 5 N. J. L. (2 South.) 552 ;

Crockett v. Crockett, 2 Ohio St. 180 ;

Findlay v. Smith, 6 Munf. (Va.) 134 ; s.c. 8 Am. Dec. 733.

purposes disconnected with the premises, he is no longer using his life estate in the lands, but is converting to his own use the permanent growth of the earth.¹ Thus a life tenant cannot cut and sell wood or timber to raise money, wherewith to pay for repairs, however necessary or indispensable,² although the amount sold be less than he would have a right to consume for the purpose ;³

¹ *Miles v. Miles*, 32 N. H. 167 ; s.c. 64 Am. Dec. 362.

See : *Davis v. Easley*, 13 Ill. 192 ; *Richardson v. York*, 14 Me. 216, 220 ;

Hubbard v. Shaw, 94 Mass. (12 Allen) 120 ;

Phillips v. Allen, 89 Mass (7 Allen) 115 ;

Cook v. Cook, 77 Mass. (11 Gray) 123 ;

White v. Cutler, 34 Mass. (17 Pick.) 284 ;

Padelford v. Padelford, 24 Mass. (7 Pick.) 152 ;

Webster v. Webster, 33 N. H. 18 ; s.c. 66 Am. Dec. 705 ;

Johnson v. Johnson, 18 N. H. 594 ;

Fuller v. Wason, 7 N. H. 341 ;

Elliot v. Smith, 2 N. H. 430 ;

Sarles v. Sarles, 7 Sandf. Ch. (N. Y.) 601.

² *Dennett v. Dennett*, 43 N. H. 500. See : *Webster v. Webster*, 33 N. H. 18 ; s.c. 66 Am. Dec. 705 ;

Miles v. Miles, 32 N. H. 147 ; s.c. 64 Am. Dec. 362, 364 ;

Elliot v. Smith, 2 N. H. 430, 432.

³ *Fuller v. Wason*, 7 N. H. 341.

Compare : *Dodd v. Watson*, 4 Jones (N. C.) Eq. 48 ; s.c. 72 Am. Dec. 577.

Doctrine of Dodd v. Watson.—The Supreme Court of North Carolina say, in the case of *Dodd v. Watson*, 4 Jones (N. C.) Eq. 48 ; s.c. 72 Am. Dec. 577, 578, that a tenant for life does not exceed his rights by cutting and using timber to repair buildings on the land, and by selling a very moderate amount thereof, all the timber taken being of the value of but a few hundred dollars, and an abundance being left for the full enjoyment of a privilege to take the timber for the use of a saw-mill, owned by the tenant for life and another.

Doctrine of Loomis v. Wilbur.—Justice STORY held in the case of *Loomis v. Wilbur*, 5 Mas. C. C. 13, that it is not waste in a tenant for life to cut down timber trees for the purpose of making necessary repairs on the estate, and to sell them and purchase boards with the proceeds, for such repairs, provided this be proved to be the most economical mode of making the repairs. The court say : " If the cutting down of the timber was without any intention of repairs, but for sale generally, the act itself would doubtless be waste ; and if so, it would not be purged or its character changed by a subsequent application of the proceeds to repairs. But if the cutting down and sale were originally for the purpose of repairs, and the sale was an economical mode of making the repairs, and the most for the benefit of all concerned, and the proceeds were *bona fide* applied for that purpose, in pursuance of the original intent, it does not appear to me to be possible that such a cutting down and sale can be waste. It would be repugnant to the principles of common-sense that the tenant should be obliged to make the repairs in the way most expensive and injurious to the inheritance."

The facts in this case were as follows : The life tenant was very poor ; the premises needed repairing badly ; he cut ten trees and sold them and bought the necessary boards wherewith to make the needed repairs ; it was shown to the court that by this means the repairs were most advantageously and economically made. The ruling has been justified on the ground

neither can he sell wood or timber to purchase fuel,¹ or pay for cutting what he needs for house use.² Neither can a tenant cut wood for the purpose of burning for sale brick made from clay dug on the land.³

SEC. 661. **Where to be taken from.**—A life tenant entitled to estovers has a right to take them where they can most conveniently be obtained without injury to the estate; he is not bound to resort for timber and fuel, necessarily and properly used on the farm, to the outlying lands.⁴

SEC. 662. **Where to be used.**—The estovers taken by a life tenant must be used on the estate where they are obtained,⁵ they cannot be used on any other estate, although both estates were acquired by the same title;⁶ but a life

that it was a "hard" case, and can be excused on no other.

¹ See: *White v. Cutler*, 34 Mass. (17 Pick.) 248;

Padelford v. Padelford, 24 Mass. (7 Pick.) 152;

Miles v. Miles, 32 N. H. 147; s.c. 64 Am. Dec. 362;

Johnson v. Johnson, 18 N. H. 594;

Doe v. Wilson, 11 East 56.

² See: *Phillips v. Allen*, 89 Mass. (7 Allen) 115;

Johnson v. Johnson, 18 N. H. 594.

³ *Livingston v. Reynolds*, 2 Hill (N. Y.) 157; s.c. 26 Wend. (N. Y.) 115.

⁴ In the case of *Webster v. Webster*, 33 N. H. 18; s.c. 66 Am. Dec. 705, the evidence showed that the defendants cut about ten cords of wood and drew it to the house on the premises for fuel. There were about one thousand cords of wood growing on the land. The quantity cut does not appear to be unreasonable for a year's supply. As to the quality and value of the trees cut, the evidence is somewhat contradictory. The inference we draw from the whole is, that about five small oak-trees were cut and split into fuel that might have answered for certain descriptions of timber; but

the quantity would have been small, and the salable value trifling, and it would have been bad economy to attempt to select these few sticks and dispose of them as timber. There were other trees on the farm, scrub-oaks, birch, and white maple, that might have been taken for fuel; but they were more difficult to get, and some of the witnesses said the wood for the fuel could not have been cut with less injury to the farm in any other way. The tenant was entitled to take out of the thousand cords on the farm good fuel, and such as was conveniently situated.

⁵ *Phillips v. Allen*, 89 Mass. (4 Allen) 115, 117;

Cook v. Cook, 77 Mass. (11 Gray) 123;

White v. Cutler, 34 Mass. (17 Pick.) 248;

Fuller v. Wason, 7 N. H. 341;

Elliot v. Smith, 2 N. H. 430;

Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601;

Gardiner v. Derring, 1 Paige Ch. (N. Y.) 573.

Compare: Dalton v. Dalton, 7 Ired. (N. C.) Eq. 197;

Loomis v. Wilbur, 5 Mas. C. C. 13.

⁶ *Cook v. Cook*, 77 Mass. (11 Gray) 123.

tenant is not bound to notice a division of the reversion in the estate among the heirs. Thus it was held in *Owen v. Hyde*,¹ that a widow occupying a dower is not bound to notice any division which may have been made of the reversionary interest after the termination of her life estate; that she took the estate as it was assigned to her with the rights and liabilities which attach to it as a whole; and that although she may have destroyed all the timber which was on a part of one of the lots included in her dower, yet if the dower estate was not injured, but benefited thereby, she would not be guilty of waste, for that is the great criterion by which to determine whether waste has been committed, as that only which does a lasting damage to the inheritance, or depreciates its value as a whole, is waste. And it has also been held that where two parcels of land are obtained from the same estate, the tenant of the life estate may use wood on one part which was cut from the other.²

SEC. 663. **Common of estovers.**—Where several tenants, for life or for a term of years, have a right to take necessary wood and timber for fuel, fences, and other agricultural purposes, from the same estate, it becomes a common of estovers.³ Common of estovers cannot be apportioned. Where a farm entitled to estovers is divided by the act of the party among several tenants, neither of them can take estovers; they belong to the whole farm as an entirety, and not to parts of it; and as the owner of no one portion of the farm entitled to common can enjoy the right, it is necessarily extinguished, and can be revived only by a new grant;⁴ and where common of estovers by operation of law, as by

¹ 6 Yerg. (Tenn.) 334; s.c. 27 Am. Dec. 467.

² *Phillips v. Allen*, 89 Mass. (7 Allen) 117;

Cook v. Cook, 77 Mass. (11 Gray) 123;

Padelford v. Padelford, 24 Mass. (7 Pick.) 152;

Webster v. Webster, 33 N. H. 18, 26; s.c. 66 Am. Dec. 705;

Dalton v. Dalton, 7 Ired. (N. C.) Eq. 197;

Owen v. Hyde, 6 Yerg. (Tenn.) 334; s.c. 27 Am. Dec. 467.

³ *Livingston v. Ketcham*, 1 Barb. (N. Y.) 592;

Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 639; s.c. 25 Am. Dec. 582.

⁴ *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639;

Bruerton's Case, 6 Co. 1;

Tyrringham's Case, 4 Co. 38; 2 Co. Litt. (19th ed.) 164b.

descent, devolves upon several, they cannot enjoy the right in severalty, but may unite in a conveyance and vest the right in one individual.¹

SECTION VII.—WASTE.

- SEC. 664. Definition.
- SEC. 665. What constitutes waste.
- SEC. 666. Same—Exceptions to the rule.
- SEC. 667. Kinds of waste.
- SEC. 668. Same—Voluntary waste.
- SEC. 669. Same—Permissive waste.
- SEC. 670. Liability of life tenant for waste—Common-law doctrine.
- SEC. 671. Same—American doctrine.
- SEC. 672. Same—Acts of strangers.
- SEC. 673. Same—Tenants in dower and curtesy.
- SEC. 674. Same—Same—Permissive waste.
- SEC. 675. Kinds of lands subject to waste.
- SEC. 676. Acts constituting waste—General rule.
- SEC. 677. Same—1. Felling timber—General rule.
- SEC. 678. Same—Same—Amount to be taken.
- SEC. 679. Same—Same—Particular kinds of trees.
- SEC. 680. Same—Same—Local custom as to timber trees.
- SEC. 681. Same—Same—Timber improperly cut—Property in.
- SEC. 682. Same—2. Opening mines.
- SEC. 683. Same—3. In respect to buildings—Pulling down houses.
- SEC. 684. Same—Same—Dilapidations.
- SEC. 685. Same—Same—Alterations.
- SEC. 686. Same—Same—Erection of new buildings.
- SEC. 687. Same—4. Changing course of husbandry.
- SEC. 688. Same—Same—Permitting land to become foul.
- SEC. 689. Same—5. Destruction of heirlooms.
- SEC. 690. Partial power to commit waste.
- SEC. 691. Waste by ecclesiastics.
- SEC. 692. Destruction by fire.
- SEC. 693. Without impeachment of waste.

¹ Van Rensselaer v. Radcliff, 10 Wend. (N. Y.) 639.

According to the English rule, where such inheritances are divided, it appears by the books that the elders shall have them, and the others a contribution; but if no other property descended from which contribution could be had, then the parceners should have alternate enjoyment, or, in case of piscary, one shall have the first fish and another the second;

and so of a toll-fish, where the hereditament was the toll of a mill. If, however, that doctrine were applicable here, it would only relate to descents, not alienation by deed; and even as to descents, it has been held that one of several heirs, to whom a right of estovers descended, could not alien his share so as to authorize the assignee to enter and cut wood. Leyman v. Abeel, 16 John, 30.

- SEC. 694. Remedies for waste—1. Writ of estrepement and writ of waste.
 SEC. 695. Same—2. Injunction.
 SEC. 696. Same—Same—Character of the remedy.
 SEC. 697. Same—Same—When granted.
 SEC. 698. Same—Same—Same—Threat to commit waste.
 SEC. 699. Same—Same—Same—Permissive waste.
 SEC. 700. Same—Same—Same—Privity of title.
 SEC. 701. Same—Same—In favor of whom granted.
 SEC. 702. Same—Same—Against whom granted.
 SEC. 703. Same—Same—Bill for account.
 SEC. 704. Same—3. Forfeiture of estate.

SECTION 664. **Definition.**—Waste, as applied to a life estate, consists in an unlawful act or omission of duty which results in a permanent injury to the estate, or which tends to the destruction of the estate or the depreciation in value of the inheritance.¹ It may consist either in diminishing the value of the estate, increasing its burden,² or changing and destroying the evidences of title to the inheritance,³ such as spoiling or destroying houses, gardens, parks, warrens, dove-cots, trees, or other corporeal hereditaments, to the disherison of him that has the remainder or reversion.⁴

SEC. 665. **What constitutes waste.**—Waste in this country is not to be determined by the rules in the English

¹ *Wilds v. Layton*, 1 Del. Ch. 226 ; s.c. 12 Am. Dec. 91 ;

Duvall v. Waters, 1 Bland's Ch. (Md.) 569 ; s.c. 18 Am. Dec. 350 ;

Webster v. Webster, 33 N. H. 18 ; s.c. 66 Am. Dec. 705 ;

Smith v. Sharpe, 1 Busbee (N. C.) L. 91 ; s.c. 57 Am. Dec. 574.

The term "waste" embraces improper usage.

59 Am. Dec. 70, note.

Waste is the abuse or destructive use of property by him who has not an absolute, unqualified title.

Duvall v. Waters, 1 Bland's Ch. (Md.) 569 ; s.c. 18 Am. Dec. 350.

Waste is defined to be spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that has the remainder or reversion in fee-simple ; whatever is done which tends to the

destruction of the inheritance or the impairing of its value is waste.

Smith v. Sharpe, 1 Busbee (N. C.) L. 91 ; s.c. 57 Am. Dec. 574.

² *Doe d. Grubb v. Burlington*, 5 Barn. & Ad. 507, 517 ; s.c. 27 Eng. C. L. 217, 221 ;

Huntley v. Russell, 13 Q. B. 572, 588 ; s.c. 66 Eng. C. L. 570, 588.

³ See : *Proffit v. Henderson*, 29 Mo. 327 ;

McGregor v. Brown, 10 N. Y. 117 ;

Doe d. Grubb v. Burlington, 5 Barn. & Ad. 507 ; s.c. 27 Eng. C. L. 217 ;

Jones v. Chappell, L. R. 20 Eq. 539 ; s.c. 15 Moak's Eng. Rep. 475 ;

Huntley v. Russell, 13 Q. B. 572 ; s.c. 66 Eng. C. L. 570.

⁴ 2 Bl. Com. 281 ;

1 Co. Litt. (19th ed.) 53a.

law in all respects, because of the difference of the situation in the two countries. Thus the cutting of timber for the purpose of clearing is waste in England, but not necessarily in this country.¹ What is to be deemed waste in this country must, in a considerable degree, be left to a jury upon the evidence.² But in equity the court must find the facts, whether waste has been committed or threatened. The general principle governing the question is that the tenant shall not be permitted to do any act of permanent injury to the inheritance, except to take his reasonable estovers.³

SEC. 666. Same—Exceptions to the rule.—There are some exceptions to this general rule. Thus damage resulting to houses, wood, or soil, from the act of God,⁴ as by lightning or tempest; or from public enemies, as an invaded army; or from the reversioner himself, is not waste.

SEC. 667. Kinds of waste.—Waste may be divided into three classes: first, voluntary waste, as by act of commission; second, involuntary waste, by an act of omission; and third, eventual waste, as an act done by an admitted particular tenant after the institution of a suit involving the title, or a partition suit.⁵

668. Same—Voluntary waste.—Voluntary waste consists in a commission of some destructive act;⁶ such as (1) felling timber trees,⁷ (2) pulling down houses,⁸ (3) opening mines or pits,⁹ (4) changing course of husbandry,¹⁰ (5) destroying heirlooms,¹¹ and the like.

SEC. 669. Same—Permissive waste.—Permissive waste is

¹ See: *Post*, § 677, *et seq.*

² See: *Padelford v. Padelford*, 24 Mass. (7 Pick.) 152;

Webster v. Webster, 33 N. H. 18;

s.c. 66 Am. Dec. 705;

Ward v. Sheppard, 2 Hayw. (N. C.) 283; s.c. 2 Am. Dec. 625;

Findlay v. Smith, 6 Munf. (Va.) 184; s.c. 8 Am. Dec. 733;

Doe d. Grubb v. Burlington, 5

Barn. & Ad. 507; s.c. 27 Eng.

C. L. 217.

³ *Pyncheon v. Stearns*, 52 Mass. (11 Met.) 304; s.c. 45 Am. Dec. 207;

Webster v. Webster, 33 N. H. 18;

s.c. 66 Am. Dec. 705;

Chase v. Hazelton, 7 N. H. 171.

⁴ See: *Post*, § 670.

⁵ *Duvall v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350.

⁶ See: *Ante*, § 667.

⁷ See: *Post*, § 677, *et seq.*

⁸ See: *Post*, § 683.

⁹ See: *Post*, § 682.

¹⁰ See: *Post*, § 687.

¹¹ *Baxter v. Taylor*, 1 Nev. & M. 13. See: *Post*, § 689.

that injury to an estate which results from the mere neglect or omission to do what will prevent injury ; such as to suffer houses or other improvements to go to decay for want of repairs. It may be incurred in respect to the soil as well as to the buildings, trees, and fences, or other improvements on the premises.¹ But if a house be ruinous at the time when the tenant for life comes into possession, he is not liable for waste in suffering it to fall down ; for in such a case he is not bound by law to repair it.

SEC. 670. **Liability of life tenant for waste—Common-law doctrine.**—At common law the tenant for life was not liable for waste ; liability was first placed upon him by the statute of Marlebridge,² which gave the right to owners of the inheritance to recover damages for the waste committed or suffered, and by the statute of Gloucester,³ which forfeited the estate and gave the reversioner or remainderman a right to recover treble the damages. It may be said to be a general principle of law that a tenant for life, without some special agreement to the contrary, is responsible to the reversioner for all injuries amounting to waste done to the premises during his term,⁴ by whomsoever the injuries may have been committed, with the exception of the acts of God, and public enemies, and the acts of the reversioner himself. The tenant is like a common carrier, and the law in this

¹ As to injunction against permissive waste, see : *Post*, § 699.

² 52 Hen. III., c. 23.

³ 6 Edw. I., c. 5.

⁴ **Negligence or wantonness** on the part of a tenant for life occasioning any permanent waste to the subsistence of the estate, whether the waste be voluntary or permissive, he becomes liable in the suit by the persons entitled to the immediate estate of inheritance, to answer in damages as well as to have his future operation stayed.

2 Bl. Com. 281 ;

1 Co. Litt. (19th ed.) 53a, 53b ;

4 Kent Com. (13th ed.) 76.

Assignee of estate *pur autre vie*.—
For the purpose of creating an

estate *pur autre vie* by assignment, the estate of tenant in tail after possibility of issue extinct does not differ from an estate for life (3 Prest. Conv. 171, 172), and the assignee is punishable for waste.

1 Co. Litt. (19th ed.) 28a ;

2 Inst. 302.

Permissive waste—Destruction by fire.—Under the head of permissive waste, the tenant is answerable if the house or other building on the premises be destroyed by fire through his carelessness or negligence, and must rebuild, in a convenient time, at his own expense.

See : *Post*, § 692.

instance is founded on the same great principles of public policy. The landlord cannot protect the property against strangers ; the tenant is on the spot, and presumed to be able to protect it himself.¹

SEC. 671. **Same—American doctrine.**—The American doctrine on the subject of waste is somewhat varied from that of the English law, and is more enlarged and better adapted to the circumstances of a new and growing country, the major portion of which had to be reclaimed and subjected to cultivation.² In this country, as a general rule, unless the estate is expressly made unimpeachable for waste, a life tenant is responsible for all waste done to the premises, not caused by the act of God, or the public enemy, or the acts of the remainderman or reversioner himself ;³ but such a tenant is not chargeable

¹ *White v. Wagner*, 4 Har. & J. (Md.) 373 ; s.c. 7 Am. Dec. 674.

² *Parkins v. Coxe*, 2 Hayw. (N. C.) 339 ;

Hastings v. Crunckleton, 3 Yeates (Pa.) 261 ;

Findlay v. Smith, 6 Munf. (Va.) 134 ; s.c. 8 Am. Dec. 733 ;

Crouch v. Puryear, 1 Rand. (Va.) 258 ; s.c. 10 Am. Dec. 528 ;

4 Kent Com. (13th ed.) 77.

In Massachusetts, however, the inclination has been to favor the strict English rule ; and that was one of the reasons assigned for holding the widow not dowerable of wild lands in an uncultivated state ; because the land did not admit of the enjoyment of dower without committing waste and thus forfeiting the estate.

Conner v. Shepherd, 15 Mass. 164.

See : *White v. Cutler*, 34 Mass. (17 Pick.) 248, 250 ;

Webb v. Townsend, 18 Mass. (1 Pick.) 21, 22 ; s.c. 11 Am. Dec. 132.

³ *Miller v. Shields*, 55 Ind. 71 ;

White v. Wagner, 4 Har. & J. (Md.) 373 ; s.c. 7 Am. Dec. 674 ;

Clark v. Holden, 73 Mass. (7 Gray) 8 ; s.c. 66 Am. Dec. 450 ;

Sackett v. Sackett, 26 Mass. (8 Pick.) 309, 314 ;

Webster v. Webster, 33 N. H. 18 ; s.c. 66 Am. Dec. 705 ;

Johnson v. Johnson, 18 N. H. 594 ;

Chase v. Hazelton, 1 N. H. 171 ;
Neel v. Neel, 19 Pa. St. 323, 324 ;

Smith v. Daniel, 2 McC. (S. C.) Eq. 143 ;

Dejarnatte v. Allen, 5 Gratt. (Va.) 499.

Waste under reservation.—Tenant for life has no right to commit waste under reservation of "all the right, title, and interest in and unto the above-named land and premises for and during my natural life."

Webster v. Webster, 33 N. H. 18 ; s.c. 66 Am. Dec. 705.

Tenants in common liability to co-tenant for waste.

See : *Nelson's Heirs v. Clay*, 7 J. J. Marsh. (Ky.) 138 ; s.c. 23 Am. Dec. 387 ;

Smith v. Sharpe, Busbee (N. C.) L. 91 ; s.c. 57 Am. Dec. 574 ;

Hancock v. Day, 1 McM. (S. C.) Eq. 69 ; s.c. 36 Am. Dec. 293 ;

Johnson v. Johnson, 2 Hill (S. C.) Eq. 277 ; s.c. 29 Am. Dec. 72.

Alienee of life tenant is liable to the remainderman or reversioner for waste.

Dejarnatte v. Allen, 5 Gratt. (Va.) 499.

Ejectment cannot be maintained by a remainderman or reversioner to recover the premises wasted ; such recovery can be attained only by an action of waste.

with waste committed to the injury of the remainderman, unless the evidence affirmatively shows such facts as will sustain the charge ; and the presumption is in favor of the tenant for life until the contrary appears.¹

The acts which may be done in this country without being guilty of waste are much less restricted than they are in England.² Thus in North Carolina it has been held not to be waste to clear tillable lands for the necessary support of the tenant's family, though the timber be destroyed in clearing,³ and in Virginia it is said that the law of waste is so varied from that in England that a tenant in dower, in working coal mines already opened, may penetrate into new seams, and sink new shafts, without being chargeable with waste.⁴

SEC. 672. **Same—Acts of strangers.**—A tenant for life is not responsible for waste occasioned by the act of God, or the public enemy, or of the law ;⁵ but he is liable not only for his own acts, but also for those of strangers who injure the estate ;⁶ and to enable him to protect the estate the law gives him an action for trespass against the wrong-doer.⁷ Consequently where waste is committed by the life tenant himself, or by a stranger, he is liable to the reversioner or remainderman.⁸

See : Robinson v. Robinson, 2 B. Mon. (Ky.) 284 ;

Patrick v. Sherwood, 4 Blatchf. C. C. 112.

¹ Lynn's Appeal, 31 Pa. St. 44 ; s.c. 72 Am. Dec. 721.

² See : Ward v. Sheppard, 2 Hayw. (N. C.) 283 ; s.c. 2 Am. Dec. 625.

³ Parkins v. Cox, 2 Hayw. (N. C.) 339.

⁴ Findlay v. Smith, 6 Munf. (Va.) 134 ; s.c. 8 Am. Dec. 733 ;

Crouch v. Puryear, 1 Rand. (Va.) 258 ; s.c. 10 Am. Dec. 528.

⁵ See : *Ante*, § 670.

⁶ Fay v. Brewer, 20 Mass. (3 Pick.) 203, 205.

⁷ Fay v. Brewer, 20 Mass. (3 Pick.) 203, 205 ;

Baxter v. Taylor, 1 Nev. & M. 13.

See : Randall v. Cleaveland, 2 Conn. 329 ;

Jesser v. Gifford, 4 Burr. 21, 41 ; Queen's College v. Hallett, 14

East 489 ;

Jackson v. Pesked, 1 Maule & S. 234.

⁸ See : White v. Wagner, 4 Har. & J. (Md.) 373 ; s.c. 7 Am. Dec. 674 ;

Fay v. Brewer, 20 Mass. (3 Pick.) 203 ;

Beers v. Beers, 21 Mich. 464 ;

Wood v. Griffin, 46 N. H. 230, 237 ;

Austin v. Hudson R. R. Co., 25 N. Y. 334, 341 ;

Cook v. Champlain Transportation Co., 1 Den. (N. Y.) 91 ;

Pollard v. Shaffer, 1 U. S. (1 Dal.) 210 ; bk. 1 L. ed. 104 ;

Toleman v. Portbury, L. R. 5 Q. B. 288, 296 ; s.c. 39 L. J. Q. B. 136 ; 22 L. T. 33 ;

Huntley v. Russell, 13 Q. B. 572, 591 ; s.c. 66 Eng. C. L. 570, 589 ;

Greene v. Cole, 2 Saund. 644 ;

Attersoll v. Stevens, 1 Taunt.

SEC. 673. **Same—Tenants in dower and curtesy.**—Tenants in dower and curtesy, under the American doctrine, are entitled to cut timber and clear lands; they are only restricted from clearing lands for cultivation when there is already sufficient cleared for that purpose;¹ and it has even been held that such tenants may use timber for making staves and shingles, where that was the ordinary use and the only use to be made of such lands.² It is said in the case of *Owen v. Hyde*,³ that the dowager is not guilty of waste in cutting timber on one of the lots included in the dower estate, not necessary for her support, but for purposes of profit, if the whole dower estate does not receive lasting injury thereby, and sufficient timber remains for the permanent use of the estate, although part of the timber is used for fencing on another lot of the dower estate assigned to a different heir.

SEC. 674. **Same—Same—Permissive waste.**—It is thought that a tenant in curtesy or in dower is answerable for waste committed by a stranger the same as other tenants for life,⁴ and take their remedy over against him.⁵

SEC. 675. **Kinds of lands subject to waste.**—Voluntary waste may be committed upon cultivated fields, orchards, gardens, meadows, and the like, by using them contrary to the course of husbandry;⁶ or by tilling the land in an improper and negligent manner so as to exhaust the soil.⁷ Waste is also committed upon wild or woodlands, under the English law, by converting them into cultivated lands, as well as by allowing tillable lands to be overrun by brush.⁸

183, 198; s.c. 9 Rev. Rep. 731, 744.

¹ *Loomis v. Wilbur*, 5 Mas. C. C. 13.

² *Ballentine v. Poyner*, 2 Hayw. (N. C.) 110.

³ 6 Yerg. (Tenn.) 334; s.c. 27 Am. Dec. 467.

⁴ See: *Ante*, § 871.

⁵ *Cook v. Champlain Transportation Co.*, 1 Den. (N. Y.) 91;

1 Co. Litt. (19th ed.) 54a;

2 Inst. 145, 303.

⁶ See: *Post*, § 687.

⁷ See: *Livingston v. Reynolds*, 2 Hill (N. Y.) 157;

Keepers, etc., Harrow School v.

Alderton, 2 Bos. & P. 86; s.c.

5 Rev. Rep. 546;

Doherty v. Allman, L. R. 3 App.

Cas. 709, 725, 733; s.c. 29 Moak's

Eng. Rep. 461;

Jervis v. Berridge, L. R. 8 Ch.

351; s.c. 5 Moak's Eng. Rep. 581;

Townsend v. Stangroom, 6 Ves.

328; s.c. 5 Rev. Rep. 312.

⁸ 1 Co. Litt. (19th ed.) 53b.

SEC. 676. **Acts constituting waste—General rule.**—By the laws of England it is considered waste to cut timber,¹ or to convert woodland into meadow or pasture or arable land. In this country these rules have been modified to some extent in reference to wild and uncleared lands leased or held for agricultural purposes.² Whether a particular act constitutes waste in this country is a question of fact to be determined by a jury under the directions of the court. It would seem that if the act does damage to the reversion, and is not one of the ordinary uses to which the land is properly put, it constitutes waste. In the settlement of the question of waste the usages and customs of the community in which the estate is situated are always to be taken into consideration, because an act which is waste in one part of the country may be a legitimate use of the land in another.³ In England the cutting of timber is *prima facie* waste,⁴ but in this country if trees or timber are cut for the purpose of preparing wild lands for cultivation,⁵ it is not waste,⁶ unless the clear-

¹ Only waste to cut timber trees.—The rule is thus stated: "It is not waste to cut down trees which are not timber, either by law or by custom, or from the situation in which they are placed, unless some special prejudice arises thereby to the inheritance. Nor is the proper and regular thinning of a wood for the purpose of improving the rest of the trees waste, provided it is done in a reasonable and husbandmanlike manner."

Kerr on Injunctions, p. 240.

² McGregor v. Brown, 10 N. Y. 114; Jackson v. Brownson, 7 John. (N. Y.) 227; s.c. 5 Am. Dec. 258;

Kidd v. Dennison, 6 Barb. (N. Y.) 9.

³ Drown v. Smith, 52 Me. 141, 143; Adams v. Brereton, 3 Har. & J. (Md.) 124;

Pyncheon v. Stearns, 52 Mass. (11 Met.) 304; s.c. 45 Am. Dec. 207;

Webster v. Webster, 33 N. H. 18, 25; s.c. 66 Am. Dec. 705;

Morehouse v. Cotheal, 22 N. J. L. (2 Zab.) 521;

Jackson v. Brownson, 7 Johns.

(N. Y.) 227; s.c. 5 Am. Dec. 258;

Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601;

Jackson v. Tibbits, 3 Wend. (N. Y.) 341;

Davis v. Gilliam, 5 Ired. (N. C.) Eq. 308, 311;

Crockett v. Crockett, 2 Ohio St. 181;

Lynn's Appeal, 31 Pa. St. 44; s.c. 27 Am. Dec. 721;

Keeler v. Eastman, 11 Vt. 293.

⁴ See: *Post*, § 677.

⁵ Lynn's Appeal, 31 Pa. St. 44; s.c. 27 Am. Dec. 721.

Thus it is said in *Owen v. Hyde*, 6 Yerg. (Tenn.) 334; s.c. 27 Am. Dec. 467, that the clearing of timber land for the purpose of cultivation, on part of the dower estate, where the land already cleared is old and worn out, and enough timber is left for permanent use, is not waste in this country, though it might be otherwise in England.

⁶ Ward v. Sheppard, 2 Hayw. (N. C.) 283; s.c. 2 Am. Dec. 625; *Owen v. Hyde*, 6 Yerg. (Tenn.) 334; s.c. 27 Am. Dec. 467.

ing of land by the tenant is bad husbandry, and without pretense that it is for estovers.¹ A life tenant is not allowed to use wood to burn brick made from clay dug on the land where the bricks are made for sale ;² nor to cut and sell wood, for the reason that he has a right to cut wood only for fuel and repairs.³ In this country it is not waste in a tenant in curtesy or other tenant for life to change pasture land into woodland by suffering timber to grow thereon,⁴ as it is in England. In England all alterations by the tenant become waste,⁵ as by converting two chambers into one, or pulling down a house and rebuilding it in a different fashion, even though the property is thereby made more valuable ;⁶ but according to the American rule actual damages to the inheritance must be shown in order to establish waste.⁷ The following acts have been held to constitute waste: Cutting hop-poles,⁸ cutting and selling wood for other purposes than fuel and repairs,⁹ tearing boards from the buildings and destroying fences ;¹⁰ but the following acts are held not to be waste unless clearly shown to be prejudicial to the inheritance ; such as changing¹¹ nature of property,¹² erecting new houses, or opening a way on

¹ Chase v. Hazelton, 7 N. H. 171.

² Livingston v. Reynolds, 2 Hill (N. Y.) 157; s.c. 26 Wend. (N. Y.) 115.

³ Ward v. Sheppard, 2 Hayw. (N. C.) 283; s.c. 2 Am. Dec. 625; Clemence v. Steere, 1 R. I. 272; s.c. 53 Am. Dec. 621.

⁴ See: Clark v. Holden, 73 Mass. (7 Gray) 8, 10; s.c. 66 Am. Dec. 450;

Pynchon v. Stearns, 52 Mass. (11 Met.) 304; s.c. 45 Am. Dec. 207.

Restoring land to pasture land.—But it will be waste for a tenant in life to cut timber trees on woodland, not for use on the estate, but done with the intention of restoring the land to the condition of pasture land, in which it was when the estate for life commenced, and although it would be good husbandry on the part of the owner in fee to so restore it.

Clark v. Holden, 73 Mass. (7 Gray) 8, 10; s.c. 66 Am. Dec. 450.

⁵ See: Post, § 685.

⁶ City of London v. Greyne, Cro. Jac. 182;

Graves' Case, H. 4 Jac. C. B.;

1 Co. Litt. (19th ed.), p. 53, note 3;

2 Rol. Abr. 815, pl. 17, 18.

⁷ See: Post, § 685.

⁸ Unless that is the ordinary method of managing the farm.

Clemence v. Steere, 1 R. I. 272; s.c. 53 Am. Dec. 621.

⁹ Clemence v. Steere, 1 R. I. 272; s.c. 53 Am. Dec. 621;

Johnson v. Johnson, 18 N. H. 594; s.c. 29 Am. Dec. 72.

As for the purpose of paying cost of cutting firewood needed for the house.

Phillips v. Allen, 89 Mass. (7 Allen) 115;

Padelford v. Padelford, 24 Mass. (7 Pick.) 152;

Johnson v. Johnson, 18 N. H. 594; s.c. 29 Am. Dec. 72.

¹⁰ Clemence v. Steere, 1 R. I. 272; s.c. 53 Am. Dec. 621.

¹¹ Pynchon v. Stearns, 52 Mass. (11 Met.) 304; s.c. 45 Am. Dec. 207.

¹² As converting arable land into

the premises,¹ removing crib erected by life tenant but not annexed to the freehold,² or raising surface of land by depositing earth thereon.³

SEC. 677. Same—1. Felling timber—General rule.—The principal method of committing waste is by felling timber trees, except they are cut for estovers, because trees are not a part of the annual product of the land and belong to the owner of the inheritance. The tenant for life has only a qualified property in the trees on the estate, as far as they afford him shade and shelter, and the right to take the mast and fruit.⁴ Consequently, by the old rule a life tenant is held to a strict account for waste in this matter, and confined to cut trees and timber for the purpose of firewood and repairs;⁵ if he takes more of the wood on the estate than is necessary to the enjoyment of his estate, to the injury of the remainder in fee, he is liable for waste.⁶

SEC. 678. Same—Same—Amount to be taken.—A tenant

woodland, meadow into pasture, or the like, but it is held otherwise in England, because such alterations change the course of husbandry.

Pynchon v. Stearns, 52 Mass. (11 Met.) 304; s.c. 45 Am. Dec. 207;
Jackson v. Brownson, 7 John. (N. Y.) 227; s.c. 5 Am. Dec. 258;
Clemence v. Steere, 1 R. I. 272; s.c. 53 Am. Dec. 258.

¹ *Pynchon v. Stearns*, 52 Mass. (11 Met.) 304; s.c. 45 Am. Dec. 207.

² *Clemence v. Steere*, 1 R. I. 272; s.c. 53 Am. Dec. 621.

³ *Pynchon v. Stearns*, 52 Mass. (11 Met.) 304; s.c. 45 Am. Dec. 207.

⁴ 1 Inst. 53a.

⁵ *Phillips v. Allen*, 89 Mass. (7 Allen) 115;

Cook v. Cook, 77 Mass. (11 Gray) 123;

Clark v. Holden, 73 Mass. (7 Gray) 8; s.c. 66 Am. Dec. 450;

White v. Cuter, 34 Mass. (17 Pick.) 248;

Sargent v. Towne, 10 Mass. 303, 307;

Webster v. Webster, 33 N. H. 18; s.c. 66 Am. Dec. 705;

Johnson v. Johnson, 18 N. H. 594; s.c. 29 Am. Dec. 72;

Clemence v. Steere, 1 R. I. 272;

s.c. 53 Am. Dec. 621.

Firewood for servants.—A tenant for life may not only cut firewood for his own house but also for that of his servant who cultivates the land, provided it can be done without injury to the inheritance (*Gardiner v. Derring*, 1 Paige Ch. (N. Y.) 573), unless indeed there be a scanty supply of timber.

Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601.

Firewood and fencing timber—Cutting elsewhere.—But a tenant with the privilege of cutting firewood or fencing timber cannot obtain his firewood or fencing timber elsewhere, and then cut as much timber from the devised premises.

Van Deusen v. Young, 29 N. Y. 10;

Clarke v. Cummings, 5 Barb. (N. Y.) 340;

Attorney-General v. Stawell, 2 Anstr. 592, 601;

Gower v. Eyre, Ceo. Cooper's Chy. Rep. 156.

Compare: Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601.

⁶ *Johnson v. Johnson*, 2 Hill (S. C.) Eq. 277; s.c. 29 Am. Dec. 72.

for life of farming lands is entitled to cut down and use so much of the standing timber on the farm as may be necessary for fuel, and for making and repairing fences and buildings. In the case of wild and uncultivated lands, in this country, he is entitled to cut down so much of the timber as may be proper for the purpose of cultivation, or for other purposes required in the reasonable cultivation or repair of the premises;¹ provided, however, that he does not materially lessen the value of the inheritance.² To what extent wood may be cut down in the case of wild lands without exposing the party to liability for waste is a question to be determined by a jury under the directions of the court.³

The general rule in this country is that a tenant for life is liable to account for waste where he has cut down more of the wood on the estate than is necessary to the enjoyment of his estate, to the injury of the remainder in fee.⁴

¹ *Lynn's Appeal*, 31 Pa. St. 44; s.c. 72 Am. Dec. 721.

² *Van Deusen v. Young*, 29 N. Y. 10;

Jackson v. Brownson, 7 John. (N. Y.) 227; s.c. 5 Am. Dec. 258;

Ward v. Sheppard, 2 Hayw. (N. C.) 283; s.c. 2 Am. Dec. 625;

Owen v. Hyde, 6 Yerg. (Tenn.) 334; s.c. 27 Am. Dec. 467;

4 *Kent Com.* (13th ed.) 76.

In *Tennessee*, the law concerning waste is construed liberally in favor of the widow. She may cut down timber for necessary uses, provided the estate be not injured, and enough be left for permanent use.

Owen v. Hyde, 6 Yerg. (Tenn.) 334; s.c. 27 Am. Dec. 467.

Clearing timber land for purposes of cultivation, on part of the dower estate, where the land already cleared is old and worn out, and enough timber is left for permanent use, is not waste in this country, though it might be otherwise in England.

Owen v. Hyde, 6 Yerg. (Tenn.) 334; s.c. 27 Am. Dec. 467.

³ *Hickman v. Irvine*, 3 Dana (Ky.) 123;

Jackson v. Brownson, 7 John. (N. Y.) 227; s.c. 5 Am. Dec. 258.

Thus it has been said that a tenant

for life does not exceed his rights by cutting and using timber to repair buildings on the land, and by selling a very moderate amount thereof, all the timber taken being worth but a few hundred dollars, and an abundance being left for the full enjoyment of a privilege to take the timber for the use of a saw-mill, owned by the tenant for life and another.

Dodd v. Watson, 4 Jones (N. C.) Eq. 48; s.c. 72 Am. Dec. 577.

But it is thought that this case cannot be safely followed as a precedent, because it contravenes the general rule as to the extent and nature of the use to be made of the timber on the premises.

See: *Ante*, § 677.

Permanently injuring inheritance.—

It would be waste to cut down all the timber, so as permanently to injure the inheritance. *Jackson v. Brownson*, 7 John. (N. Y.) 227; s.c. 5 Am. Dec. 258.

Clearing land by the tenant, which is bad husbandry, and without pretense that it is for estovers, is waste.

Chase v. Hazelton, 7 N. H. 171.

⁴ *Johnson v. Johnson*, 2 Hill (S. C.) Eq. 277; s.c. 29 Am. Dec. 72

Thus it has been held by the Supreme Judicial Court of Massachusetts that cutting timber trees on woodland by the tenant for life not for the use of the estate, but with the intention of restoring the land to the condition of pasture land in which it was when the estate for life commenced, is waste, although it would be good husbandry in the owner in fee to make such alterations.¹

SEC. 679. **Same—Same—Particular kinds of trees.**—Whether cutting any particular kinds of trees for fuel is waste depends upon the situation and circumstances, and, perhaps, in some instances, on the custom of the district of the country in which the land lies. Thus where oak-trees are abundant and are in common use for fuel, it is not waste to cut them for that purpose.² In this country no act of a tenant for life amounts to waste unless it is or may be prejudicial to the inheritance.³ By the general law of England, oak, ash, and elm trees are timber, provided they are of the age of twenty years and upwards; provided also that they are not so old as not to have a reasonable quantity of usable wood in them, sufficient, according to some writers, to make a good post.⁴

SEC. 680. **Same—Same—Local custom as to timber trees.**—The question of what timber is depends first on the general law, that is, the law of the country, and consequently on the special custom of the locality.⁵ It has been said that the custom of the country may vary in two ways: first of all, you may have trees called timber by the custom of the country—beech in some countries, horn-

English rule—Doctrine of Packington's Case.—It was held in Packington's Case, 3 Atk. 216, that the felling of three oaks growing in the avenues of a park was waste, and the defendant was restrained from the further cutting of trees in the avenues or drive-ways, and also from cutting trees not of proper growth. The same doctrine is laid down in the following cases:

Simmons v. Norton, 7 Bing. 640;
Gorges v. Stanfield, 2 Cro. Eliz. 592;

Abraham v. Budd, 2 Freem. 54;
Aston v. Aston, 1 Ves. 264;
Famworth v. Ferrers, 6 Ves. 419;
Vane v. Barnard, 2 Vern. 738.

¹ *Clark v. Holden*, 73 Mass. (7 Gray) 8; s.c. 66 Am. Dec. 450.

² *Padelford v. Padelford*, 24 Mass. (7 Pick.) 152.

³ *Webster v. Webster*, 33 N. H. 18; s.c. 66 Am. Dec. 705.

⁴ *Honywood v. Honnywood*, L. R. 18 Eq. Cas. 303; s.c. 9 Moak's Eng. Rep. 819.

⁵ *Honywood v. Honnywood*, L. R. 18 Eq. Cas. 306; s.c. 9 Moak's Eng. Rep. 819.

bean in others, and even white-thorn and black-thorn, and many other trees are considered timber in peculiar localities—in addition to the ordinary timber trees.¹ Then again, in certain localities, arising probably from the nature of the soil, the trees of even twenty years old are not necessarily timber, but may go to twenty-four years, or even to a later period if necessary; and in other places the test of when a tree becomes timber is not its age but its girth.²

SEC. 681. **Same—Same—Timber improperly cut—Property in.**—Where timber is severed from the land, by improperly cutting by the tenant for life, or is blown down, it belongs to the owner of the first estate of inheritance.³ Where timber is cut by a stranger, it belongs to the reversioner and not to the tenant; and if carried away, the reversioner has a constructive possession, sufficient to maintain trespass *de bonis asportatis* against the stranger.⁴ If the timber is cut by the tenant unnecessarily, he acquires no title thereto, and cannot convey any to a purchaser.⁵ In a case where the court orders timber to be cut for any reason, the proper course is for the proceeds to be invested, and the income given to the successive owners of the estate, until there is an absolute estate of inheritance, the owner of which is entitled to

¹ *Honywood v. Honwood*, L. R. 18 Eq. Cas. 306; s.c. 9 Moak's Eng. Rep. 819.

² *Honywood v. Honwood*, L. R. 18 Eq. Cas. 306; s.c. 9 Moak's Eng. Rep. 819.

³ *Bulkley v. Dolbeare*, 7 Conn. 233; *Phillips v. Allen*, 89 Mass. (7 Allen) 115;

Clark v. Holden, 73 Mass. (7 Gray) 8; s.c. 66 Am. Dec. 450;

Moores v. Wait, 3 Wend. (N. Y.) 104;

Honywood v. Honwood, L. R. 18 Eq. Cas. 306; s.c. 9 Moak's Eng. Rep. 819.

In Bateman v. Hotchkin, 31 Beav. 486, a tenant for life, impeachable for waste, was held entitled to have the benefit of the sale of all such trees felled by the wind as he would be entitled to

cut them himself, and to all fair and proper thinnings, and to all coppices cut periodically in the nature of crops.

⁴ *Bulkley v. Dolbeare*, 7 Conn. 233.

⁵ *Moores v. Wait*, 3 Wend. (N. Y.) 104.

Proceeds of trees not timber—English rule.—In England, however, a life tenant is entitled at law to the proceeds of trees which are not timber cut by him, whether rightfully or wrongfully, though liable, where wrongfully cut, to an action of waste. See: *Bateman v. Hotchkin*, 31 Beav. 486;

Pidgeley v. Rawling, 2 Coll. 275; *Honywood v. Honwood*, L. R. 18 Eq. Cas. 306; s.c. 9 Moak's Eng. Rep. 819.

the principal ; and the same rule applies to cases of equitable waste.¹

SEC. 682. **Same—2. Opening mines.**—We have already seen that a tenant for life cannot dig for gravel, lime, coal, brick, earth, stone, and the like ;² unless, indeed, for the purpose of manuring the land. He cannot open new mines, but he may work mines already opened.³ Whether a tenant for life can work old abandoned mines or pits which have neither been worked nor prepared for work by the preceding owner of the fee, or which he has not worked, but has made preparation for working, there is some question.⁴ It is thought, however, that in the case of minerals, the tenant for life may follow the vein already opened up, and, for the purpose of working it more advantageously, may even open new shafts and pits, and make other improvements.⁵ In working mines already

¹ *Honywood v. Honnywood*, L. R. 18 Eq. Cas. 306 ; s.c. 9 Moak's Eng. Rep. 819.

² *Ante*, § 583, *et seq.*

See : *Chase v. Hazelton*, 7 N. H. 171 ;

Parkins v. Cox, 2 Hayw. (N. C.) 339 ;

Kidd v. Dennison, 6 Barb. (N. Y.) 9 ;

Clemence v. Steere, 1 R. I. 272 ; s.c. 53 Am. Dec. 621.

³ See : *Ante*, §§ 583–585 ;

Lenfers v. Henke, 73 Ill. 405 ; s.c. 24 Am. Rep. 263 ;

Hendrix v. McBeth, 61 Ind. 473 ; s.c. 28 Am. Rep. 680 ;

Billings v. Taylor, 27 Mass. (10 Pick.) 460 ; s.c. 20 Am. Dec. 533 ;

Reed v. Reed, 16 N. J. Eq. (1 C. E. Gr.) 248 ;

Rockwell v. Morgan, 13 N. J. Eq. (2 Beas.) 384, 389 ;

Coates v. Cheever, 1 Cow. (N. Y.) 460 ;

Kier v. Peterson, 41 Pa. St. 357, 361 ;

Lynn's Appeal, 31 Pa. St. 44 ; s.c. 72 Am. Dec. 721 ;

Irwin v. Covode, 24 Pa. St. 162 ;

Neel v. Neel, 19 Pa. St. 323, 324 ;

Findlay v. Smith, 6 Munf. (Va.) 134 ; s.c. 8 Am. Dec. 733 ;

Crouch v. Puryear, 1 Rand. (Va.) 253–258 ; s.c. 10 Am. Dec. 528 ;

36

Hinley v. Russell, 13 Q. B., 572, 591 ; s.c. 66 Eng. C. L. 570, 589 ;

Knight v. Mosely, Amb. 176 ;

Moyle v. Mayle, Owen 66 ;

Stoughton v. Leigh, 1 Taunt. 410.

Working coal mine.—It is said in the case of *Crouch v. Puryear*, 1 Rand. (Va.) 258 ; s.c. 10 Am. Dec. 528, that it is not waste for a tenant in dower of coal lands to take coal to any extent from a mine already opened, or to sink new shafts into the same veins, or to penetrate through a seam already opened and to dig into one lying under it.

⁴ *Viner v. Vaughan*, 2 Beav. 466 ; s.c. 4 Jur. 332.

See : *Ante*, §§ 583–585.

⁵ See : *Billings v. Taylor*, 27 Mass. (10 Pick.) 460 ; s.c. 20 Am. Dec. 533 ;

Coates v. Cheever, 1 Cow. (N. Y.) 460 ;

Kier v. Peterson, 41 Pa. St. 357, 361 ;

Lynn's Appeal, 31 Pa. St. 44 ; s.c. 72 Am. Dec. 721 ;

Irwin v. Covode, 24 Pa. St. 162 ;

Findlay v. Smith, 6 Munf. (Va.) 134 ; s.c. 8 Am. Dec. 733 ;

Crouch v. Puryear, 1 Rand. (Va.) 253 ; s.c. 10 Am. Dec. 528 ;

Clavering v. Clavering, 2 Pr. Wms. 388.

opened up, a tenant for life is entitled to cut timber from the premises for mining operations.¹

SEC. 683. Same—3. In respect to buildings—Pulling down houses.—At common law a life tenant may be guilty of waste to houses or other buildings by pulling them down,² or suffering them to be uncovered, whereby the timbers become rotten, and the structure otherwise injured; but the bare suffering of buildings to become uncovered without the rotting of the timber is not waste.³ At common law waste will also be committed by pulling down a house or other building, and rebuilding it in a different fashion or place, even though the value of the estate be enhanced thereby.⁴ If the strict doctrine of waste is to be applied, the pulling down of a barn and building another even on the same farm, and on a more convenient site, at the distance of a mile and a half, might be considered waste, as destroying the evidence of identity.⁵ If, however, a house be uncovered when the tenant comes into possession, it is not waste for him to suffer it to fall down; but it would be waste for him to pull it down, unless he rebuilt it.⁶ It has been said that if a lessee for life razes a building and erects a new one which is not so large as the former, it is waste; but where an old house falls down and the tenant builds a new one, it need not be so large as the old one. While a life tenant is not ordinarily allowed to tear down a building, yet if it has grown so ruinous as to be dangerous to life or limb, or to stock, he may do so with impunity.⁷

SEC. 684. Same—Same—Dilapidations.—A tenant for life is under obligations to keep the tenant's house or other

¹ *Neel v. Neel*, 19 Pa. St., 323;
Findlay v. Smith, 6 Munf. (Va.)
134; s.c. 8 Am. Dec. 733.

² **Destruction of untenable house.**—
Destruction by life tenant of
house not tenable is waste,
unless it be with the reversion-
er's consent; and the life tenant
is liable even if the house be
torn down without his permis-
sion after his leaving the pre-
mises.

Clemence v. Steere, 1 R. I. 272;

s.c. 53 Am. Dec. 621.

³ *Knoll's Case*, P. 9 Jac. B. C.;

1 Co. Litt. (19th ed.) 53a, note 3.

⁴ *Graves' Case*, 1 Co. Litt. (19th ed.)
53, note 3;

City of London v. Greyme, Cro.
Jac. 182;

2 Rol. Abr. 815, pl. 17, 18.

⁵ *Huntley v. Russell*, 13 Q. B. 572,
588; s.c. 66 Eng. C. L. 570, 588.

⁶ 1 Inst. 53a.

⁷ *Clemence v. Steere*, 1 R. I. 272;
s.c. 53 Am. Dec. 621.

buildings in repair, and the premises in as good condition as when he entered in possession of the estate, ordinary wear and tear excepted,¹ and inevitable accident only excepted.² To the end that the tenant for life may keep the premises in repair, as we have already seen,³ he may cut and use the timber found upon the estate,⁴ and is obliged to repair, even though there be no timber on the land.⁵ If the tenant for life fails to make requisite repairs he is liable for waste where he permits buildings to run to decay and become dilapidated,⁶ because a tenant for life *sans waste* is obliged to repair, unless the charge therefor be excessive.⁷

Where there has been an extraordinary decay or destruction of the buildings and large sums of money will be required to rebuild or repair; and where the buildings on the lands are in a state of decay at the time the tenant came in possession, he will not be called upon to repair.⁸

¹ See : Doe ex d. Thomson v. Amey, 12 Ad. & E. 476; s.c. 14 Eng. C. L. 239;

Wise v. Metcalf, 10 Barn. & C. 299; s.c. 21 Eng. C. L. 132;

Torriano v. Young, 6 Car. & P. 8; s.c. 25 Eng. C. L. 295;

Ausworth v. Johnson, 5 Car. & P. 239; s.c. 24 Eng. C. L. 545;

Bullock v. Dommitt, 6 T. R. 650; s.c. 3 Rev. Rep. 300.

Repairing house out of rents and profits.—In the case of Cook v. Cholmondeley, 4 Jur. N. S. 827; s.c. 27 L. J. 826, where a testator gave land to a tenant for life, with remainder over, and directed his trustees out of the rents and profits to keep the building in good repair, the court held that these buildings which were in bad repair at his death must be put in good repair out of the rents and profits.

² **Destruction of house by mob.**—Thus it has been held that a tenant is liable in an action on the case in the nature of waste, where a house is destroyed by a mob, when the tenant had reason to believe that such mob would attack the house on account of his using the same for the purpose of distributing a certain newspaper.

See : White v. Wagner, 4 Har. & J. (Md.) 373; s.c. 7 Am. Dec. 674.

³ See : Ante, §§ 655, 677, et seq.

⁴ Walls v. Hinds, 70 Mass. (4 Gray) 256; s.c. 64 Am. Dec. 64;

Miles v. Miles, 32 N. H. 147; s.c. 64 Am. Dec. 362;

Wilson v. Edmonds, 24 N. H. (4 Fost.) 517;

Kearney v. Kearney, 17 N. J. Eq. (2 C. E. Gr.) 504;

Harder v. Harder, 26 Barb. (N. Y.) 409;

Long v. Fitzsimmons, 1 Watts & S. (Pa.) 530;

Harvey v. Harvey, 41 Vt. 373;

Darcy v. Askwith, Hob. 234;

Griffith's Case, Moore 69;

Sticklehorne v. Hatchman, Owen 43;

1 Co. Litt. (19th ed.) 53a.

⁵ 1 Co. Litt. (19th ed.) 53b, 54b.

⁶ Parteriche v. Powlet, 2 Atk. 383.

See : Langley v. Furlong, 1 Dick. 315.

⁷ Parteriche v. Powlet, 2 Atk. 383.

See : Ante, §§ 600, 601.

⁸ Fay v. Brewer, 20 Mass. (3 Pick.) 203;

Wilson v. Edmonds, 24 N. H. (4 Fost.) 517;

Clemence v. Steere, 1 R. I. 272; s.c. 53 Am. Dec. 621.

Thus it has been said that if a life tenant receives a house in such a state as not to be repairable, or so dilapidated that the expense of repairing would be beyond the value of the house, he is not bound to repair and may leave it to its natural destruction. But if the house is such that repair would make it tenantable, he is bound to make the repairs.¹

SEC. 685. **Same—Same—Alterations.**—According to the old rule, all alterations in a house or other buildings become waste when there cannot be a complete restoration at the end of the term ;² such as the removal of wainscots, the opening of windows or doors, or changing the building from a dwelling to a store-room, or moving the location of the building ;³ but, according to the modern and more liberal rule, actual damages must be shown in order to maintain an action.⁴ If the tenant changes the nature of the house by altering it injuriously, as by changing it into a warehouse with machinery for raising heavy packages, it will be waste ;⁵ but if the alteration is not injurious either to the building or to the title of inheritance, it will not be waste.⁶ Thus any slight or immaterial change, such as the cut-

¹ *Clemence v. Steere*, 1 R. I. 272 ; s.c. 53 Am. Dec. 621.

² *Graves' Case*, 1 Co. Litt. (19th ed.), p. 53, note 3 ; *City of London v. Greyme*, Cro. Jac. 182 ;

2 Rol. Abr. 815, pl. 17, 18.

³ *Austin v. Stevens*, 24 Me. 520 ; *Walls v. Hinds*, 70 Mass. (4 Gray) 256 ; s.c. 64 Am. Dec. 64 ; *Maunsell v. Hart*, 11 Ir. Reports Eq. 478 ;

Agate v. Lowenbein, 57 N. Y. 604 ;

Douglass v. Wiggins, 1 John. Ch. (N. Y.) 435 ;

McManus v. Cooke, L. R. 35 Ch. Div. 681, 695 ; s.c. 56 L. J. Ch. 662 ;

Greene v. Cole, 3 Saund. 252 ;

Huntley v. Russell, 13 Q. B. 588 ; s.c. 66 Eng. C. L. 572 ;

Jackson v. Cator, 5 Ves. 688 ; s.c. 5 Rev. Rep. 144 ;

Graves' Case, 1 Co. Litt. (19th ed.), p. 53, note 3.

City of London v. Greyme, Cro. Jac. 182.

⁴ *Webster v. Webster*, 33 N. H. 18, 25 ; s.c. 66 Am. Dec. 705 ; *Jackson v. Andrew*, 18 John. (N. Y.) 431 ;

McGregor v. Brown, 10 N. Y. 114 ; *Jackson v. Tibbits*, 3 Wend. (N. Y.) 141 ;

Young v. Spencer, 10 Barn. & C. 145 ; s.c. 27 Eng. C. L. 70 ;

Doe ex d. Grubb v. Burlington, 5 Barn. & Ad. 507 ; s.c. 27 Eng. C. L. 217 ;

Phillips v. Smith, 14 Mees. & W. 595.

⁵ *Hasty v. Wheeler*, 12 Me. (3 Fairf.) 434, 439 ;

Douglass v. Wiggins, 1 John. Ch. (N. Y.) 435 ;

Doe ex d. Dalton v. Jones, 4 Barn. & Ad. 126 ; s.c. 24 Eng. C. L. 64 ;

Bonnett v. Sadler, 14 Ves. 526 ; s.c. 9 Rev. Rep. 341.

⁶ *Young v. Spencer*, 10 Barn. & C. 145 ; s.c. 27 Eng. C. L. 70.

ting of a door, or the opening of two rooms into one, will be permissible, in all cases where it will be possible for the premises to be restored to their original condition at the end of the term.

SEC. 686. **Same—Same—Erection of new buildings.**—It is thought that the erection of new buildings, or the opening of new ways, on the premises by the life tenant will not be accounted waste,¹ even though cellars are dug under the houses, and drains are made on either side of the way.² Particularly is this true if the building is an agricultural fixture which the tenant may remove according to the law of fixtures, as hereinbefore set out.³ Ordinarily it is not an act of waste to erect such a building, and the tenant may remove it at the expiration of the estate, if he can do so without materially injuring the inheritance.⁴

SEC. 687. **Same—4. Changing course of husbandry.**—By the common law it was waste to convert one kind of land into another; such as plowing up meadow or pasture lands, and sowing them to grain, and allowing agricultural lands to run to pasture lands, because it not only changes the course of husbandry, but also the evidence of the estate under the English law; and for this the tenant was answerable to the remainderman.⁵ But in the improved state of agriculture, the old doctrine of waste respecting a change of the course of husbandry is no longer applied in England,⁶ and never was applicable to the new and unsettled condition of this country.⁷

¹ *Beers v. St. John*, 16 Conn. 322, 329;

Winship v. Pitts, 3 Paige Ch. (N. Y.) 259;

Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601;

Jackson v. Tibbett, 3 Wend. (N. Y.) 341;

Jones v. Chappelle, L. R. 20 Eq. 539; s.c. 15 Moak's Eng. Rep. 475.

² *Pyncheon v. Stearns*, 52 Mass. (11 Met.) 304; s.c. 45 Am. Dec. 207

³ See: *Ante*, bk. I., c. IV.

⁴ *Austin v. Stevens*, 24 Me. 520; *Washburn v. Sproat*, 16 Mass. 499;

Dozier v. Gregory, 1 Jones (N. C.) L. 100;

McCullough v. Irvine, 13 Pa. St. 438;

Clemence v. Steere, 1 R. I. 272; s.c. 53 Am. Dec. 621.

Compare: Conklin v. Foster, 57 Ill. 104.

⁵ *Darcy v. Askwith*, Hob. 234; 2 Bl. Com. 282; 1 Co. Litt. (19th ed.) 53a.

⁶ *Principals Harrow School v. Alderton*, 2 Bos. & P. 86; s.c. 5 Rev. Rep. 546.

⁷ See: *Jackson ex d. Van Rensselaer v. Andrew*, 18 John. (N. Y.) 431;

Whether it will be waste in this country to convert meadow or pasture land into plow lands, or woodland into farm land, and the like, is a question of fact.¹ The general rule in this country is that no such change will be waste unless it results in a permanent injury to the inheritance. In each case it is a question of fact whether a particular act is waste, and is largely governed by the usages and customs of the community.²

SEC. 688. **Same—Same—Permitting land to become foul.**—A tenant for life is obliged to use the land in the manner required by the rules of good husbandry. Permitting pasture to become overrun with brush, while waste on the part of the tenant for life in England, will not be so in this country unless there be such neglect in cutting the brush as a man of ordinary prudence would not permit.³ But the removal of manures or grasses and the decaying of turf, which the rules of good husbandry require to be left upon the land to enrich it, will be waste in this country as well as in England.⁴ The reason for this is that, in the absence of any particular agreement dispensing with that engagement, the tenant for life is bound to cultivate the estate in a husbandlike manner, and to consume the produce on it for its enrichment and preparation for future crops.⁵ The manure

Kidd v. Dennison, 6 Barb. (N. Y.) 9.

¹ See : Crockett v. Crockett, 2 Ohio St. 180 ;

Clemence v. Steere, 1 R. I. 272 ; s.c. 53 Am. Dec. 621.

² See : Proffitt v. Henderson, 29 Mo. 325, 327 ;

Webster v. Webster, 33 N. H. 18, 25 ; s.c. 66 Am. Dec. 705 ;

McGregor v. Brown, 10 N. Y. 114, 118 ;

Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601 ;

Crockett v. Crockett, 2 Ohio St. 180 ;

Jones v. Whitehead, 1 Pars. (Pa.) 304 ;

Clemence v. Steere, 1 R. I. 272 ; s.c. 53 Am. Dec. 621 ;

Owen v. Hyde, 6 Yerg. (Tenn.)

334 ; s.c. 27 Am. Dec. 467 ;

Keeler v. Eastman, 11 Vt. 293.

³ See : Clark v. Holden, 73 Mass. (7 Gray) 8 ; s.c. 66 Am. Dec. 450 ;

Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601 ;

Clemence v. Steere, 1 R. I. 272 ; s.c. 53 Am. Dec. 621.

⁴ Daniels v. Pond, 38 Mass. (21 Pick.) 367, 371 ; s.c. 32 Am. Dec. 269 ;

Plummer v. Plummer, 30 N. H. (10 Fost.) 558 ;

Middlebrook v. Corwin, 15 Wend. (N. Y.) 169 ;

Sarles v. Sarles, 3 Sandf. Ch. (N. Y.) 601 ;

Lewis v. Jones, 17 Pa. St. 262 ; s.c. 55 Am. Dec. 550 ;

Harris v. Mins, 20 W. R. 999.

⁵ Middlebrook v. Corwin, 15 Wend. (N. Y.) 169, 171.

made upon premises held for agricultural purposes belongs to the premises and not to the tenant.¹

SEC. 689. **Same—5. Destruction of heirlooms.**—In England, where some chattels are considered in law as part of the inheritance, and called heirlooms, the destruction of such chattels is waste. Thus if a tenant for life of a dove-house, vivary, or warren, kills so many of the doves, deer, fish, or game that there is not sufficient left for the stores, it is waste.²

SEC. 690. **Partial powers to commit waste.**—There are some cases in which estates for life were granted, with partial powers to commit waste. In such cases the tenant will not be liable to impeachment for such waste, but a Court of Chancery will interpose to restrain the tenants from exceeding such powers.

SEC. 691. **Waste by ecclesiastics.**—Ecclesiastical persons, such as bishops, rectors, parsons, vicars, and the like, being considered in most respects as tenants for life of the lands which they hold *jure ecclesiæ*, are prohibited from committing any kind of waste, and if they cut down trees for any other purpose than reparations they are punishable in ecclesiastical courts as well as by writ of prohibition.³

SEC. 692. **Destruction by fire.**—Under the head of permissive waste, the tenant for life is answerable if the houses or other buildings on the premises are destroyed by fire from the negligence or carelessness of himself or his servants; and he must rebuild within a convenient time at his own expense.⁴ The life tenant is not liable, however, if the fire is the result of an accident, and he and his servants are free from fault.⁵

¹ Middlebrook v. Corwin, 15 Wend. (N. Y.) 169;

Lewis v. Jones, 17 Pa. St. 262; s.c. 55 Am. Dec. 550.

See: Daniels v. Pond, 38 Mass. (21 Pick.) 367; s.c. 32 Am. Dec. 269;

Kittredge v. Woods, 3 N. H. 503; s.c. 14 Am. Dec. 393;

Bishop v. Bishop, 11 N. Y. 123, 127;

Gray v. Holdship, 17 Serg. & R. (Pa.) 413; s.c. 17 Am. Dec. 690.

² 1 Inst. 53a; 2 Id. 304.

See: Baxter v. Taylor, 1 Nev. & M. 13.

³ See: Post, § 695, *et seq.*

⁴ See: 4 Kent Com. (13th ed.) 81.

⁵ Maull v. Wilson, 2 Har. (Del.) 443; Barnard v. Poor, 38 Mass. (21 Pick.) 378;

SEC. 693. **Without impeachment of waste.**—At common law a tenant for life, without impeachment of waste, had much the same character as a tenant in fee, except as to duration of the estate. He might cut down trees and open mines, and take the product for his own benefit.¹ It was formerly the practice in England, where estates for life were expressly limited, to insert a clause that the tenant for life should have the lands “without impeachment of waste,” which words were originally held to exempt the tenant for life from the penalty of the statutes of Marlebridge;² but it is laid down by Lord Coke, that the words “without charge or impeachment of waste” enabled the tenant for life to cut down timber and convert it to his own use. This will be otherwise, however, where the words are “without impeachment of any action of waste,” for in that case the discharge extends to the action only and not to the property or the timber.³ In equity a more limited construction is given to the clause “without impeachment of waste,” which allows to the tenant for life those powers only which a prudent tenant in fee would exercise. He can pull down or dilapidate houses, destroy pleasure-grounds, prostrate

Lansing v. Stone, 37 Barb. (N. Y.)

15; s.c. 14 Abb. Pr. (N. Y.) 199;

Althorf v. Wolfe, 22 N. Y. 355,

366;

Clark v. Foot, 8 John. (N. Y.)

421;

Spaulding v. Chicago & N. W.

R. Co., 30 Wis. 110; s.c. 11

Am. Rep. 550;

Filliter v. Phippard, 11 Q. B. 347;

s.c. 63 Eng. C. L. 346.

The statute of 6 Anne, c. 31, made tenants for life free from the consequence of accidental fires by declaring that no suit should be brought against any person in whose house or chamber any fire should accidentally begin; prior to this statute tenants were liable, under the statute of Gloucester.

See: *Ante*, § 670.

Same.—In this country.—As for permissive waste, Kent says (4 Kent Com., 13th ed., 82): “There does not appear to have been any question raised, and judicially decided in this country,

respecting the tenant’s responsibility for accidental fires, as coming under the head of this species of waste. I am not aware that the statute of Anne has, except in one instance, been formally adopted in any of the states. It was intimated, upon the argument in the case of *White v. Wagner*, 4 Har. & J. (Md.) 373, 381–385; s.c. 7 Am. Dec. 674, that the question had not been decided; and conflicting suggestions were made by counsel. Perhaps the universal silence in our courts upon the subject of any such responsibility of the tenant for accidental fires is presumptive evidence that the doctrine of permissive waste has never been introduced, and carried to that extent, in the common-law jurisprudence of the United States.”

¹ Bowles’ Case, 1 Co. 79a. 82b;

2 Co. Litt. (19th ed.) 220a.

² See: *Ante*, § 670.

³ 1 Inst. 22a.

trees planted for ornament or shelter,¹ but may not commit malicious waste so as to destroy the estate, which is called equitable waste; for in that case the Court of Chancery will not only stop him by injunction, but will also order him to repair, if possible, the damages he has already done.

SEC. 694. Remedies for waste—1. Writ of estrepement and writ of waste.—At common law the remedies against waste were: (1) A prohibition commanding the sheriff to prevent its being done, technically called the writ of estrepement,² and (2) a writ of waste after the injury had been done to recover the place wasted and treble damages under the statute.³ The writ of estrepement and writ of waste were at one time common in some of the states of the Union, as in Delaware,⁴ Maryland,⁵ and Pennsylvania, where the ancient writ of estrepement to prevent the commission of waste was in use on the revision of the civil code of Pennsylvania in 1835.⁶ Here and in England, alike, these writs have fallen into disuse, and are now seldom or never brought, having given way for the more easy and expeditious remedy, an action on the case, in the nature of waste at common law; by which the plaintiff obtained satisfaction for the injury to the inheritance by the recovery of

¹ *Packington v. Packington*, 3 Atk. 215;

Rolt v. Lord Somerville, 2 Eq. Cas. Abr., tit. "Waste," pl. 8;

Vane v. Lord Barnard, 2 Vern. 739; s.c. 1 Salk. 161.

² *Anderson's L. Dict.* 417.

The writ of estrepement lay at common law in aid of an action to recover real property or to prevent an injury being done thereto; it was corrective as well as preventive, for if the prohibition was violated the plaintiff might recover damages.

Duwall v. Waters, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350.

To prevent waste, pending a suit to determine a title, the only remedy in England seems to be the writ of estrepement, which

has fallen into disuse; although in a variety of other cases the Court of Chancery exercises its conservative power to protect the subject of litigation from waste, injury, or loss, pending a suit. *Id.*

³ *Ante*, § 670.

See: *Duwall v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350.

⁴ *Greenly v. Hall*, 3 Har. (Del.) 9.

⁵ *Duwall v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350, 356;

Adams v. Brereton, 3 Har. & J. (Md.) 124;

2 Harr. Ent. 189, 800.

⁶ In Virginia the action of waste at law is never brought. The remedy is exclusively in chancery. 1 Robinson Pr. 560.

damages alone.¹ In some of the states resort is had to injunction from chancery, which performs the office of a writ of estrepement.²

SEC. 695. **Same—2. Injunction.**—At common law there was no prohibition against waste, against a life tenant deriving his interest from an act of the party. The remedy was by writ of estrepement and writ of waste.³ These writs are essentially obsolete, and the modern rule in this country, as well as in England, is to resort to the prompt and efficacious remedy by an injunction bill, to stop the commission of waste, when the injury would be irreparable; or by a special action on the case in the nature of waste, to recover damages.⁴ The Supreme Court of Maryland say,

¹ *Duvall v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350;

McLaughlin v. Long, 5 Har. & J. (Md.) 113;

White v. Wagner, 4 Har. & J. (Md.) 373; s.c. 7 Am. Dec. 674;

Greene v. Cole, 3 Saund. 252, note 7;

3 Bl. Com. 227.

² See: *Duvall v. Waters*, 1 Bland's Ch. (Md.) 560, 569; s.c. 18 Am. Dec. 350;

1 Robinson Pr. 560.

Permissive waste—The remedy by an action on the case in the nature of waste has been held (*Gibson v. Wells*, 4 Bos. & P. 290; s.c. 8 Rev. Rep. 801; *Herne v. Bembow*, 4 Taunt. 764; *Powys v. Blagrove*, 4 DeG. M. & G. 448) not to lie for permissive waste. If this last doctrine be well founded (and it may very reasonably be doubted), then recourse must be had, in certain cases,—as where the premises are negligently suffered to be dilapidated,—to the old and sure remedy of a writ of waste, and which, so far as it is founded either upon the common law or upon the statute of Gloucester (6 Edw. I., c. 5), has been generally received as law in this country, and is applicable to all kinds of tenants for life and years. 4 Kent Com. (13th ed.) 79. It has been said that

waste would not lie at common law against the lessee for life or years; for the lessor might have restrained him by covenant or condition. *Shrewsbury's Case*, 5 Co. 13; 2 Inst. 299. But Mr. Reeves insists that the common law provided a remedy against waste by all tenants for life and for years, and that the statute of Gloucester only made the remedy more specific and certain.

Reeves' Hist. Eng. L. (2d ed.) 11, 73, 184.

³ See: *Ante*, § 694.

⁴ *Dickinson v. Mayor, etc.*, 48 Md. 583; s.c. 30 Am. Rep. 492.

Cutting of line trees will be restrained by injunction if of sufficient importance.

Relyea v. Reaver, 34 Barb. (N. Y.) 547; s.c. affirmed *sub nom.*

Dubois v. Beaver, 25 N. Y. 123.

In Maryland, the Court of Equity will not grant an injunction to restrain a party from cutting trees, where it appears that they are of no particular value, and with adequate compensation for their destruction by an action at law. *Powell v. Rollins*, 63 Md. 239. But it is thought that this case will not be followed elsewhere. The difficulty of the court in adequately compensating the owner for the value of trees cut in the settled portion of our

in the case of *Duvall v. Waters*,¹ that the whole subject of waste seems to have passed almost together from the cognizance of the courts of common law to that of the Court of Chancery, and the shifting of this matter so entirely from the one jurisdiction to the other may be attributed to the nature of the injury requiring redress ; to the different constitutions of the tribunals ; and to their peculiar modes of proceeding. Waste is a wrong which cannot always be duly estimated and remunerated in damages ; it is an injury which requires to be met, in its onset or earliest approaches, by a strong and decisive preventive remedy, acting with a promptness almost amounting to surprise, and yet affording to the party restrained a speedy hearing. No adequate remedy of this kind, it is evident, can be obtained from a court of common law, open only at short intervals during the year, acting from term to term, and limited to a given set of technical forms of proceeding. Hence it is that the remedy has been so constantly, in modern times, sought in the Court of Chancery, which is always open, constantly accessible, and is capable of moving with an energy and dispatch called for by the emergency, and suited to the peculiar nature of the case.

SEC. 696. **Same—Same—Character of the remedy.**—The modern remedy in chancery, by injunction, is broader than the old remedy at law. Equity will interpose in many cases, and stay waste, where there is no remedy at law. If there was an intermediate estate for life, between the lessee for life or the remainderman or reversioner in fee, the action of waste would not lie at law ; for it lay on behalf of him who had the next immediate estate of inheritance.² The remedy by injunction is generally limited to those cases in which the title is clear and undisputed ;³ privity of estate or of contract not appearing between the parties, or the complaint not showing

country is apparent.

See : *Stanford v. Hurlstone*, L. R.

9 Ch. App. 116 ; s.c. 8 Moak's

Eng. Rep. 775.

¹ 1 Bland's Ch. (Md.) 569 ; s.c. 18

Am. Dec. 350.

² 1 Co. Litt. (19th ed.) 53b, 54a.

³ See : *Storm v. Mann*, 4 John. Ch. (N. Y.) 21.

Pillsworth v. Hopton, 6 Ves. 51.

a clear legal or equitable title, the question will not intervene.¹

EC. 697. **Same—Same—When granted.**—In general, an injunction may be obtained in this country, as in England, to stay waste in all cases where an action would lie at common law,² whether there be any privity of title or not.³ And an injunction may be granted where no account of damages could be claimed, or where the waste done is so insignificant that there could be no recovery of damages at law.⁴ An injunction will also be granted in special cases, as where the party committing the waste is insolvent,⁵ or where some of the heirs have filed their bill in court against the rest, to obtain a partition according to the act to direct descent, and one of the heirs, who is in possession, is committing waste; and upon a representation of the fact by the trustee to make sale of lands, for the purpose of effecting a partition, he will be restrained by injunction.⁶ An injunction will be granted against a life tenant, also, where the tenant affects the inheritance in an unreasonable and an unconscientious manner, even though the lease be granted without impeachment of waste.⁷ Thus it has been held that an injunction will lie to restrain a tenant tilling a farm contrary to the established rotation of crops on it, and contrary to the usage of that part of the country.⁸ Injunc-

¹ See: *Boulo v. New Orleans*, M. & T. R. Co., 55 Ala. 480, 488;

Falls Village W. P. Co. v. Tibbetts, 31 Conn. 165;

Roath v. Driscoll, 20 Conn. 533; s.c. 52 Am. Dec. 352;

Echelkamp v. Schrader, 45 Mo. 505;

Irwin v. Dixon, 50 U. S. (9 How.) 10, 28; bk. 13 L. ed. 25, 33.

² *Duvall v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350.

Ordinary use and cultivation will not be inhibited by injunction.

Duvall v. Waters, 1 Bland's Ch. (Md.) 568; s.c. 18 Am. Dec. 350.

See: *Ante*, § 687.

³ See: *Post*, § 700.

⁴ *Duvall v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350;

Keepers, etc., Harrow School v. Alderton, 2 Bos. & P. 86; s.c.

5 Rev. Rep. 546;

Universities of Oxford v. Richardson, 6 Ves. 706.

⁵ *Smallman v. Onions*, 3 Bro. C. C. 621.

⁶ *Duvall v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350; *Clarke v. Clarke*, MS., January 24, 1882.

⁷ See: *Kane v. Vanderburgh*, 1 John. Ch. (N. Y.) 11;

Perrot v. Perrot, 3 Atk. 94;

Tracy v. Hereford, 2 Bro. C. C. 138;

Vane v. Barnard, 2 Vern. 738;

Aston v. Aston, 1 Ves. Sr. 264;

Briggs v. Earl of Oxford, 16 Jur. 53.

⁸ *Wilds v. Layton*, 11 Del. Ch. 226; s.c. 12 Am. Dec. 91.

Injudicious husbandry, or tilling the land in an unhusbandmanlike

tion is a remedy to prevent an imminent loss where there is no other adequate redress ; consequently it is only under special circumstances will the court grant an injunction where waste has been committed by a tenant to prevent his removing timber which had been cut. Ordinarily, it will only interfere to prevent or stay future waste ;¹ but a bill for account for past waste may be allowed in a proper case to prevent multiplicity of suits.²

SEC. 698. **Same—Same—Same—Threat to commit waste.**—A mere threat on the part of the tenant for life to commit waste will furnish a sufficient foundation for an injunction being granted before any waste has actually been done.³

SEC. 699. **Same—Same—Same—Permissive waste.**—A court of equity will not interfere in case of permissive waste by the tenant for life at the instance of the remainderman or reversioner, either by injunction,⁴ or give satisfaction against an equitable tenant for life.⁵

SEC. 700. **Same—Same—Privity of title.**—In England an injunction to stay waste will be granted where there is a subsisting privity of title or contract admitted by the answer, or an uncontroverted legal or equitable title in the plaintiff ; but not where the bill states that the defendant relies upon an alleged adverse title in himself, or where the plaintiff's title is positively denied by the answer.⁶

manner, or bad farming merely, however, has been held not to constitute an injury to the inheritance for which an action for waste would lie, in a case containing exactly the same facts as in the principal case, so far as the nature of the injury to the soil complained of is concerned.

See: *Richards v. Torbert*, 3 Houst. (Del.) 172.

¹ *Watson v. Hunter*, 5 John. Ch. (N. Y.) 169 ; s.c. 9 Am. Dec. 295.

² See: *Post*, § 703.

³ See: *Duvall v. Waters*, 1 Bland's Ch. (Md.) 569 ; s.c. 18 Am. Dec. 350 ; *Gibson v. Smith*, 2 Atk. 183 ; *Coffin v. Coffin*, Jac. 70 ;

Hannay v. McEntire, 11 Ves. 54.

⁴ *Warren v. Rudall*, 1 John. & H. 1 ; s.c. 29 L. J. Ch. 543.

Compare: *Caldwall v. Baylis*, 2 Meriv. 408.

⁵ See: *Powys v. Blagrove*, 4 DeG. M. & G. 448 ; s.c. 24 L. J. Ch. 143 ;

Exp. Godfrey, *Warren v. Rudall*, 1 John. & H. 1 ; s.c. 29 L. J. Ch. 543 ;

Caldwall v. Baylis, 2 Meriv. 408.

⁶ *Duvall v. Waters*, 1 Bland's Ch. (Md.) 569 ; s.c. 18 Am. Dec. 350 ; *Hughlett v. Harris*, 1 Del. Ch. 349 ; s.c. 13 Am. Dec. 104.

Waste, who may have action for.—At the time the waste is committed, the party must have the

It appears to be even yet a fixed rule of the Court of Chancery of England that the granting of an injunction to stay waste must depend either upon the fact of there being a privity of title or contract acknowledged by the answer ; or an unquestionable legal or equitable title in the plaintiff, as where a purchaser files a bill for a specific performance of his contract, suggesting that the defendant was proceeding to cut timber, etc., an injunction may be granted, if the contract be stated and admitted. For if the bill states and admits that the defendant asserts and relies upon what he alleges to be a valid adverse title in himself, the plaintiff thereby states himself out of court ; or if the defendant in his answer positively denies the plaintiff's title, the injunction will be refused, or, having been granted, will, on the coming in of such an answer, be dissolved.¹ In this country the prevailing rule is that privity of title or contract is unnecessary to support an injunction against waste ; and that it will be granted whenever an action of waste would lie at common law, whether there is privity of title or not, and in other cases where such an action could not be brought ;² but a legal title in the plaintiff is necessary to support an action of waste.³

title to the land, to sustain his action for the injury.

Hughlett v. Harris, 1 Del. Ch. 349; s.c. 12 Am. Dec. 104.

This writ is treated as a remedy against waste, but where there is no privity of title between the parties in the action to which it is auxiliary, the injury which it seeks to prevent is, in chancery acceptance, trespass rather than waste.

Duval v. Waters, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350.

¹ *Duval v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350; *Storm v. Mann*, 4 John. Ch. (N.Y.) 21;

Norway v. Rowe, 19 Ves. 147;

Smith v. Collyer, 8 Ves. 89;

Pillsworth v. Hopton, 6 Ves. 51.

Denial of the plaintiff's title, however, in the answer does not warrant the dissolution of an injunction against waste pending the suit.

Duval v. Waters, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350;

² *Duval v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350;

Woodson v. Good, 6 Watts & S. (Pa.) 169;

Wyant v. Deiffendafer, 2 Grant (Pa.) 334.

In Pennsylvania, it is held that a *cestui que trust* after attaining full age, can maintain an action for waste against the trustee, without first obtaining a conveyance of the legal title. *Wyant v. Deiffendafer*, 2 Grant (Pa.) 334. And in *Woodson v. Good*, 6 Watts & S. (Pa.) 169, an equitable tenant for life was considered liable in an action of waste at the suit of a holder of the legal title in trust.

³ *Whitney v. Morrow*, 34 Wis. 644;

Gillett v. Treganza, 13 Wis. 472; *Loudon v. Warfield*, 5 J. J. Marsh. (Ky.) 196.

SEC. 701. **Same—Same—In favor of whom granted.**—An injunction against a life tenant to stay waste will be granted in favor of a remainderman¹ or reversioner,² where there is an intervening estate for life;³ in favor of any one entitled to a contingent or executory estate of inheritance;⁴ in favor of trustees to preserve a contingent remainder before the contingent remainderman has come *in esse*;⁵ and it may be granted in favor of a child *en ventre sa mere*.⁶

SEC. 702. **Same—Same—Against whom granted.**—An injunction to stay waste may be granted against a tenant for life holding the estate under either a deed or devise, and may also be granted, on proper conditions shown, as between tenants in common⁷ or joint tenants and coparceners against malicious destruction, or when the

¹ Remainderman has right to stay waste on premises in which he is interested. *Miles v. Miles*, 32 N. H. 147; s.c. 64 Am. Dec. 362. But a remainderman cannot maintain action for waste after taking lease from the tenant of the preceding estate for years, for his full term, for part of the land, as to the part of the land so leased, whether the waste was committed before or after the lease, for the estates to that extent are thereby merged; so, though the lease reserves to the lessor the right to erect buildings on the leased premises, and provides for the payment of rent, if there is no reservation of a right of re-entry for non-payment.

Pynchon v. Stearns, 52 Mass. (11 Met.) 304; s.c. 45 Am. Dec. 207.

² Action of waste by reversioner against life tenant is provided for by statute in Rhode Island, and the liability of the life tenant therein, though very stringent, is to be fairly and reasonably enforced.

Clemence v. Steere, 1 R. I. 272; s.c. 53 Am. Dec. 621.

³ *Duwall v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350, 357;

Farrant v. Lovel, 3 Atk. 723; *Bewick v. Whitfield*, 3 Pr. Wms. 268, note.

⁴ *Duwall v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350, 357;

Hayward v. Stillingfleet, 1 Atk. 422;

Bewick v. Whitfield, 3 Pr. Wms. 268, note.

⁵ *Duwall v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350, 357;

Garth v. Cotton, 3 Atk. 754.

⁶ *Duwall v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350, 357;

Robinson v. Litton, 3 Atk. 211.

⁷ Tenants in common are liable to co-tenant for waste.

See: *Nelson's Heirs v. Clay's Heirs*, 7 J. J. Marsh. (Ky.) 138; s.c. 23 Am. Dec. 387;

Smith v. Sharpe, 1 Busbee (N. C.) L. 91; s.c. 57 Am. Dec. 574;

Hancock v. Day, 1 McM. (S. C.) Eq. 69; s.c. 36 Am. Dec. 293;

Johnson v. Johnson, 2 Hill (S. C.) Eq. 277; s.c. 29 Am. Dec. 72.

Such as to prevent one tenant in common, in possession, from cutting down timber growing on the land, and not wanted for the necessary use of the farm.

Hawley v. Clowes, 2 Johns. Ch. (N. Y.) 122.

tenant committing the waste is insolvent or is occupying tenant with the plaintiff ;¹ and it has been said that an injunction will lie to restrain a tenant by elegit from tilling a farm contrary to the established rotation of crops on it, and contrary to the usage of that part of the country ;² but not to prevent waste in case of tenants in common, or coparceners, or joint tenants, for the reason that they have a right to enjoy the estate as they please.³ An injunction will also be granted against a tenant for life without impeachment for waste ;⁴ against a mortgagee of a life tenant in possession.⁵ An injunction may also be obtained in respect to equitable waste against a tenant in tail after possibility of issue extinct.⁶

It appears that the English Court of Chancery had steadily confined itself in granting relief against waste to those cases only where there was some subsisting privity of title or contract between the parties until about the year 1785, since which time it has gone one step further, and granted injunctions against strangers to stay trespass in strong cases of destruction or irreparable mischief ; or where the irreparable mischief might be completely effected before any trial could be had as to the controverted right. But at that point it seems to have come to a stand ; not, however, without expressing a regret that its jurisdiction had not extended so far as to protect real estate from waste and injury pending a controversy about the title. There is no reason to doubt that the powers of the courts in this country in granting injunctions have always been considered as in all re-

¹ *Duvall v. Waters*, 1 Bland's Ch. (Md.) 569 ; s.c. 18 Am. Dec. 350. *Smallman v. Onions*, 3 Bro. C. C. 621 ;

Twort v. Twort, 16 Ves. 128 ; *Hole v. Thomas*, 7 Ves. 589 ; s.c. 6 Rev. Rep. 195.

Equitable waste.—As between tenants in common, however, an injunction will not be granted against pure equitable waste. *Hole v. Thomas*, 7 Ves. 589 ; s.c. 6 Rev. Rep. 195.

² *Wilds v. Layton*, 1 Del. Ch. 226 ; s.c. 12 Am. Dec. 91.

Compare : *Richards v. Torbert*, 3 Houst. (Del.) 172.

³ See : *Hihn v. Peck*, 18 Cal. 640 ; *Hole v. Thomas*, 7 Ves. 589 ; s.c. 6 Rev. Rep. 195.

⁴ *Duvall v. Waters*, 1 Bland's Ch. (Md.) 569 ; s.c. 18 Am. Dec. 350 ;

Bernard's Case, Prec. Ch. 454.

⁵ See : *Duvall v. Waters*, 1 Bland's Ch. (Md.) 569 ; s.c. 18 Am. Dec. 350 ;

Farrant v. Lovel, 3 Atk. 723 ;

Humphreys v. Harrison, 1 Jac. & W. 581.

⁶ *Duvall v. Waters*, 1 Bland's Ch. (Md.) 569 ; s.c. 18 Am. Dec. 350 ;

Abraham v. Bubb, 2 Freem. 53.

spects co-extensive with those of the Chancery Court of England.¹

SEC. 703. **Same—Same—Bill for accounting.**—Full relief in equity is given to prevent the multiplicity of suits, where an injunction has issued to restrain a wrong; consequently when a bill for an injunction to stay further waste is granted, and waste has already been committed, the court, to prevent double suits, will decree an account and satisfaction for what is past, and not oblige the plaintiff to bring an action at law, as well as a bill in equity;² but such decrees for the part are only given as an incident to the injunction to obtain which the plaintiff was under a necessity of going into chancery; consequently it may be regarded as a general rule, to which there are few exceptions, that when no injunction is or can be asked for or granted, a bill to have an account of past waste, and nothing more, cannot be sustained, the proper remedy being at law.³

SEC. 704. **Same—3. Forfeiture of estate.**—By the early English law, estates for life were liable to forfeiture by waste as well as by alienation.⁴ The provision in the

¹ *Duvall v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350.
As to the extent of the powers of the English Court of Chancery, see:

Jones v. Jones, 3 Meriv. 173;
Norway v. Rowe, 19 Ves. 147;
Crockford v. Alexander, 15 Ves. 138; s.c. 10 Rev. Rep. 44;
Courthope v. Mapplesden, 10 Ves. 290;
Smith v. Collyer, 8 Ves. 89;
Hanson v. Gardiner, 7 Ves. 305;
Mitchell v. Dors, 6 Ves. 147;
Pillsworth v. Hopton, 6 Ves. 51.

² *Duvall v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350;

Hughlett v. Harris, 1 Del. Ch. 349; s.c. 12 Am. Dec. 104.

But this principle is limited to cases where a right to relief exists for injury already done, independently of the injunction to prevent future injury. Accordingly a judgment-creditor who sues out an injunction to

restrain waste upon land covered by the lien of his judgment, and pending the injunction, purchases the land at the sheriff's sale, cannot recover for the waste committed prior to his purchase.

Hughlett v. Harris, 1 Del. Ch. 349; s.c. 12 Am. Dec. 104.

³ *Duvall v. Waters*, 1 Bland's Ch. (Md.) 569; s.c. 18 Am. Dec. 350;

Jesus College v. Bloom, 3 Atk. 262.

Damages—How ascertained.—Damages must be assessed in action of waste for the place wasted over and above the value of the place.

Clemence v. Steere, 1 R. I. 272; s.c. 53 Am. Dec. 621.

⁴ 2 Co. Litt. (19th ed.) 251a;

2 Bl. Com. 274;

Glanv., lib. 9, c. 1.

See: *Ante*, § 590, *et seq.*

Waste forfeits part of premises wasted, but by the destruction

statute of Gloucester,¹ giving, by way of penalty, the forfeiture of the place wasted and treble damages, may be considered as imported by our ancestors, with the whole body of the common and statute law then existing, and applicable to our local circumstances; in some of the states the provisions as to forfeiture of the premises wasted, and treble damages, have been incorporated into the body of the law by special statutory enactments. Kent says² that, "so far as the provisions of the statute are received as law in this country, the recovery in an action for waste, for waste done or permitted, is the place wasted, and treble damages," but that "the writ of waste has gone out of use, and a special action on the case, in the nature of waste, is substituted; and this latter action, which has superseded the common-law remedy, relieves the tenant from the penal consequences of waste under the statute of Gloucester. The plaintiff, in this action upon the case, recovers no more than the actual damages which the premises have sustained."³

of a dwelling-house the whole premises are forfeited.

Clemence v. Steere, 1 R. I. 272; s.c. 53 Am. Dec. 621.

¹ 6 Edw. I., c. 5.

See: *Ante*, § 670.

² 4 Kent Com. (13th ed.) 81.

³ See: *Parker v. Chambliss*, 12 Ga. 235;

Williams v. Lanier, 1 Busbee (N. C.) L. 30;

Linton v. Wilson, 1 Kerr (N. B.) 239, 240.

CHAPTER XVII.

ESTATE BY CURTESY.

- SECTION I. Origin and requisites.
SECTION II. Nature, incidents, and duties.
SECTION III. Barring curtesy.
SECTION IV. Curtesy under statute.
SECTION V. Who may be tenants by curtesy.
SECTION VI. What property subject to curtesy.
SECTION VII. What property not subject to curtesy.

SECTION I.—ORIGIN AND REQUISITES.

- SEC. 705. Estate by curtesy—Introduction.
SEC. 706. Definition of estate by curtesy.
SEC. 707. Origin of estate by curtesy—Littleton's view.
SEC. 708. Same—Early origin of the estate.
SEC. 709. Same—Adopted from northern nations.
SEC. 710. Curtesy in England.
SEC. 711. Same—Curtesy in gavelkind lands.
SEC. 712. Curtesy in the United States.
SEC. 713. Same—Under married women's acts.
SEC. 714. Kinds of curtesy.
SEC. 715. Same—1. Curtesy initiate.
SEC. 716. Same—2. Curtesy consummate.
SEC. 717. Same—3. Equitable curtesy.
SEC. 718. Common-law requisites of curtesy.
SEC. 719. Same—1. Lawful marriage.
SEC. 720. Same—Same—*Lex loci* governs.
SEC. 721. Same—Same—Celebration of ceremony.
SEC. 722. Same—Same—Void and voidable marriages.
SEC. 723. Same—2. Seisin of wife.
SEC. 724. Same—Same—What is sufficient seisin.
SEC. 725. Same—Same—Seisin in fact or in deed.
SEC. 726. Same—Same—Same—Exceptions to the rule.
SEC. 727. Same—Same—Seisin in law.
SEC. 728. Same—Same—Same—Reasons for relaxing rule.
SEC. 729. Same—Same—Same—Extent to which rule relaxed.
SEC. 730. Same—Same—Seisin by descent cast.
SEC. 731. Same—Same—Seisin at time of death.
SEC. 732. Same—Same—Possession by coparcener.
SEC. 733. Same—Same—Possession by co-tenant.

- SEC. 734. Same—Same—Possession by wife's tenant.
 SEC. 735. Same—Same—Same—Lease for life before marriage.
 SEC. 736. Same—Same—Same—Receiving rents and profits.
 SEC. 737. Same—Same—Possession by husband—Kentucky doctrine.
 SEC. 738. Same—Same—Same—Possession by husband's grantee.
 SEC. 739. Same—Same—Seisin by guardian.
 SEC. 740. Same—Same—Equitable title and seisin.
 SEC. 741. Same—Same—Same—Exception to the rule.
 SEC. 742. Same—Same—Actual entry.
 SEC. 743. Same—Same—Same—Wild, waste, and uncultivated lands.
 SEC. 744. Same—Same—Time of seisin.
 SEC. 745. Same—Same—Adverse possession.
 SEC. 746. Same—Same—Remainder and reversion.
 SEC. 747. Same—3. Issue of marriage.
 SEC. 748. Same—Same—Change of rule by statute.
 SEC. 749. Same—Same—a. Born alive.
 SEC. 750. Same—Same—Same—Degree of development and vitality.
 SEC. 751. Same—Same—Same—Death of issue.
 SEC. 752. Same—Same—b. In lifetime of wife.
 SEC. 753. Same—Same—c. Be capable of inheriting.
 SEC. 754. Same—Same—Same—Seisin by wife.
 SEC. 755. Same—Same—Same—Estate devised to wife and heirs.
 SEC. 756. Same—Same—Same—Gives second husband curtesy.
 SEC. 757. Same—Same—Same—Wife's attainder.
 SEC. 758. Same—Same—d. Essentials need not coincide in point of time.
 SEC. 759. Same—4. Death of wife.
 SEC. 760. Same—Same—Civil death and bigamy of wife.

SECTION 705. **Estate by curtesy—Introduction.**—The second estate for life, known to the common law, is that which a husband acquired in his wife's lands by having issue by her born alive and capable of inheriting, for before issue born the husband had only an estate during the joint lives of himself and his wife.¹ This interest in the wife's lands is called an "estate by the curtesy of England," or more commonly an "estate by curtesy." This estate, as we shall see hereafter when we come to consider its nature,² partakes more of the character of an estate by descent than of one by purchase,³ as it accrues to the husband by operation of law upon the death of the wife.⁴

SEC. 706. **Definition of estate by curtesy.**—An estate by

¹ 1 Inst. 351a.

² See: *Post*, section II., this chapter.

³ *Watson v. Watson*, 13 Conn. 75, 77, 83;

Pemberton v. Hicks, 1 Binn. (Pa.)

1.

⁴ 1 Inst. 18b, 106;

4 Kent Com. (13th ed.) 373.

curtesy, or tenancy by curtesy of England, is an estate thrown upon the tenant by operation of law,¹ and consists in the interest to which a husband is entitled, upon the death of his wife, in the land and tenements of which she was seized in possession at the time of their marriage, or became possessed of during coverture,² in fee-simple or in fee-tail, where issue was born³ alive⁴ during such coverture,⁵ which might have been capable of inheriting the estate,⁶ even though such issue dies before the death of the wife.⁷ Tenancy by the curtesy has been said to have no moral foundation, and for that reason is properly called "tenancy by the curtesy of England;" that is, an estate by the favor of the law of England.⁸ Lord Littleton says: "The husband is called tenant by the curtesy of England, because this is used in no other realm, but England only."⁹ This, however, is a mistake, as we shall see further on.¹⁰

SEC. 707. **Origin of estate by the curtesy—Lord Littleton's view.**—That the interest of a husband in his deceased wife's lands, known as an estate by the curtesy, was established in the English law at a very early period, is admitted by all;¹¹ but there has been much diversity of opinion among writers as to whether this estate was originally an English institution, or an importation. Lord Littleton says that the husband "is called tenant by the curtesy of England, because this is used in no other realm, but in England only,"¹² and Sir William Blackstone, following Lord Littleton, attributes the introduction of this estate to Henry I.¹³ The estates of tenants by the curtesy and

¹ See: *Watson v. Watson*, 13 Conn. 75, 83;

1 Co. Litt. (19th ed.) 18b, 29a;

4 Kent Com. (13th ed.) 373; Litt., § 35.

² 1 Co. Litt. (19th ed.) 29b.

³ See: *Post*, § 747.

⁴ See: *Post*, § 749.

⁵ A bastard legitimized by subsequent marriage will, in some states, cast upon the husband and father an estate by the curtesy.

See: *Post*, § 758.

⁶ See: *Post*, § 753;

2 Bl. Com. 126;

Buckworth v. Thirkell, 3 Bos. & P. 652, note.

⁷ *Heath v. White*, 5 Conn. 228, 235;

Litt., §§ 29a, 35.

⁸ *Banks v. Sutton*, 2 Pr. Wms. 703; 1 Cruise Real Prop. (4th ed.) 153.

⁹ 1 Co. Litt. (19th ed.) 30a.

¹⁰ See: *Post*, §§ 708, 709.

¹¹ See: 2 Bl. Com. 126, 127; 1 Cruise Real Prop. (4th ed.) 139, 140;

4 Kent Com. (13th ed.) 27, 28.

¹² Litt., § 35.

¹³ 2 Bl. Com. 126.

In treating of some early statutes,

tenants by dower¹ seem to have originated at the same time, and to have borne some relation to each other in their origin, for the claim of the wife in one case, and of the husband in the other, were founded on equal considerations in law and in policy. Thus it is laid down by Littleton that a seisin in fee, in fee-tail general, or as heir in special tail, was the proper estate in the wife to make her husband tenant by the curtesy, and in the husband to give a title of dower.²

SEC. 708. **Same—Early origin of the estate.**—It is now settled beyond controversy that the estate by curtesy is not a species of property peculiar in the English law. It had its origin prior to the invasion of Britain by Cæsar. This estate existed with some modifications, it is true, in the ancient Almain laws, and was known in ancient Germany, Ireland, Normandy,³ and Scotland.⁴ Erskine says⁵ that in Scotland “the right of curtesy or curiality has been received by our most ancient customs.” It is now conceded by all that the estate is not of feudal origin;⁶ indeed, it is laid down expressly in the Book of Feuds, that the husband did not succeed to the feud of the

in his “History of the English Law,” Reeves mentions among others the *statutum pro tenentibus per legem Angliæ*, which he says bears evident marks of an earlier period than the reign of Edward II.

² Reeves’ Hist. Eng. L. (2d ed.) 315.

¹ See: *Post*, bk. III., c. XVIII.

³ Reeves’ Hist. Eng. L. (2d ed.) 334.

⁴ In Normandy.—It is said by Coustomier, c. 119, that the estate lasted in Normandy only during the widowhood of the husband.

⁵ 1 Co. Litt. (19th ed.) 30a; Hale, Hist. Com. L. 180; Hen. III., m. 3; Mir., c. 1, § 3; Wright, Ten. 193.

English writers on.—Wooddeson in his lectures, and Christian in his notes to Blackstone, consider it of English origin, and thence transferred into the laws

of Scotland and Ireland, though it seems to be conceded that it takes its name from *curtis*, a court, rather than from any peculiar regard to husbands in the English law.

² Bl. Com. 126;

Wright, Ten. 192, 193.

Mr. Barrington says the word is clearly derived from the French word *courtesie*, and it is called curtesy of England, to distinguish it from a very similar right by the Norman law. Stat. 440.

⁵ Institutes 380.

⁶ By that law, though, as soon as a son was born the father was admitted, in respect to the estate, as one of the *pares curiæ*, and did homage* for the same alone, while prior to that husband and wife did the homage together.

² Bl. Com. 126, 127;

Wright, Ten. 193.

* As to homage, see: *Ante*, § 210.

wife, without a special investiture.¹ Sir Martin Wright² adopts the opinion of Craig,³ who declares that curtesy was originally granted out of respect to the former marriage, and to save the husband from falling into poverty and coming to want. He deduces curtesy from one of the rescripts of the Emperor Constantine.⁴

SEC. 709. **Same—Adopted from northern nations.**—Modern research has demonstrated that the law which gives to the husband who has issue born alive during coverture a life estate in the lands of his deceased wife, prevailed among all the northern nations. When the customs of the Normans were reduced to writing, this law was inserted among them.⁵ It is said by Horne,⁶ that this custom was established in England by King Henry I., and this is thought by some to be highly probable, because we find a full account of it in a treatise by Glanville,⁷ written in the reign of King Henry II.⁸

¹ See : Craig, Jus. Feud., lib. 2.

² Wright, Ten. 194.

³ Wright says, *loc. cit.*, that “tenancies by the curtesy, or *per legem terræ*, though so called, as if they were peculiar to England, were known not only in Scotland, but in Ireland, and in Normandy also; and the like law or custom is to be found among the ancient Almain laws; and yet it doth not seem to have been feudal, nor doth its original anywhere satisfactorily appear. Some English writers ascribe it to Henry I.; but Nathaniel Bacon calls it a law of counter tenure to that of dower, and yet supposes it as ancient as from the time of the Saxons, and that it was rather restored by Henry I. than introduced by him. But as there are no notices of this curtesy among the laws of the Saxons, or among those we have of Henry I., I shall propose Mr. Craig’s conjecture as the most rational I have met with, who is so far from thinking it feudal that he is of opinion that the original of it is *ex jure civili non incommode deduci potest; ex Constantini*

enim Rescripti (says he) *sanc-tum est, ut hæreditatis maternæ Pater usufructum filii proprietatem.*”

⁴ Craig, Jus. Feud., lib. 2 ;

Dig. 22, § 40 ;

4 Kent Com. (13th ed.) 28 ;

Wright, Ten. 194.

⁵ As given in the Latin translation of the Grand Coustumier, this law was as follows : *Consuetudo enim in Normannia, ex antiquitate approbata, quod si quis uxorem habuerit ex qua hæredem aliquem procreaverit, quem natum vivum fuisse constituterit, sive vivat, sive decesserit, totum feodum quod maritus possidebat, ex parte uxoris suæ tempore quo decesserit, ipsi marito, quamdiu ab aliis cessabit nuptiis remanebit.*

Grand Coustumier, c. 121.

See : Cruise Real Prop. (4th ed.) 153.

⁶ Mir., c. 1, § 3.

⁷ Glanv., lib. 7, c. 18.

⁸ See : Bract. 437b ;

Jura et Consuetudines, Norman, fol. 21 ;

Lindebrog, L. L. Alleman, tit. 92 ;

1 Cruise Real Prop. (4th ed.) 153.

SEC. 710. **Curtesy in England.**—Whatever may have been the origin of the estate by curtesy, it has been a well-known estate in England, with well-defined incidents and qualities, from the reign of King Henry I., if indeed it does not antedate that period.¹ Of late, however, this estate has been of infrequent occurrence in England, owing to the prevalence of marriage settlements.²

SEC. 711. **Same—Curtesy in gavelkind lands.**—By special custom of Kent, in gavelkind lands, a husband who survives his wife is entitled to dower in her lands whether he has issue or not ; but by this custom, curtesy extends only to a moiety³ of the wife's lands, and in conformity to the custom of Normandy, the estate is forfeited by and ceases on the second marriage of the husband.⁴

SEC. 712. **Curtesy in the United States.**—The right of the husband to an estate by curtesy was brought over by our forefathers as a part of our inheritance from the English law, and was adopted into and became a part of the fundamental laws of all those states of the Union whose laws are founded upon and are the outgrowth of the common law, although a different rule prevails in those states whose laws are founded upon the civil law, in whole or in part, and community of property obtains. In those states which may be designated as “the common-law states,” and in which the law relating to and governing estates by curtesy was adopted, the estate has been materially modified by statute in many, but abolished in but few. The right of the husband as tenant by the curtesy is expressly given by statute, substantially in the language of Littleton, in many of the states ; in others it has been incidentally recognized as an existing legal estate, either in statutes or judicial decisions. The common-law estate of tenancy by the curtesy may be

¹ See : *Ante*, §§ 708, 709.

² Williams' Real Prop. 187.

³ Special custom may assign a different proportion, or the whole to the husband.

⁴ Bac. Abr., tit. “Gavelkind” (A) ;
1 Co. Litt. (19th ed.) 30a, note 1 ;
1 Inst. 30a, note 1 ;

² Rob. Gav., c. 1.

“Free bench-lands.”—In his treatise on Gavelkind, Mr. Robinson says that this was formerly called the man's free bench, and cites a record of 21 Edward I., in which this custom is recognized.

said to prevail generally in this country, though greatly modified by statute in many of the states, and in some of them a statutory estate has been substituted for it.

Estate by the curtesy still exists in its common-law form, either by express statute or other recognition, in the following states: Delaware,¹ Kentucky,² Maine,³ Maryland,⁴ Massachusetts,⁵ Nebraska,⁶ New Hampshire,⁷ New Jersey,⁸ New York,⁹ North Carolina,¹⁰ Ohio,¹¹ Oregon,¹²

¹ Del. Rev. St. 1874, pp. 515, 533.

² Ky. Gen. Stats. 1873, c. 52, art. 4, § 14.

Compare: Carr v. Givens, 9 Bush (Ky.) 679; s.c. 15 Am. Rep. 747.

³ Limited to a life estate in one-third of the wife's realty, in case she die solvent. Me. Rev. St. 1883, c. 103, § 15.

Wife intestate.—Where the wife dies intestate and childless, and the estate is solvent, the husband receives one-half for his life. Me. Rev. St. 1883, c. 103, § 15.

⁴ Md. Rev. Code, 1878, art. 45, § 2.

⁵ Same as at common law, but restricted where the wife dies intestate and without issue. Mass. Pub. Stat. 1881, c. 124, § 1. By section 3 of this act, under such circumstances the husband takes the wife's realty in fee to the amount of \$5,000, and curtesy in the residue, if any; both estates being subject to the wife's debts.

Where there is no issue of the marriage, the husband takes one-half the land for life, whether the wife provides otherwise by her will or not. Mass. Stat. 1885, c. 225, § 2.

⁶ Neb. St. 1873, c. 17, §§ 29, 40.

⁷ N. H. Gen. L. 1878, c. 202, § 14.

⁸ N. J. Rev. Stats. 1877, pp. 298, 320.

⁹ The estate is liable to be defeated by the wife's separate conveyance in her lifetime. 4 N. Y. Stat. at L. 513.

See: Thurber v. Townshend, 22 N. Y. 517;

Adair v. Lott, 3 Hill (N. Y.) 182, 186.

Descent does not affect. 4 N. Y. Rev. St. (8th ed.) 2466, § 20;

1 Rev. Stats. Codes & L. 860, § 20.

See: Clark v. Clark, 24 Barb. (N. Y.) 581;

Leach v. Leach, 21 Hun (N. Y.) 381;

Mack v. Roch, 13 Daly (N. Y.) 103; s.c. 24 Week. Dig. 35;

Hurd v. Cass, 9 Barb. (N. Y.) 366. *Compare*: Billings v. Baker, 15 How. (N. Y.) Pr. 525.

It is said by the court in the case of Mack v. Roch, 13 Daly (N. Y.) 103, 104, that the acts for the more effectual protection of married women, passed in New York, do not affect the common-law rights of the husband as tenant by the curtesy. While these acts have excluded him from any control of his wife's separate estate during her life, they have left to him the right of curtesy in so much of her real property as remains at her death undisposed of and unbequeathed.

Citing: Hatfield v. Sneden, 54 N. Y. 280;

Burke v. Valentine, 52 Barb. (N. Y.) 412; affirmed by Court of Appeals, 6 Alb. L. J. 167;

Barnes v. Underwood, 47 N. Y. 351; Leach v. Leach, 21 Hun (N. Y.) 381;

Matter of Winne, 2 Lans. (N. Y.) 21;

Beamish v. Hoyt, 2 Robt. (N. Y.) 307.

¹⁰ N. C. Code 1883, § 1838.

¹¹ Given though there was no issue born alive. Ohio Rev. Stats. 1880, § 4176.

Lands of former husband.—But in this state there is no curtesy in lands received by the wife from a former husband, except by devise, where there is issue to take it.

¹² Given though no issue born alive. Oreg. Gen. L. 1872, p. 588.

Pennsylvania,¹ Rhode Island,² Tennessee,³ Vermont,⁴ West Virginia,⁵ and Wisconsin.⁶ The estate is recognized by the courts as an existing estate in the following states, to wit : Connecticut, Missouri,⁷ and Virginia. The estate never existed, or has been expressly abolished by the statutes, in the following states, namely : Alabama,⁸ Arizona,⁹ Arkansas,¹⁰ California,¹¹ Dakota,¹² Florida,¹³ Georgia,¹⁴ Illinois,¹⁵ Indiana,¹⁶ Iowa,¹⁷ Kansas,¹⁸ Louisiana,¹⁹

¹ Brightly's Prud. Dig., p. 1007.

See: Pryor v. Wood, 31 Pa. St. 142, 147.

² R. I. Pub. Stat. 1882, c. 166, §§ 20, 35; Id., c. 182, § 2.

Issue by former husband.—It is otherwise in this state, however, where the wife has issue by a former husband who would take the estate.

³ Tenn. Stat. 1871, § 2486f.

See: McCorry v. King's Heirs, 3 Humph. (Tenn.) 267; s.c. 39 Am. Dec. 165.

⁴ Vt. Rev. L. 1880, § 2229.

⁵ W. Va. Rev. Stat., c. 70, § 15.

⁶ In lands of which the wife died seized, and which were not disposed of by will. Wis. Rev. Stat. 1878, §§ 2180, 2277.

⁷ Alexander v. Warrance, 17 Mo. 228.

See: Reaume v. Chambers, 22 Mo. 36.

⁸ Abolished by unrestricted power of a married woman to convey *inter vivos* and dispose by will of all her realty. Ala. Code 1876, § 2713.

See: Tong v. Marvin, 14 Mich. 60, 73.

Where the wife dies intestate the husband is entitled to the use of her realty for life. Ala. Code 1876, § 2714.

⁹ Receives in fee one-half of the property held in community by his wife and himself. Ariz. Comp. L. 1877, §§ 1976, 1977.

¹⁰ The unrestricted power of a married woman to convey *inter vivos* and dispose by will of all her realty in effect abolishes curtesy. Ark. Dig. 1874.

See: Tong v. Marvin, 14 Mich. 60, 73.

¹¹ There is community of property in which a common stock is made of all acquisitions by either

husband or wife during marriage. Stat. 1850, c. 147, § 10.

Wood, Cal. Dig. 488, § 10.

¹² Dak. Rev. Code 1887, p. 247.

¹³ Fla. Dig. 1881, p. 471, § 12; Id. 757, § 16.

The husband takes the child's share, and the whole if there are no children.

¹⁴ The wife has the power of disposition by will of all her separate earnings. Ga. Code 1873, § 240.

The husband takes a child's share of the wife's real estate, and the whole where there are no children. Id., § 1761.

¹⁵ The husband is endowed of a life estate similar to dower at common law. Ill. Rev. Stat. 1883, c. 41, § 1.

See: Henson v. Moore, 104 Ill. 403.

Compare: Armstrong v. Wilson, 60 Ill. 226.

¹⁶ The husband takes as heir fee in one-third of the wife's realty. Ind. Rev. Stat. 1881, § 2483. Where the property exceeds \$10,000, the husband has but one-fourth, and if more than \$20,000, but one-fifth. Ind. Rev. Stat. 1881, § 2483.

¹⁷ The husband takes a fee in one-third of the wife's realty in lieu of curtesy. Iowa Rev. Code 1880, § 2440.

¹⁸ The husband takes in lieu of curtesy a fee in one-half of the wife's estate, subject to her debts and sale on execution. Kan. Comp. L. 1879, §§ 2109, 2118.

If there are no children, the husband takes the whole estate. Id., § 2121.

¹⁹ Community of property prevails, as in California and Texas.

Michigan,¹ Minnesota,² Mississippi,³ Montana,⁴ Nevada,⁵ South Carolina,⁶ Texas,⁷ and Wyoming.⁸

SEC. 713. Same—Under married women's acts.—The cases in some of the states, particularly Michigan⁹ and Mississippi,¹⁰ hold that statutes securing to married women their property free from the control of their husbands, with power to dispose of it by will or by deed, by implication abolish the estate by curtesy; but the better opinion is thought to be that the Legislature must express an intention to abolish the common-law estate before this is accomplished.¹¹ The prevailing opinion, as well as the weight of authority, is that separate property acts suspend, during coverture, all the rights of the husband, or of his creditors, in statutory property,¹² but do not destroy

¹ The unrestricted power of a married woman to convey *inter vivos* and dispose by will of all her realty is held to abolish estate by curtesy. Comp. L. 1871, § 4300. See: *Tong v. Marvin*, 14 Mich. 60, 73.

² Minn. L. 1875, c. 40, § 5.

³ Miss. Rev. Code 1880, § 1170.

Compare: *Malone v. McLaurin*, 40 Miss. 161, 162.

⁴ Curtesy is abolished by the unrestricted power of a married woman to convey *inter vivos* and dispose by will of all her real property. Mont. Rev. Stat. 1879, p. 272.

⁵ The husband received the whole of the community property held by himself and his wife. Nev. Comp. L. 1873, §§ 157, 160.

⁶ The husband takes in fee-simple the same share in the wife's estate which she would, on surviving, take in his, namely, one-third; and in certain cases one moiety, and in other cases two-thirds. 1 Brev. Dig. 422-424.

In case of *Withers v. Jenkins*, 14 S. C. 597, it is said that the statute of 1791 only abolished curtesy in fees-simple, and that it still exists in that state in fees conditional. The court held that the statute impliedly abolishes curtesy; but it is thought that the statute merely puts the husband to his election; he cannot take both the

curtesy and the statutory provision.

⁷ There is community of property, as in California and Louisiana, with special provisions in case of intestacy. Tex. Rev. Stat. 1879, § 1653.

If there are children, the survivor takes one-half, and in some cases the whole estate. *Portis v. Parker*, 22 Tex. 699.

⁸ Wy. Comp. L. 1873, § 157.

⁹ *Ransom v. Ransom*, 30 Mich. 328; *Tong v. Marvin*, 14 Mich. 60, 70, 73.

¹⁰ *Stewart v. Ross*, 50 Miss. 776, 790. The question is considered at length in *Billings v. Baker*, 28 Barb. (N. Y.) 343, and the discussion pronounced able and exhaustive, but the conclusion doubted in the *Matter of Winne*, 2 Lans. (N. Y.) 21; and the case is criticised and distinguished by the Court of Chancery of New Jersey, in *Porch v. Fries*, 18 N. J. Eq. (3 C. E. Gr.) 204.

¹¹ *Matter of Winne*, 2 Lans. (N. Y.) 21, 34;

Houston v. Brown, 7 Jones (N. C.) L. 161;

Winkler v. Winkler, 18 W. Va. 455, 469.

¹² *Martin v. Robson*, 65 Ill. 130, 132; s.c. 16 Am. Rep. 578;

Beach v. Miller, 51 Ill. 206, 209; s.c. 2 Am. Rep. 290;

Cole v. Van Riper, 44 Ill. 58, 66;

curtesy, or prevent its vesting on the death of the wife, without disposing of her statutory estate,¹ unless tenancy by the curtesy is destroyed by expressed words of the statute, or necessary implication, or by a lawful disposition of the property by the wife.² Where the purpose and the effect of a married woman's act is to secure the wife the control of her separate property during coverture, it has the effect to suspend the husband's common-law rights in the property during that period, and curtesy in the lands of the wife does not vest in the husband until after the wife's death,³ but upon her death estate by curtesy becomes consummate, and vests in the husband in all respects as at common law.⁴

SEC. 714. **Kinds of curtesy.**—Tenancy by the curtesy may be said to be of two kinds or classes, to wit : (1) legal

- Rice *v.* Hoffman, 35 Md. 344, 350;
Schindel *v.* Schindel, 12 Md. 108,
313;
Logan *v.* McGill, 8 Md. 461, 470;
Anderson *v.* Tydings, 8 Md. 427,
443;
Brown *v.* Clark, 44 Mich. 309, 311;
Porch *v.* Fries, 18 N. J. Eq. (3 C.
E. Gr.) 204, 208;
Hatfield *v.* Sneden, 54 N. Y. 280;
Matter of Winne, 2 Lans. (N. Y.)
21, 26, 34;
Hurd *v.* Cass, 9 Barb. (N. Y.) 366,
368;
Jones *v.* Carter, 73 N. C. 148, 149
Houston *v.* Brown, 7 Jones (N.
C.) 161, 162;
Coleman *v.* Satterfield, 2 Head
(Tenn.) 259, 264;
Bottoms *v.* Corley, 5 Heisk
(Tenn.) 1, 6, 9.
¹ Cole *v.* Van Riper, 44 Ill. 58, 66;
Rice *v.* Hoffman, 35 Md. 344, 350;
Anderson *v.* Tydings, 8 Md. 427,
443;
Pratt *v.* Smith, 31 N. J. L. (2 Vr.)
244, 246;
Porch *v.* Fries, 18 N. J. Eq. (3 C.
E. Gr.) 204, 209;
Johnson *v.* Cummins, 16 N. J.
Eq. (1 C. E. Gr.) 97; s.c. 84
Am. Dec. 142;
Hatfield *v.* Sneden, 54 N. Y. 280,
287;
Burke *v.* Valentine, 52 Barb. (N.
Y.) 412; s.c. 5 Abb. Pr. N. S.
(N. Y.) 164;
Hurd *v.* Cass, 9 Barb. (N. Y.) 366,
368, 370;
Leach *v.* Leach, 21 Hun (N. Y.)
381, 382;
Zimmerman *v.* Schoenfeldt, 3
Hun (N. Y.) 692, 695;
Matter of Winne, 2 Lans. (N. Y.)
21, 26, 34;
Houston *v.* Brown, 7 Jones (N. C.)
161, 162;
Carter *v.* Dale, 3 Lea (Tenn.) 710;
s.c. 31 Am. Rep. 660;
Breeding *v.* Davis, 77 Va. 639;
s.c. 46 Am. Rep. 740;
Winkler *v.* Winkler, 18 W. Va.
455, 464, 467;
Kingsley *v.* Smith, 14 Wis. 360,
366.
See: Martin *v.* Robson, 65 Ill.
132; s.c. 16 Am. Rep. 578;
Hill *v.* Chambers, 30 Mich. 427.
² Bozarth *v.* Largent, 128 Ill. 95;
s.c. 21 N. E. Rep. 218;
Noble *v.* McFarland, 51 Ill. 226;
Freeman *v.* Hartman, 45 Ill. 57;
Cole *v.* Van Riper, 44 Ill. 58;
Hatfield *v.* Sneden, 54 N. Y. 280.
³ Bozarth *v.* Largent, 128 Ill. 95;
s.c. 21 N. E. Rep. 218;
Lucas *v.* Lucas, 103 Ill. 121;
Beech *v.* Miller, 51 Ill. 206.
⁴ Bozarth *v.* Largent, 128 Ill. 95;
s.c. 21 N. E. Rep. 218;
Gay *v.* Gay, 123 Ill. 221; s.c. 13
N. E. Rep. 813;
Castner *v.* Walrod, 83 Ill. 171;
Noble *v.* McFarland, 51 Ill. 226;
Shortall *v.* Hinckley, 31 Ill. 219.

curtesy, or the interest of a husband in the lands of his deceased wife, usually designated by that name; and (2) equitable curtesy, a right allowed to the husband by a Court of Chancery, which is analogous to legal curtesy. Legal curtesy consists of two stages, known as (a) curtesy initiate and (b) curtesy consummate.

SEC. 715. **Same—1. Curtesy initiate.**—The first stage of legal curtesy, known as curtesy initiate, begins either upon the birth of issue, born alive,¹ in the lifetime of the mother,² and capable of inheriting the estate,³ or of seisin in the wife, whichever first takes place,⁴ and this estate being once vested by the birth of issue is not suffered to determine by the subsequent death or the coming of age of the child.⁵ This stage has sometimes been referred to the time of the marriage, but this is erroneous, because there is no curtesy in any degree until after the birth of issue or the possession of property by the wife.⁶ The error is thought to arise from confusing the estate by curtesy with the common-law right a husband acquires in his wife's lands, by virtue of the marriage. Marriage is the foundation of the whole, but it does not constitute it at the common law.⁷ The husband indeed becomes seized of a freehold by the marriage, but it is his wife's freehold, not his, insomuch that both must do homage for it; in contemplation of law her person is his person, and her

¹ See: *Post*, § 749.

² See: *Post*, § 752.

³ 1 Co. Litt. (19th ed.) 30a, 40;

2 Bl. Com. 126;

Post, § 753.

See: *Chambers v. Handley*, 3 J.

J. Marsh. (Ky.) 98;

Stewart v. Ross, 50 Miss. 776;

Wilson v. Arentz, 70 N. C. 670;

Foster v. Marshall, 22 N. H. (2
Fost.) 491;

Marable v. Jordan, 5 Humph.
(Tenn.) 417.

In Delaware the right of a tenant
by the curtesy initiate is prac-
tically abolished by statute.

Moore v. Darby, 18 Atl. Rep. 768.

⁴ *Gibbins v. Eyden*, L. R. 7 Eq. 371,
376.

⁵ *Watson v. Watson*, 10 Conn. 75,
83;

Witham v. Perkin, 2 Me. (2

Greenl.) 400;

Comer v. Chamberlain, 88 Mass.
(6 Allen) 166;

Jackson ex d. v. Johnson, 5 Cow.
(N. Y.) 74; s.c. 15 Am. Dec.
433;

Guion v. Anderson, 8 Humph.
(Tenn.) 298, 307;

2 Bl. Com. 126.

Lancaster County Bank v. Stauffer, 10 Pa. St. 398.

⁷ In *Monroe v. Van Meter*, 100 Ill.
367, a marriage had taken
place before, and issue had been
born after, the passage of an
act abolishing curtesy, and the
court held that the husband
had, prior to the passage of the
act, acquired no such estate as
would be protected from des-
truction on the ground of its
being a vested right.

seisin his seisin. But after the birth of issue the husband has a separate estate.¹ The husband's estate by curtesy becomes initiate upon the birth of a child, or the acquisition of property after the date of the marriage, and becomes consummate on the death of the wife.² The tenant by curtesy initiate has an estate for life in his deceased wife's estate of inheritance, in his own right.³ The estate the husband thus acquires is an estate of freehold in the husband in the lands of the wife held by her in her own right; yet he is not seized solely, during coverture, and after issue born he is tenant by the curtesy, and is jointly seized with his wife;⁴ the estate of the husband in the land, being a vested estate, is bound by a judgment recovered against him before the death of the wife, to the extent of the value of the estate.⁵

In some states it is held that by reason of husband's curtesy initiate a married woman during coverture has no right of action to recover possession of her fee-simple lands from a stranger, that right being in her husband; and after her death her heirs have no right of action, by reason of the husband's curtesy consummate, prior to his death; and hence the statute of limitations does not commence to run against the heirs of a married woman until after the death of her husband.⁶

¹ *Lancaster County Bank v. Stauffer*, 10 Pa. St. 398.

² See: *Post*, § 716.

³ *Foster v. Marshall*, 22 N. H. (2 Fost.) 491.

⁴ See: *Junction Railroad v. Harris*, 9 Ind. 184;

Butterfield v. Beall, 3 Ind. 203;

Wass v. Buckman, 38 Me. 356;

Melvin v. Prop'rs, 33 Mass. (16 Pick.) 161;

Jackson ex d. v. Johnson, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 133;

Weisinger v. Murphy, 2 Head (Tenn.) 674;

Guion v. Anderson, 8 Humph. (Tenn.) 298, 323;

McCorry v. King's Heirs, 3 Humph. (Tenn.) 267.

⁵ *Matter of Winne*, 1 Lans. (N. Y.) 515.

⁶ *Dyer v. Wittler*, 89 Mo. 81; s.c. 58 Am. Rep. 85; 4 West. Rep. 673, overruling *Valle v. Oben-*

hause, 62 Mo. 81.

See: *Heath v. White*, 5 Conn. 288;

Foster v. Marshall, 22 N. H. (2 Fost.) 491;

Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433.

Disseisin of husband.—In New Hampshire the seizure and possession of the tenant by the curtesy initiate is so completely his own that if he is disseized during coverture neither his wife nor her heirs are affected by the possession under such disseisin, so long as the husband is alive; and they having twenty years after their death in which to regain their estate. *Foster v. Marshall*, 22 N. H. (2 Fost.) 491.

In other states it has been held that such disseisin and possession will run against both hus-

SEC. 716. **Same—2. Curtesy consummate.**—Upon the death of the wife the curtesy initiate becomes consummate by operation of law,¹ and without any act or proceeding on the part of the husband² it devolves upon him, as the estate of the ancestor does upon the heir; and no disclaimer on the part of the husband, short of an actual release, will prevent the estate from vesting in him instantly upon the death of his wife.³ It is not until the death of the wife that the husband becomes tenant by the curtesy in the proper sense of the term. During the life of the wife he is only “tenant by the curtesy initiate,” and as such is respected in law for some purposes; but he is not tenant by curtesy consummate, so as

band and wife, in absence of a saving clause in the statute in favor of the *femes covert*, which gives a certain time in which to bring an action after disability is removed; and the same rule applies to her heirs in those cases where the husband survives the wife.

See: *Coe v. Wolcottville Mfg. Co.*, 35 Conn. 175;

Watson v. Watson, 10 Conn. 75, 88;

Mellus v. Snowman, 21 Me. 201;

Bruce v. Wood, 42 Mass. (1 Met.) 542;

Melvin v. Prop'rs of Locks and Canals, 33 Mass. (16 Pick.) 161;

Weisinger v. Murphy, 2 Head (Tenn.) 764;

Guion v. Anderson, 8 Humph. (Tenn.) 298;

McCorry v. King's Heirs, 3 Humph. (Tenn.) 267.

Conveyance by husband.—By the statute of 32 Henry VIII., c. 8, which is a part of the common law of many of the states of the Union, where the husband alone conveys his wife's land, it does not work a discontinuance of her estate, and at his decease the wife, or her heirs, may enter upon and take possession of the land the same as if no such conveyance had been made.

See: *Miller v. Shackleford*, 4 Dana (Ky.) 264, 277;

Bruce v. Wood, 42 Mass. (1 Met.) 542, 544;

4 Kent Com. (13th ed.) 133.

The wife must join in the deed: that is, it must appear that both husband and wife were parties to the efficient and operative parts of the instrument of conveyance; it is not sufficient that her name was annexed, as expressing her assent to the act of her husband, and without words showing her formal participation in the granting part of the deed.

Bruce v. Wood, 42 Mass. (1 Met.) 542, 543.

See: *Allendorff v. Gaugengigl*, 146 Mass. 542;

Chapman v. Miller, 128 Mass. 269;

Price v. Chace, 108 Mass. 254, 258;

Wales v. Coffin, 95 Mass. (13 Allen) 213, 216;

Jewett v. Davis, 92 Mass. (10 Allen) 68, 71;

Wight v. Shaw, 59 Mass. (5 Cush.) 56, 66;

Raymond v. Holden, 56 Mass. (2 Cush.) 264, 271;

Lufkin v. Curtis, 13 Mass. 223;

Lithgow v. Kavenagh, 9 Mass. 161;

Powell v. Monson & Brimfield Manfg. Co., 3 Mas. C. C. 347.

¹ See: *Post*, § 759.

² *Watson v. Watson*, 10 Conn. 75, 83;

Witham v. Perkins, 2 Me. (2 Greenl.) 400;

Young v. Davis, 7 H. & N. 766;

2 Bl. Com. 128;

1 Co. Litt. (19th ed.) 30a.

³ *Watson v. Watson*, 13 Conn. 77, 83;

Witham v. Perkins, 2 Me. 400.

to give him a separate and independent estate of freehold until after the death of his wife.¹

SEC. 717. **Same—3. Equitable curtesy.**—In England the Court of Chancery allowed to the husband a right, analogous to curtesy, which may be styled equitable curtesy, in respect to equitable estates having the same nature and quantum as legal estates which confer the right.² The phrase “equitable estate” was understood in the English cases to include an equity of redemption,³ and trust money held upon trust for investment in land. In the case of *Sweetapple v. Bindon*,⁴ the court expressed a doubt whether curtesy should be allowed where the trust arose under marriage articles, but this doubt is disposed of in *Cunningham v. Moody*.⁵

SEC. 718. **Common-law requisites of curtesy.**—At common law to entitle the husband to be tenant by the curtesy of the wife's lands of inheritance after her death the following circumstances are necessary, to wit: (1) Lawful marriage;⁶ (2) seisin by the wife during coverture of an estate of inheritance to which issue of the marriage may possibly succeed as heir to the wife;⁷ (3) birth of issue alive in the lifetime of the wife;⁸ (4) the death of the wife,⁹

¹ *Jones v. Davies*, 7 H. & N. 766;

2 Bl. Com. 128.

See: *Oldham v. Henderson*, 5 Dana (Ky.) 254;

Marsellis v. Thalhimer, 2 Paige Ch. (N. Y.) 35; s.c. 21 Am. Dec. 66;

Matter of Winne, 2 Lans. (N. Y.) 21, reversing s.c. 1 Lans. (N. Y.) 508.

In lands disposed of by will.—An estate by the curtesy consummate exists in the husband in the wife's lands unaliened by her during her lifetime, though devised by her will. Such estate is subject to the liens of the husband's creditors acquired during the coverture, in preference to the general liens of her creditors upon her real estate.

Browne v. Bockover, 84 Va. 424; s.c. 4 S. E. Rep. 745.

² See: 1 Co. Litt. (19th ed.) 29a, Hargrave's note 6.

³ *Casborne v. Scarfe*, 1 Atk. 603.

⁴ 2 Vern. 536.

⁵ 1 Ves. Sr. 174.

⁶ See: *Post*, § 719.

⁷ *McDaniel v. Grace*, 15 Ark. 465, 483;

Litt., §§ 35, 52.

See: *Post*, § 747.

⁸ *Comer v. Chamberlain*, 88 Mass. (6 Allen) 166, 169.

See: *Post*, § 749.

⁹ *Hunter v. Whitworth*, 9 Ala. 965, 967;

McDaniel v. Grace, 15 Ark. 465, 483;

Wheeler v. Hotchkiss, 10 Conn. 225, 230;

Stewart v. Ross, 50 Miss. 776, 788;

Forbes v. Sweezy, 8 Neb. 520; s.c. 1 N. W. Rep. 571;

Ferguson v. Tweedy, 43 N. Y. 543, affirming s.c. 56 Barb. (N. Y.) 163;

Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74, 95; s.c. 15 Am. Dec. 433;

and (5) the right of the husband to hold real estate;¹ but these requisites need not all exist contemporaneously.² Thus it is not necessary that there should be seisin and issue at the same time;³ and, therefore, if the wife become seized of lands during the coverture, and then be disseized, and then have issue, the husband shall be tenant by the curtesy of those lands;⁴ also if the wife become seized after issue born, though the issue die before seisin.⁵ And the same is true of a birth before marriage, if the issue is legitimized by the marriage.⁶

SEC. 719. Same—1. Lawful marriage.—The first requisite to an estate by curtesy is a legal and valid marriage,⁷ because a man has curtesy in a woman's lands only as her husband.⁸ Blackstone says⁹ that the marriage should be a "legal and canonical" one; but this is manifestly erroneous, because a marriage within the Levitical degrees is voidable only, and if not voided by a divorce obtained in the lifetime of the wife, the husband will take his estate by the curtesy.¹⁰ A marriage is legal and valid when all those conditions exist and are performed which are essential before a man and woman may lawfully cohabit and bear children. These essentials are, generally speaking, as follows: (1) Parties competent to contract who have the capacity to marry each other;¹¹ (2) a mutual agreement

Templeton v. Twitty, 88 Tenn. 595;

Carpenter v. Garrett, 75 Va. 129, 133;

Winkler v. Winkler, 18 W. Va. 455, 457;

Menvil's Case, 13 Co. 19, 23.

See: *Post*, § 759.

¹ See: *Post*, section V., this chapter.

² Hunter v. Whitworth, 9 Ala. 965, 969;

Comer v. Chamberlain, 88 Mass. (6 Allen) 166, 169;

Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74, 95; s.c. 15 Am. Dec. 433;

Menvil's Case, 13 Co. 19, 23;

1 Co. Litt. (19th ed.) 30a.

³ Comer v. Chamberlain, 88 Mass. (6 Allen) 166, 169;

Stewart v. Ross, 50 Miss. 776.

⁴ Comer v. Chamberlain, 88 Mass. 38

(6 Allen) 166, 169;

Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433.

⁵ Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433.

See: Heath v. White, 5 Conn. 228, 236;

Templeton v. Twitty, 88 Tenn. 595.

⁶ Hunter v. Whitworth, 9 Ala. 965, 969.

⁷ Ferguson v. Tweedy, 43 N. Y. 543, aff'g s.c. 56 Barb. (N. Y.) 168;

1 Co. Litt. (19th ed.) 30a.

⁸ See: Heath v. White, 5 Conn. 228, 235.

⁹ 2 Bl. Com. 127.

¹⁰ Prest. Est. 473, 478.

¹¹ The marriage must be between people capable of contracting

between the parties to be henceforth husband and wife ;¹ (3) a ceremony accompanied by certain formalities is usually necessary,² and (4) an assumption of the marriage relations, having sexual intercourse and taking on the rights, duties, and obligations of husband and wife.³

SEC. 720. **Same—Same—Lex loci governs.**—The legality and validity of a marriage is governed by the *lex loci contractus*. If the marriage is valid where the contract is made, it is valid everywhere else ; if it is invalid where made, it is invalid everywhere else. In the various states of the Union, marriage is usually regarded as a civil contract,⁴ and differs from other contracts only in that it cannot be rescinded at the will of the parties. Consequently any agreement based upon mutual consent of the parties properly made, by which a man and woman agree to cohabit, as husband and wife, necessarily establishes a legal marriage. A solemnization by a clergyman⁵ is unnecessary in all except a few of the states, a mere consent *per verba de presenti* being sufficient to constitute a valid contract of marriage.⁶

a marriage, and curtesy cannot arise where one of the parties is an idiot or insane, for in that case the marriage is void, *ab initio*.

See : Morison v. Stewart, Deleg. 1745 ;

Turner v. Meyers, 1 Hagg. Cons. 416.

¹ See : Maguire v. Maguire, 7 Dana (Ky.) 181, 183, 184 ;

Rundle v. Pegram, 49 Miss. 751, 754 ;

True v. Ranney, 21 N. H. (1 Faust) 52, 54 ;

Ferlat v. Gojon, 1 Hopk. Ch. (N. Y.) 478, 494 ;

Mt. Holly v. Andover, 11 Vt. 226, 227 ;

Dalrymple v. Dalrymple, 2 Hagg. Cons. 54 ; s.c. 4 Eng. Ec. 485, 489 ;

Lockyer v. Sinclair, 8 Sess. Cas. (2d ser.) 582.

² See : Post, § 721.

³ See : Dumaresly v. Fishly, 3 A. K. Marsh. (Ky.) 368, 377 ;

Dalrymple v. Dalrymple, 2 Hagg. Cons. 54 ; s.c. 4 Eng. Ec. 485 ;

Briggs v. Morgan, 3 Phillim. 325 ;

s.c. 1 Eng. Ec. 408, 409 ; 28 Eng. L. & Eq. 96, 101 ;

Deane v. Aveling, 1 Rob. Ecc. 279, 298.

⁴ **Marriage a civil contract.**—It is said by Lord STOWELL in the case of Dalrymple v. Dalrymple, 2 Hagg. Cons. 54, that “marriage, in its origin, is a contract of natural law ; it may exist between two individuals of different sexes, although no third person existed in the world, as happened in the case of the common ancestors of mankind. It is the parent, not the child, of civil society. In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences.”

⁵ See : Post, § 721.

⁶ See : State v. Murphy, 6 Ala. 765 ; Port v. Port, 70 Ill. 484 ;

Estill v. Rogers, 1 Bush (Ky.) 62 ;

Mansfield, C. & L. M. R. R. Co. v. Drinker, 30 Mich. 126 ;

Minnesota v. Worthingham, 23 Minn. 528 ;

SEC. 721. *Same—Same—Celebration of marriage.*—The celebration of the marriage is not one of the essentials by the law of nature,¹ by the civil law,² by the common law until after the Council of Trent,³ or by the laws of Scotland;⁴ whether it was required at common law has been much discussed, and the decisions are conflicting. In England it is held that a celebration was necessary at common law to a valid marriage,⁵ and the same doctrine prevails in this country in the states of Maryland,⁶ Massachusetts,⁷ North Carolina,⁸ Tennessee,⁹ and Texas, by force of pre-existing law, and in Kentucky, by statute;¹⁰ but a contrary doctrine has been held in

Russell v. State, 53 Miss. 371;
Boyer v. Dively, 58 Mo. 510;
Pearson v. Howey, 6 Halst. (N. J.)

12;
Caujole v. Ferrie, 23 N. Y. 90;
People v. Ferris, 1 Abb. N. S.

195;
Carmichael v. State, 12 Ohio St.

553;
Hantz v. Sealy, 6 Binn. (Pa.) 405;
Peck v. Peck, 12 R. I. 485;
Bashaw v. State, 1 Yerg. (Tenn.)

177;
State v. Rood, 12 Vt. 396.

¹ See: Dumaresly v. Fishly, 3 A. K. Marsh. (Ky.) 368, 370;
Richard v. Brehm, 73 Pa. St. 140,

144;
Lindo v. Belisario, 1 Hagg. Cons.

216; s.c. 4 Eng. Ec. 367.
² Hallett v. Collins, 51 U. S. (10 How.) 174, 181; bk. 13 L. ed. 376,

379.
³ Prevost, Succession of, 4 La. An.

347, 349;
Patton v. Philadelphia, 1 La. An.

98, 101;
Hallett v. Collins, 51 U. S. (10 How.) 174; bk. 13 L. ed. 376;
Queen v. Millis, 10 Cl. & Fin.

534;
Dalrymple v. Dalrymple, 2 Hagg. Cons. 54; s.c. 4 Eng. Ec. 485.

⁴ See: McAdam v. Walker, 1 Dow. 148;

Dalrymple v. Dalrymple, 2 Hagg. Cons. 54; s.c. 4 Eng. Ec. 485;
Wright v. Wright, 15 Sess. Cas. 767.

⁵ Queen v. Millis, 10 Cl. & Fin. 534;
Beamish v. Beamish, 9 H. L. Cas. 274;

Dumoulin v. Druitt, 13 Ir. C. L. R. 212;

Catherwood v. Caslor, 13 Mees. & W. 261; s.c. 8 Jur. 1076.

⁶ Classen v. Classen, 57 Md. 510, 512;

Denison v. Denison, 35 Md. 361.

⁷ Commonwealth v. Munson, 127 Mass. 459;

Thompson v. Thompson, 114 Mass. 566, 567;

Milford v. Worcester, 7 Mass. 48, 52.

⁸ So held in the earlier cases of State v. Samuel, 2 Dev. & B. (N. C.) L. 177, 179, and Cooke v. Cooke, 1 Phill. (N. C.) 583, 586; but questioned in later decisions.

See: State v. Tachanatah, 64 N. C. 614, 616.

⁹ While the question is not definitely settled in this state, it is thought that the state is properly classified here.

Grisham v. State, 2 Yerg. (Tenn.) 589, 592;

Bashaw v. State, 1 Yerg. (Tenn.) 177.

See: Johnson v. Johnson, 1 Coldw. (Tenn.) 626, 635;

Rice v. State, 7 Humph. (Tenn.) 14, 15.

Compare: Andrews v. Page, 3 Heisk. (Tenn.) 653, 667.

¹⁰ Estill v. Rogers, 1 Bush (Ky.) 62, 64;

Respecting the rule before the passage of the statute, consult: Dumaresly v. Fishly, 3 A. K. Marsh. (Ky.) 369.

Alabama,¹ California,² District of Columbia,³ Georgia,⁴ Illinois,⁵ Iowa,⁶ Louisiana,⁷ Michigan,⁸ Minnesota,⁹ Mississippi,¹⁰ Missouri,¹¹ New Hampshire,¹² New Jersey,¹³ New York,¹⁴ Ohio,¹⁵ Pennsylvania,¹⁶ South Carolina,¹⁷ and Wisconsin.¹⁸ The same doctrine has been announced

- ¹ *Campbell v. Gullatt*, 43 Ala. 57, 69;
Robertson v. State, 42 Ala. 509;
State v. Murphy, 6 Ala. 845.
² *McCausland v. McCausland*, 52 Cal. 568, 577;
Graham v. Bennett, 2 Cal. 503, 506.
³ *Meister v. Moore*, 96 U. S. 76, 78; bk. 24 L. ed. 826;
Blackburn v. Crawfords, 70 U. S. (3 Wall.) 175; bk. 18 L. ed. 186;
United States v. Lambert, 2 Cr. C. C. 137;
United States v. McCormick, 1 Cr. C. C. 593.
⁴ *Askew v. Dupree*, 30 Ga. 173, 179.
⁵ *Hebblethwaite v. Hepworth*, 98 Ill. 126; s.c. 13 Chic. L. N. 19;
Port v. Port, 70 Ill. 484, 486.
⁶ *Blanchard v. Lambert*, 43 Iowa 228, 231;
Kilburn v. Mullen, 22 Iowa 498;
State v. Wilson, 22 Iowa 364;
State v. Williams, 20 Iowa 98;
White v. State, 4 Iowa 449.
⁷ *Blasini v. Blasini*, 30 La. An. 1383;
Hubbe v. Hubbe, 20 La. An. 97;
Philbrick v. Spangler, 15 La. An. 46;
Cole v. Langley, 14 La. An. 784;
Holmes v. Holmes, 6 La. 463, 470;
Prevost v. Prevost, 4 La. An. 347, 349;
Patton v. Philadelphia, 1 La. An. 98, 101.
⁸ *Hutchins v. Kimmell*, 31 Mich. 126, 130.
 See: *Meister v. Moore*, 96 U. S. 76, 78; bk. 25 L. ed. 826.
⁹ *State v. Worthington*, 23 Minn. 528, 533.
¹⁰ *Floyd v. Calvert*, 53 Miss. 37, 44;
Rundle v. Pegram, 49 Miss. 751;
Dickerson v. Brown, 49 Miss. 357;
Hayrover v. Thompson, 31 Miss. 211, 215.
¹¹ *Dyer v. Brannock*, 66 Mo. 391, 402;
Boyer v. Dively, 58 Mo. 510.
¹² *State v. Winkley*, 14 N. H. 480;
Clark v. Clark, 10 N. H. 380, 383;
Londonderry v. Chester, 2 N. H. 268, 270.
Compare: Dunbarton v. Franklin, 19 N. H. 257.
¹³ *Vreeland v. Vreeland*, 18 N. J. Eq. (3 C. E. Gr.) 43, 45;
Goldbeck v. Goldbeck, 18 N. J. Eq. (3 C. E. Gr.) 42, 43;
Wilson v. Hill, 13 N. J. Eq. (2 Beas.) 143, 145;
Pearson v. Howey, 11 N. J. L. (6 Halst.) 12, 18.
¹⁴ *Hynes v. McDermott*, 82 N. Y. 41, 46;
Chamberlain v. Chamberlain, 71 N. Y. 423, 427;
Hayes v. People, 25 N. Y. 390;
Canjolle v. Ferrie, 23 N. Y. 90;
Davis v. Davis, 1 Abb. (N. Y.) N. C. 140;
Van Tuyl v. Van Tuyl, 57 Barb. (N. Y.) 235;
Bissell v. Bissell, 55 Barb. (N. Y.) 325;
Fenton v. Reed, 4 John. (N. Y.) 52;
Re Taylor, 9 Paige Ch. (N. Y.) 611;
Rose v. Clark, 8 Paige Ch. (N. Y.) 574.
¹⁵ *Carmichael v. State*, 12 Ohio St. 553, 557-559;
Duncan v. Duncan, 10 Ohio St. 181, 183.
¹⁶ *Richard v. Brehm*, 73 Pa. St. 140, 144;
Commonwealth v. Stump, 53 Pa. St. 132;
Hantz v. Sealy, 6 Binn. (Pa.) 405;
Physick v. Physick, 2 Brewst. (Pa.) 179;
Guardians v. Nathans, 2 Brewst. (Pa.) 149, 152;
Brice's Estate, 11 Phila. (Pa.) 98.
¹⁷ *State v. Whaley*, 10 S. C. 500;
North v. Valk, Dud. (S. C.) Eq. 212;
Fryer v. Fryer, 1 Rich. (S. C.) Eq. Cas. 85, 92.
¹⁸ *Williams v. Williams*, 46 Wis. 464, 475.

by the Supreme Court of the United States.¹ It is open to some doubt whether a celebration is requisite to a valid marriage in some of the states not above enumerated; but it is thought that it is probably necessary in Delaware,² Maine,³ Virginia,⁴ and West Virginia; and is not required in the states of Arkansas,⁵ Florida,⁶ Indiana,⁷ Kansas,⁸ Nebraska, Nevada,⁹ Rhode Island,¹⁰ and Vermont.¹¹ Although the question has not been decided in the states of Connecticut, Colorado, Idaho, Montana, North Dakota, South Dakota, Oregon, Utah, and Washington, it is thought there is reason to believe that, should the question be directly raised in either of these states, a celebration of the marriage will be held not to be essential.¹²

SEC. 723. **Same—Same—Void and voidable marriage.**—Where the marriage is a void one because of some illegality, the man acquires no right to curtesy; but if it be voidable merely, and is not annulled during the lifetime of the wife, the husband will be tenant by the curtesy; for a marriage cannot be avoided by the courts after the death of either of the parties.¹³

SEC. 723. **Same—2. Seisin of wife.**—To entitle the husband to hold as tenant by the curtesy, the wife must be seized,¹⁴

¹ *Meister v. Moore*, 96 U. S. 76, 78; bk. 24 L. ed. 826.

² See: *Pettyjohn v. Pettyjohn*, 1 Houst. (Del.) 232, 234.

³ *State v. Hodgskins*, 19 Me. 155, 157;

Damon v. Damon, 6 Me. (6 Greenl.) 148;

Cram v. Burnham, 5 Me. (5 Greenl.) 213;

Brunswick v. Litchfield, 2 Me. (2 Greenl.) 28.

⁴ *Francis v. Francis*, 31 Gratt. (Va.) 283, 286-7;

O'Neal v. Commonwealth, 17 Gratt. (Va.) 582, 587.

⁵ *Scoggins v. State*, 32 Ark. 205, 212.

⁶ *Burns v. Burns*, 13 Fla. 369, 380; *Pondes v. Graham*, 4 Fla. 23.

⁷ *Nassamon v. Nassamon*, 4 Ind. 648, 650;

Trimble v. Trimble, 2 Ind. 76, 78; *Fleming v. Fleming*, 8 Blackf.

(Ind.) 234, 235.

⁸ See: *State v. White*, 19 Kan. 445, 449.

⁹ *Fitzpatrick v. Fitzpatrick*, 6 Nev. 63, 66.

¹⁰ *Peck v. Peck*, 12 R. I. 485, 488.

¹¹ *Newberry v. Brunswick*, 2 Vt. 151, 160.

See: *Northfield v. Vershire*, 33 Vt. 110;

State v. Rood, 12 Vt. 396, 399.

Compare: *Northfield v. Plymouth*, 20 Vt. 582, 591.

¹² See: *Andrews v. Page*, 3 Heisk. (Tenn.) 653, 667;

Catterall v. Sweetman, 1 Rob. Ecc. 304, 312, 317.

¹³ 2 Burns Ecc. Law, 458, 501.

¹⁴ *Bogy v. Roberts*, 48 Arl. 17; s.c. 3 Am. St. Rep. 211; 2 S.W.186;

Mackey v. Proctor, 12 B. Mon. (Ky.) 433;

Neely v. Butler, 10 B. Mon. (Ky.) 48;

during coverture, of an estate of inheritance,¹ which may be either legal² or equitable;³ and the estate must also be an estate in possession, for it is a general rule that there can be no curtesy in an estate in reversion expectant on a life interest, or other estate of freehold.⁴

Stevens v. Smith, 4 J. J. Marsh.

(Ky.) 64; s.c. 20 Am. Dec. 205;

Malone v. McLaurin, 40 Miss. 161;

s.c. 90 Am. Dec. 320;

Den ex d. Hopper v. Demarest,

21 N. J. L. 525;

Taylor v. Gould, 10 Barb. (N. Y.)

400;

Jackson ex d. Swartwout v. Johnson,

5 Cow. (N. Y.) 74; s.c. 15

Am. Dec. 433;

Adair v. Lott, 3 Hill (N. Y.) 186;

Lessee of Merritt v. Horns, 5 Ohio

St. 307; s.c. 67 Am. Dec. 298.

Thus where an estate was devised to the wife during widowhood, or until his son B arrived at the age of twenty-one, and one-third on her marriage, and a daughter married and had issue and died before B arrived at the age of twenty-one and in the lifetime of her mother, the court held that the husband of the daughter so dying was not entitled to curtesy in the one-third left to the widow of the testator, because the wife never had seisin thereof.

Carter v. Williams, 8 Ired. (N. C.)

Eq. 177;

Carpenter v. Garrett, 75 Va. 129.

Sale and reinvestment of funds.—In the case of *Bogy v. Roberts*, 48 Ark. 17, a father who was tenant by the curtesy sold his interest in his deceased wife's lands in connection with a sale as guardian of the children's interest therein, under an order of the Probate Court, and reinvested the whole proceeds in other lands, taking a deed to himself as guardian of the children, under which deed he took possession, received the rents and profits for years, and made valuable improvements. On marriage of his daughter and ejectment brought, the court held that the husband was not entitled to curtesy in the tract of land thus purchased, because his deceased wife was never

seized of it.

A contrary doctrine, however, is held by some courts, which maintain that a husband may be entitled to tenancy by curtesy though the wife never was seized in deed, either actually or constructively, of the land, and although the same may be held adversely during coverture.

See: *Mitchell v. Ryan*, 3 Ohio St. 377.

Thus it was held in *Borland v. Marshall*, 2 Ohio St. 308, that the owner of the inheritance in land is "possessed" of it for the purposes of dower and curtesy.

Weir v. Tate, 4 Ired. (N. C.) Eq. 264.

¹ *Ferguson v. Tweedy*, 56 Barb. (N. Y.) 168;

Watkins v. Thornton, 11 Ohio St. 367.

See: *Haynes v. Bourne*, 42 Vt. 686.

² See: *Post*, § 727.

³ *Templeton v. Twitty*, 88 Tenn. 595.

Under the statute of uses, in giving effect to estates under, courts of equity have always sought to follow, and in most respects have followed, the law in regard to the nature and incidents of such estates, and the husbands of *cestui que trusts* were allowed to take curtesy in the trust estates where they were estates of inheritance, and the wife had an equity which answered to a seisin in law of legal estates in possession.

See: *Davis v. Mason*, 26 U. S. (1 Pet.) 503; bk. 7 L. ed. 239;

Robinson v. Codman, 1 Sumn. C. C. 121;

Hearle v. Greenback, 3 Atk. 695, 717;

Morgan v. Morgan, 5 Madd. 408;

Sweetapple v. Bindon, 2 Vern. 537, n. 3;

Watts v. Ball, 1 Pr. Wms. 109.

⁴ See: *Bogy v. Roberts*, 48 Ark. 17;

Whether the husband is entitled to hold as tenant by the curtesy, or not, must be determined by the nature of the estate of which the husband and wife were seized in her right in her lifetime.¹

SEC. 724. **Same—Same—What seisin is sufficient.**—To entitle a husband to curtesy in the lands of his deceased wife, there must have been seisin of the wife, or of the husband in her right :² (1) in law or in fact ; (2) the seisin must be beneficial ;³ (3) it must be sole, and (4) must exist

s.c. 3 Am. St. Rep. 211 ; 2 S. W. Rep. 186 ;

Carter v. Williams, 8 Ired. (N. C.) Eq. 177 ;

Watkins v. Thornton, 11 Ohio St. 367 ;

Carpenter v. Garrett, 75 Va. 129 ; Watk. Desc. (4th ed.) 121.

¹ Haynes v. Bourn, 42 Vt. 686.

² Petty v. Malier, 15 B. Mon. (Ky.) 591 ;

Stinebaugh v. Wisdom, 13 B. Mon. (Ky.) 467 ;

Orr v. Hollidays, 9 B. Mon. (Ky.) 59.

³ Thus where a woman was seized in fee, in trust for the grantor for life, with a reversion in the beneficial interest to herself, it was held that the husband was not entitled to curtesy in *Chew v. Commissioners of Southwark*, 5 Rawle (Pa.) 159. In the course of the opinion the court say : " Now the quotation from Lord Coke relative to the seisin that is necessary to give a right of dower, and the nature of the estate out of which such right may or may not be claimed, is equally applicable as well as necessary to establish a right by the curtesy. And Lord HARDWICKE, accordingly, in the case of *Hearle v. Greenback*, 1 Ves. Sr. 307, laid it down in these words : ' Though said to be determined in *Casborn v. Scarfe*, 1 Atk. 603, that a husband may be tenant by the curtesy of a trust in equity, yet the wife must in the first place have the inheritance ; and secondly, there must be a seisin of the freehold during the coverture.' The same principle is repeated and con-

firmed by Chancellor Kent in his Commentaries, vol. IV., p. 31 (of the first edition), who there states, ' The wife must have had a seisin of the freehold and inheritance *semel et simul*, either at law or in equity, during the coverture.' But the seisin at law here mentioned must be understood as a seisin attended by or under a right of ownership ; because in addition to what has been already advanced going to show that this must be so, the husband, if entitled to the estate at all by the curtesy, has the right to it immediately upon the death of his wife, or it would not be, as has been already shown, a continuation of the estate or right of the wife ; but if the wife was seized only in trust for the use of another, and not for her own benefit, at the time of her death, the husband cannot take, for Chief Baron Gilbert, in his treatise on Uses and Trusts, 171, lays it down that ' tenant by the curtesy, or tenant in dower, cannot be seized to uses, because they come to these estates by the disposition of law, for the advancement and encouragement of matrimony ; and those estates are given them for their own maintenance, and are consequently exclusive of all other uses for the advantage of other people.' And besides, to permit the husband to take the estate for his own use on the death of the wife, where she was only seized of the freehold as a trustee, would be in direct violation of the trust and of the rights of the *cestui que*

some time during coverture.¹ In some of the states the wife must die seized.² In this country the common law on this point is not observed with the same degree of strictness as in England, and an immediate right of entry or constructive seisin, in the absence of any adverse possession, is considered sufficient to vest the title as tenant by curtesy in the husband.³

SEC. 725. **Same—Same—Seisin in fact or in deed.**—At com-

trust, which are paramount to that of either the wife or the husband, and, therefore, is not to be tolerated for a moment." See to same effect *McKee v. Jones*, 6 Pa. St. 429.

¹ Lord Coke says, if a man dies seized of lands in fee-simple or fee-tail general, and they descend to his daughter, who marries, has issue, and dies before entry, the husband shall not be tenant by the curtesy; yet in this case the husband had a seisin in law. But if she or her husband had entered during her life, he would have been tenant by the curtesy.

Doe v. Rivers, 7 T. R. 276;

Thomas v. Thomas, 6 T. R. 671, 679; s.c. 3 Rev. Rep. 306;

1 Inst. 29a.

² See: *Post*, § 731.

Incorporeal hereditaments.—With respect to the seisin which is necessary in the incorporeal hereditaments, to give a title to curtesy, a seisin in law or constructive seisin is sufficient, even at common law, as the husband could not by any industry obtain a seisin in deed. If it be a rent created by means of a conveyance to uses, the grantee immediately acquires a seisin by the words of the statute.

1 Inst. 29a.

Remainder in tail—Surrender of particular estate.—A married woman owning a vested remainder in tail receiving a surrender of a particular estate acquires a sufficient seisin to support an estate by the curtesy.

Pierce v. Hakes, 23 Pa. St. 231.

³ *Jackson ex d. Beekman v. Sellick*, 8 John. (N. Y.) 262;

Adair v. Lott, 3 Hill (N. Y.) 182; *McCorry v. King's Heirs*, 3 Humph. (Tenn.) 267;

Davis v. Mason, 26 U. S. (1 Pet.) 507, 508; bk. 7 L. ed. 239;

Green v. Liler, 12 U. S. (8 Cr.) 229, 249; bk. 3 L. ed. 545;

Barr v. Galloway, 1 McL. C. C. 476.

Compare: Day v. Cochran, 24 Miss. 261;

Taylor v. Gould, 10 Barb. (N. Y.) 388.

The owner of the inheritance in land is possessed of it sufficient for the purpose of curtesy in dower.

Wier v. Tate, 4 Ired. (N. C.) Eq. 264.

A recovery alone, in ejectment, by the husband and wife, has been held sufficient for this purpose. *Ellsworth v. Cook*, 8 Paige Ch. (N. Y.) 643.

A right of entry by the wife is sufficient, in some of the states, by force of the statute of descents, notwithstanding any adverse seisin or possession.

Kline v. Beebe, 6 Conn. 494;

Bush v. Bradley, 4 Day (Conn.) 298, 306;

Hillhouse v. Chester, 3 Day (Conn.) 166;

Mitchell v. Ryan, 3 Ohio St. 377.

Peaceable possession under claim of title, though for less than 20 years, when there has been no abandonment, is sufficient prima facie evidence of an estate of inheritance in the wife to sustain a claim of curtesy by the husband.

Smoot v. Lecatt, 1 Stew. (Ala.) 590.

A fortiori, is this sufficient, with a descent cast, or devise?

Rochon v. Lecatt, 1 Stew. (Ala.) 609.

mon law a husband could not be tenant by the curtesy, unless the wife, or the husband in her right, had actual seisin, or seisin in deed, that is, had possession of the land during coverture;¹ and this doctrine has been held by some of the courts of this country.² Any one who is in actual possession of land, claiming a freehold,³ or who has the immediate right to possession under a deed⁴ or a judicial judgment,⁵ is said to be seized in fact or in deed.

SEC. 726. **Same—Same—Same—Exceptions to the rule.**—The common-law rule, that actual seisin or seisin in deed must be acquired during the coverture, applied in its full

¹ 1 Co. Litt. (19th ed.) 29a.

² See: *Rochon v. Lecatt*, 1 Stew. (Ala.) 602, 610;

Bush v. Bradley, 4 Day (Conn.) 298, 305;

Stinebaugh v. Wisdom, 13 B. Mon. (Ky.) 467;

Welch's Heirs v. Chandler, 13 B. Mon. (Ky.) 420;

Neely v. Butler, 10 B. Mon. (Ky.) 48;

Orr v. Hollidays, 9 B. Mon. (Ky.) 59;

Adams v. Logan, 6 T. B. Mon. (Ky.) 175;

Stevens v. Smith, 4 J. J. Marsh. (Ky.) 64; s.c. 20 Am. Dec. 205;

Ferguson v. Tweedy, 56 Barb. (N. Y.) 186; s.c. 43 N. Y. 543;

Gibbs v. Esty, 22 Hun (N. Y.) 266;

Nixon v. Williams, 95 N. C. 103; *Carpenter v. Garrett*, 75 Va. 129, 184;

Mercer's Lessees v. Selden, 42 U. S. (1 How.) 37; bk. 11 L. ed. 38;

Davis v. Mason, 26 U. S. (1 Pet.) 503, 507; bk. 7 L. ed. 239, 240;

Lessee of Barr v. Galloway, 1 McL. C. C. 476;

Stoddard v. Gibbs, 1 Sumn. C. C. 263.

The reason for the rule is given by the Supreme Court of Kentucky in the case of *Neely v. Butler*, 10 B. Mon. (Ky.) 48, to be because "it is the duty of the husband, to enable him to protect the land from injury and for the purpose of fortifying the title of his wife, to take it into actual possession. The

wife being disabled by coverture to do it herself, the law devolves the duty on the husband, and if he fails in his performances, he has no interest in the land upon the death of the wife. The uniform course of the decisions in this court, therefore, has been to regard actual seisin by the husband during coverture as necessary to entitle him to an estate in the land of his wife after her death, as tenant by curtesy."

³ See: *Durando v. Durando*, 32 Barb. (N. Y.) 529;

Vanderheyden v. Crandall, 2 Den. (N. Y.) 9, 21;

Wendell v. Crandall, 1 N. Y. 491;

Mercer's Lessee v. Selden, 42 U. S. (1 How.) 37, 54; bk. 11 L. ed. 38, 46;

Hovenden v. Annesley, 2 Schoales & Lef. 623.

The word "seisin" applies only to freehold estates.

See: *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429; s.c. 19 Am. Dec. 139;

Slater v. Ramson, 47 Mass. (6 Met.) 439, 444;

Towle v. Ayer, 8 N. H. 58;

Englishbe v. Helmuth, 3 N. Y. 294;

1 Co. Litt. (19th ed.) 153a.

⁴ See: *Higbee v. Rice*, 5 Mass. 352;

Adair v. Lott, 3 Hill (N. Y.) 182;

Mercer's Lessee v. Selden, 42 U. S. (1 How.) 37, 54; bk. 11 L. ed. 38, 46.

⁵ *Ellsworth v. Cook*, 8 Paige Ch. (N. Y.) 643.

rigor only to lands. As regards other realty of which there is curtesy, a seisin in law suffices if circumstances make seisin in deed impossible; as of a rent, if the wife dies before it becomes due.¹ Entry is not necessary to acquire seisin in deed of land, if there be a tenant for years of the land; because his possession is the possession of the husband and wife, even before the receipt of rent from him.² The Supreme Court of New York have declared that the doctrine of actual seisin, or seisin in deed, is of limited scope.³ The court say that in all cases where actual seisin of the wife has been required, it will be found that the wife claimed either as heir or devisee, and hold that where the wife's title rests on a deed taking effect by the statute of uses, the corporal possession would be drawn to the legal title "by a kind of parliamentary magic."

We have already seen⁴ that the rule requiring that the wife should have actual seisin is not applied in this country as strictly as in England, and we will see presently⁵ that it is not applied to wild and uncultivated lands; where she is owner of such lands, she is deemed in possession, so as to entitle her husband to become tenant by the curtesy, though there has been no actual possession by either of them during the coverture.⁶

There is also an exception to the rule requiring seisin in fact or deed, where actual seisin during coverture was prevented by bodily fear.⁷

¹ 1 Co. Litt. (19th ed.) 29a.

² 1 Co. Litt. (19th ed.) 29a, Hargrave's note 3.

Seisin under English Descent Act.—

In *Eager v. Furnivall*, 17 Ch. D. 115, it seems to have been assumed that the alteration of the English rules of descent has not affected the necessity for actual seisin; but the point was not raised. It was also assumed that a seisin in law of lands would suffice, when a seisin in deed could not by any possibility be had. It is to be observed that in this case the impossibility arose out of a peculiar state of circumstances caused by sect. 33 of the Wills Act, and was an absolute impossibility; whereas, upon an

actual descent at common law, there could never be an absolute impossibility to obtain seisin in deed, but only a certain degree of difficulty which, however great in practice, could not in theory be said to be insuperable.

³ *Jackson ex d. Swartwout v. Johnson*, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433.

⁴ See: *Ante*, § 724.

⁵ See: *Post*, § 743.

⁶ *Jackson ex d. Beekman v. Sellick*, 8 John. (N. Y.) 262.

See: *Davis v. Mason*, 26 U. S. (1 Pet.) 503, 506; bk. 7 L. ed. 239, 240;

Green v. Lister, 12 U. S. (8 Cr.) 229, 249; bk. 3 L. ed. 545, 552.

⁷ *Lessee of Barr v. Galloway*, 1 McL. C. C. 476.

SEC. 727. **Same—Same—Seisin in law.**—The common-law rule requiring seisin in fact, or actual possession, by the wife or by the husband in her right during coverture, has been greatly relaxed in this country, so that in most of the states it is deemed sufficient that the wife had title to the lands, and a potential seisin or right of seisin,¹ so that entry could have been made by the voluntary act of the husband, there being no adverse possession.² It seems

- ¹ Wells v. Thompson, 13 Ala. 793 ; s.c. 48 Am. Dec. 76 ; Kline v. Beebe, 6 Conn. 494 ; Bush v. Bradley, 4 Day (Conn.) 298 ; Mettler v. Miller, 129 Ill. 630 ; s.c. 22 N. E. Rep. 529. See : Neely v. Butler, 10 B. Mon. (Ky.) 48 ; Wass v. Bucknam, 38 Me. 356 ; Redus v. Hayden, 43 Miss. 614 ; Day v. Cochran, 24 Miss. 277 ; Stephens v. Hume, 25 Mo. 349 ; Harvey v. Wickham, 23 Mo. 112 ; Reaume v. Chambers, 22 Mo. 36 ; McKee v. Cottle, 6 Mo. App. 416 ; Jackson ex d. Beekman v. Sellick, 8 Johns. (N. Y.) 262 ; Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74 ; s.c. 15 Am. Dec. 433 ; Adair v. Lott, 3 Hill (N. Y.) 182 ; Lessee of Merritt v. Horne, 5 Ohio St. 307 ; s.c. 67 Am. Dec. 298 ; Buchanan v. Duncan, 40 Pa. St. 82 ; Chew v. Commissioners of Southwark, 5 Rawle (Pa.) 160 ; McCorry v. King's Heirs, 3 Humph. (Tenn.) 267 ; Mercer's Lessee v. Selden, 42 U. S. (1 How.) 37, 54 ; bk. 11 L. ed. 38, 45 ; Davis v. Mason, 36 U. S. (1 Pet.) 506 ; bk. 7 L. ed. 249.
- Mississippi doctrine.**—Livery of seisin being unknown in Mississippi, and *pedis possessio* being unnecessary to vest a freehold, an estate by curtesy may be created, in that state, whenever there is a seisin of the wife during the coverture, with actual possession of the husband and wife, or a right to immediate entry by their voluntary act. Redus v. Hayden, 43 Miss. 614.
- In West Virginia**—The mere seisin in law by a married woman created by her inheriting realty does not entitle her husband to curtesy. Fulton v. Johnson, 24 W. Va. 95.
- ² Wells v. Thompson, 13 Ala. 793 ; s.c. 48 Am. Dec. 76 ; McDaniel v. Grace, 15 Ark. 465 ; Kline v. Beebe, 6 Conn. 494 ; Bush v. Bradley, 4 Day (Conn.) 298 ; Stinebaugh v. Wisdom, 13 B. Mon. (Ky.) 467 ; Neely v. Butler, 10 B. Mon. (Ky.) 48 ; Adams v. Logan, 6 T. B. Mon. (Ky.) 175 ; Wass v. Bucknam, 38 Me. 356 ; Redus v. Hayden, 43 Miss. 614 ; Rabb v. Griffin, 26 Miss. 579 ; Day v. Cochran, 24 Miss. 261, 277 ; Reaume v. Chambers, 22 Mo. 36 ; McKee v. Cottle, 6 Mo. App. 416 ; Den ex d. Hopper v. Demarest, 21 N. J. L. (1 Zab.) 525 ; Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74 ; s.c. 15 Am. Dec. 433 ; Jackson ex d. Beekman v. Sellick, 8 Johns. (N. Y.) 262 ; Ellsworth v. Cook, 8 Paige Ch. (N. Y.) 643 ; Pierce v. Wanett, 10 Ired. (N. C.) L. 446 ; Watkins v. Thornton, 11 Ohio St. 367 ; Mitchell v. Ryan, 3 Ohio St. 377 ; Borland's Lessee v. Marshall, 2 Ohio St. 308 ; Buchanan v. Duncan, 40 Pa. St. 83 ; Chew v. Commissioners of Southwark, 5 Rawle (Pa.) 160 ; McCorry v. King's Heirs, 3 Humph. (Tenn.) 267 ; Barr v. Galloway, 1 McL. C. C. 476 ; Mercer's Lessee v. Selden, 42 U. S. (1 How.) 37, 54 ; bk. 11 L. ed. 38, 45 ;

that the rule requiring actual seisin applies only to cases in which seisin is not complete until entry is made, as where the estate descends or is devised to the wife, and not where it is acquired by deed, and is transferred into possession by the statute of uses.¹

SEC. 728. **Same—Same—Same—Reason for relaxing rule.**—The general tendency of the courts in this country is to disregard the common-law requirements of actual seisin, as being no longer supported by the reason which formerly existed when the feudal *regime* prevailed. Justice STORY says in *Green v. Lister*,² that “the object of the law in requiring actual seisin was to evince notoriety of title to the neighborhood and the consequent burthens of feudal duties. * * * But in a mere uncultivated country, in wild and impenetrable woods, in the sullen and solitary haunts of beasts of prey, what notoriety could an entry or gathering of a twig or acorn convey to civilized man at the distance of one hundred miles?”³

SEC. 729. **Same—Same—Same—Extent to which rule relaxed.**—While the general tendency is to disregard the

Davis v. Mason, 36 U. S. (1 Pet.) 506; bk. 7 L. ed. 239;

4 Kent Com. (13th ed.) 30.

A husband may have tenancy by the curtesy though the wife be never seized in deed, either actually or constructively, of the land, and though the same be adversely held during coverture.

Mitchell v. Ryan, 3 Ohio St. 377; *Borland's Lessee v. Marshall*, 2 Ohio St. 308.

Compare: *Den ex d. Hopper v. Demarest*, 21 N. J. L. (1 Zab.) 525.

¹ *Jackson ex d. Swartwout v. Johnson*, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433.

A constructive seisin is all that is required in all other cases.

Day v. Cochran, 24 Miss. 261.

It is sufficient that the wife has title to the lands, etc., and a potential seisin, or right of seisin.

See: *Kline v. Beebe*, 6 Conn. 494; *Bush v. Bradley*, 4 Day (Conn.) 298;

Chew v. Commissioners of Southwark, 5 Rawle (Pa.) 161;

Stoolfoos v. Jenkins, 8 Serg. & R. 175.

In the case of *Borland's Lessee v. Marshall*, 2 Ohio St. 308, it is said that a husband may have tenancy by the curtesy though the wife be never seized in deed, either actually or constructively, of the land; and though the same be adversely held during coverture.

² 12 U. S. (8 Cr.) 243; bk. 3 L. ed. 545.

³ See: *McDaniel v. Grace*, 15 Ark. 468;

Shores v. Carley, 90 Mass. (8 Allen) 425;

Malone v. McLaurin, 40 Miss. 161;

Ferguson v. Tweedy, 43 N. Y. 543; s.c. 56 Barb. (N. Y.) 168;

Gellespie v. Worford, 2 Cald.

(Tenn.) 632;

Guion v. Anderson, 8 Humph. (Tenn.) 298;

Davis v. Mason, 36 U. S. (1 Pet.) 503; bk. 7 L. ed. 239.

requirement of actual seisin, as being no longer supported by the reason which formerly existed, yet the courts have hesitated to go so far as to declare a legal seisin sufficient under all circumstances, but have simply relaxed the rule with reference to certain kinds of land and properties, such as wild, waste, and uncultivated lands,¹ and that which lies in grant and not in livery.² Actual entry and possession is not necessary to give right to hold by curtesy in any estate that lies in grant and not in livery, as known to the common law,³ nor is it required in those cases of grant by deed, where the seisin passes to the grantee by force of the statute of uses.⁴

SEC. 730. **Same—Same—Seizure by descent cast.**—Where a descent is cast upon a married woman during coverture, this is sufficient to support the husband's title to curtesy without entry,⁵ and a devise to executors for payment of debts does not prevent the descent of the freehold and inheritance; consequently, in a case of this kind, the estate by curtesy will attach. Thus where a person having issue, a daughter, devised his lands to his executors for payment of his debts, and until his debts were paid, and the executors entered. The daughter married, had issue,

¹ See : *Post*, § 743.

² It is said in *Wells v. Thompson*, 13 Ala. 793; s.c. 48 Am. Dec. 76, that by the common law as administered in England it was essential to an estate by the curtesy that the wife should have had an actual seisin or possession of the land and not the bare right to possess, which is a seisin in law. 1 Steph. Com. 246, *et seq.* But this rule has been relaxed in this country, and if the wife be the owner of waste, uncultivated lands, not held adversely, she is to be deemed seized in fact, so as to entitle her husband to his right of curtesy. The title to such property draws to it the possession; and that constructive possession continues in judgment of law until an adverse possession be clearly made out.

⁴ Kent Com. (13th ed.) 29.

³ *Jackson v. Sellick*, 8 John. (N. Y.) 262;

Davis v. Mason, 26 U. S. (1 Pet.) 503, 507; bk. 7 L. ed. 239, 240.

⁴ *Jackson ex d. Swartwout v. Johnson*, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433.

⁵ *Lochon v. Lecatt*, 1 Stew. (Ala.) 609;

Harvey v. Wickham, 23 Mo. 112; *Stephens v. Hume*, 21 Mo. 349; *Reaume v. Chambers*, 22 Mo. 36; *Childers v. Bumgarner*, 8 Jones (N. C.) L. 297.

Thus where the ancestor of a married woman died seized and possessed of a tract of land, the Supreme Court of North Carolina said that the descent cast, and the title derived from her ancestor, according to the law of the state, gave her an actual seisin; and, having had children during her coverture, her husband became tenant by the curtesy.

Childers v. Bumgarner, 8 Jones (N. C.) L. 297.

and died ; afterwards the debts were paid. The court held that the husband should be tenant by the curtesy.¹

SEC. 731. **Same—Same—Seized at time of death.**—In some of the states the statutes make the right of the husband to an estate by the curtesy contingent upon the seisin of the wife in possession at the time of her death. Under these statutes the estate does not become vested in the husband by the birth of issue, as at common law, but is subject to be defeated by disseisin under statute.²

SEC. 732. **Same—Same—Possession by coparcener.**—The occupancy of the land by part of several coparceners is sufficient seisin to make the husband tenant by the curtesy of his wife's part, although neither she nor her husband had ever lived upon the land or exercised any act of ownership over it.³ Thus, where land descended to several coparceners, one of whom afterwards married, had issue, and died without she or her husband having lived upon or exercised any act of ownership over the land, but permitted it to remain in the possession of the coparceners, the court held that this was a sufficient seizure in fact to sustain the husband's claim as tenant by the curtesy.⁴ And where a person, in right of his wife, became a partner, with others, in the ownership of a cotton factory and other mills, and in the management of the business thereof, and received a proportionate share of the profits, from the time his wife became interested therein until after her death, this was held to be a sufficient seisin of the wife to consummate the estate by the curtesy in the husband.⁵

SEC. 733. **Same—Same—Possession by co-tenant.**—The seisin or possession of one co-tenant in common is so far the seisin and possession of all the other co-tenants as to enable the husband of one such co-tenant in common to

¹ Manning's Case, 8 Co. 96a.

See : Robertson v. Stevens, 1 Ired. (N. C.) Eq. 247.

² See : Stewart v. Ross, 50 Miss. 776.

³ Carr v. Givens, 9 Bush (Ky.) 679 ; s.c. 15 Am. Rep. 747.

See : Buckley v. Buckley, 11

Barb. (N. Y.) 43 ;

DeGrey v. Richardson, 3 Atk. 469.

⁴ Carr v. Givens, 9 Bush (Ky.) 679 ; s.c. 15 Am. Rep. 747.

⁵ Buckley v. Buckley, 11 Barb. (N. Y.) 43.

claim by the curtesy in the wife's part,¹ though she die before actual entry.² Thus where the ancestors of a married woman died seized and possessed of a tract of land, and one of the wife's co-tenants made an actual entry, the possession of this co-heir was held to be the possession of all the heirs, and to entitle the husband of one of the deceased heirs to curtesy in her share of the estate.³ Consequently the right to claim by the curtesy will not be lost by the abandonment of the premises to a co-tenant in common.⁴ The law in this respect in this country is in accord with that of England, as found in the case of *Sterling v. Penlington*,⁵ but differs from that in force in England since the passage of the statute of William IV.⁶

SEC. 734. **Same—Same—Possession by wife's tenant.**—It is a sufficient seisin for the purpose of curtesy, without entry,⁷ or any receipt of rents,⁸ even at common law, where the wife has a tenant in possession who holds

¹ *Powell v. Gossom*, 18 B. Mon. (Ky.) 179 ;

Vanarsdall v. Fauntleroy, 7 B. Mon. (Ky.) 401 ;

Wass v. Buckman, 38 Me. 360

Day v. Cochrane, 24 Miss. 261 ;

Buckley v. Buckley, 11 Barb. (N. Y.) 43 ;

Tayloe v. Gould, 10 Barb. (N. Y.) 388 ;

Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74 ; s.c. 15 Am. Dec. 433 ;

Dunscomb v. Dunscomb's Exrs., 1 John. Ch. (N. Y.) 508 ;

Carter v. Williams, 8 Ired. (N. C.) Eq. 177 ;

Childers v. Bumgarner, 8 Jones (N. C.) L. 297 ;

Green v. Liter, 12 U. S. (8 Cr.) 245 ; bk. 3 L. ed. 545 ;

DeGrey v. Richardson, 3 Atk. 469 ;

Sterling v. Penlington, 2 Eq. Cas. Abr. 730 ; s.c. 14 Vin. Abr. 512, pl. 5 ; 7 Id. 150, pl. 11.

In England, this was formerly the rule (see : *Sterling v. Penlington*, *supra*), but the rule was changed by the statute 3 & 4 Wm. IV., c. 27, § 12.

See : *Culley v. Doe d. Taylerson*, 11 Ad. & E. 1008 ; s.c. 39 Eng. C. L. 527 ;

Doe d. Holt v. Harrocks, 1 Car.

& K. 566 ; s.c. 47 Eng. C. L. 545.

² *Sterling v. Penlington*, 2 Eq. Cas. Abr. 730 ; s.c. 14 Vin. Abr. 512, pl. 5 ; 7 Id. 150, pl. 11.

³ *Childers v. Bumgarner*, 8 Jones (N. C.) L. 297.

⁴ *Wass v. Buckman*, 38 Me. 356 ; *Buckley v. Buckley*, 11 Barb. (N. Y.) 43 ;

Dunscomb v. Dunscomb's Exrs., 1 John. Ch. (N. Y.) 508 ;

Childers v. Bumgarner, 8 Jones (N. C.) L. 297.

⁵ 7 Vin. Abr. 150, pl. 11.

⁶ 3 and 4 Wm. IV., c. 27, § 12.

See : *Culley v. Doe d. Taylerson*, 11 Ad. & E. 1008 ; s.c. 39 Eng. C. L. 527 ;

Doe d. Holt v. Harrocks, 1 Car. & K. 566 ; s.c. 47 Eng. C. L. 545.

⁷ *Jackson ex d. Swartwout v. Johnson*, 5 Cow. (N. Y.) 74 ; s.c. 15 Am. Dec. 433.

⁸ *Powell v. Gossom*, 18 B. Mon. (Ky.) 179 ;

Tayloe v. Gould, 10 Barb. (N. Y.) 388 ;

Ellsworth v. Cook, v. Paige Ch. (N. Y.) 643 ;

Carter v. Williams, 8 Ired. (N. C.) Eq. 177 ;

Lowry v. Steele, 4 Ohio 170 ;

Green v. Liter, 12 U. S. (8 Cr.) 229 ; bk. 3 L. ed. 545.

from year to year, at will, or at sufferance;¹ the tenant in such case holding the estate as quasi bailee of the wife.² The same is true where the estate descends to the wife subject to a tenancy for years in another, and the wife dies before receiving rent,³ the possession of the lessee for years being the possession of the person to whom the inheritance descends, even before entry or receipt of rent.⁴

In the case of *Grey v. Richardson*,⁵ an estate-tail descended from her brother to A, who was married and had no issue; the lands were let on leases for years, and the rents were payable at Michaelmas and Lady-day. The tenants, being greatly in arrear, did not receive any of the Lady-day rents, but died four months after that time; nor did any other person receive rent during her life. The question was, whether her husband was entitled to be tenant by the curtesy. Lord Hardwicke said, if A had died before Lady-day, there could not have been a doubt of the husband's right to curtesy, because he could do nothing till the rent became due. The only objection arose from the neglect of the husband in not distraining for the rent which became due at Lady-day. The receipt of rent would have amounted to an actual seisin. If the representatives of the brother had received any rent during the life of the wife, it would have been a material

¹ *Malone v. McLaurin*, 40 Miss. 161;

Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433;

Lowry v. Steele, 4 Ohio 170;

Buchanan v. Duncan, 40 Pa. St. 82;

Green v. Liter, 12 U. S. (8 Cr.) 245; bk. 3 L. ed. 545.

² *Powell v. Gossom*, 18 B. Mon. (Ky.) 179;

Vanarsdall v. Fauntleroy, 7 B. Mon. (Ky.) 401;

Wass v. Buckman, 35 Me. 360;

Day v. Cochrane, 24 Miss. 261;

Tayloe v. Gould, 10 Barb. (N. Y.) 388;

Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433;

Carter v. Williams, 8 Ired. (N. C.) Eq. 177;

Green v. Liter, 12 U. S. (8 Cr.) 229, 245; bk. 3 L. ed. 545, 550;

DeGrey v. Richardson, 3 Atk. 469.

³ *Powell v. Gossom*, 18 B. Mon. (Ky.) 179;

Mackey v. Proctor, 12 B. Mon. (Ky.) 433;

Day v. Cochrane, 24 Miss. 261;

Tayloe v. Gould, 10 Barb. (N. Y.) 388;

Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433;

Carter v. Williams, 8 Ired. (N. C.) Eq. 177;

Lowry v. Steele, 4 Ohio 170;

Green v. Liter, 12 U. S. (8 Cr.) 229, 245; bk. 3 L. ed. 545, 550;

DeGrey v. Richardson, 3 Atk. 469.

⁴ 1 Cruise's Real Prop. (4th ed.) 156.

⁵ 3 Atk. 469.

objection ; but no part of the rent which accrued after the death of the brother was ever received by the wife, or by any other person ; so that the possession of the lessee was the possession of the wife ; nor could there be any other without making the husband a trespasser. The court decreed that the husband was entitled to be tenant by the curtesy.

SEC. 735. Same—Same—Same—Lease for life before marriage.—There seems to be an exception to the general rule above stated, in those cases where the wife's estate was leased by her for life before her marriage. If the rent be reserved it seems doubtful whether the husband will be entitled to have curtesy of it ; but in a similar case Lord Coke was of the opinion that the wife should have dower.¹

SEC. 736. Same—Same—Same—Receiving rents and profits.—The receipt of rents and profits by the wife during coverture, or by the husband for her, is sufficient seisin to give the husband a right to an estate by curtesy,² even in those states where the rule of actual seisin is insisted upon ;³ but a devise to a woman of the sole control of all the income from an estate, without accountability, does not give such possession or seisin of the trust estate as to entitle the husband to curtesy therein where the doctrine of actual seisin is maintained.⁴

SEC. 737. Same—Same—Possession by husband—Kentucky doctrine.—In some of the states, and particularly Kentucky, actual possession by the husband of the lands of his wife, at the time of or during coverture, is in general necessary to constitute the husband tenant by the curtesy,

¹ 1 Co. Inst. 29a, 32a.

See : Stoddard v. Gibbs, 1 Sumn. C. C. 263.

² Powell v. Gossom, 18 B. Mon. (Ky.) 179.

If land is in lease for years, curtesy may be without entry, or even receipts of rents, the possession of the lessee being deemed the possession of the husband and wife.

Lowry v. Steele, 4 Ohio 170.

See : Green v. Litter, 12 U. S. (8 Cr.) 229, 245 ; bk. 3 L. ed. 545, 550.

³ Powell v. Gossom, 18 B. Mon. (Ky.) 179.

⁴ Stewart v. Barclay, 2 Bush (Ky.) 550.

See : Hearle v. Greenbank, 3 Atk. 717 ;

Sweetapple v. Bindon, 2 Vern. 537n.

after her death ;¹ and in case he was not so seized, he has no right in the land, which will prevent the heir, during the life of the husband, from maintaining ejectment against an adverse holder.² Possession by the immediate or remote vendee of the husband, or by any person under authority of the husband, is sufficient.³

SEC. 738. Same—Same—Possession by husband's grantee.—It seems that in some of the states, if the grantee of the husband enters upon the land of the wife, and holds possession under such grant, he will have the rights of a tenant by curtesy against the heirs of the wife during the life of the husband, notwithstanding the fact that the latter never had actual possession of the premises.⁴ Thus in the case of *Nixon v. Williams*,⁵ where the wife of the plaintiff, who was dead, was entitled to the land in dispute as heir at law, and her husband rented it as tenant of the ancestor's widow, but the wife lived on the land, the court held that she had such a seisin as entitled her husband to an estate by the curtesy.

SEC. 739. Same—Same—Seisin by guardian.—Where the wife is married while a minor, and her guardian retains the possession of the land after her marriage, the seisin and possession of the guardian is the seisin and possession of the wife, and will support the claim of the husband to curtesy ;⁶ and the possession of land by a tenant, who leased the same from such guardian, is, in law, the possession of the ward, and such possession by the ward, at the time of her marriage, entitles her husband to tenancy by the curtesy.⁷

SEC. 740. Same—Same—Equitable title and seisin.—At common law the husband's right of curtesy exists in

¹ *Vanarsdall v. Fauntleroy*, 7 B. Mon. (Ky.) 401.

See : *Stinebaugh v. Wisdom*, 13 B. Mon. (Ky.) 467.

² *Stinebaugh v. Wisdom*, 13 B. Mon. (Ky.) 467.

³ *Vanarsdall v. Fauntleroy*, 7 B. Mon. (Ky.) 401.

⁴ *Vanarsdall v. Fauntleroy*, 7 B.

Mon. (Ky.) 401 ;

Nixon v. Williams, 95 N. C. 103.

⁵ 95 N. C. 103.

⁶ *Phillips v. Phillips*, 2 Duv. (Ky.) 549 ;

Powell v. Gossom, 18 B. Mon. (Ky.) 179.

⁷ *Powell v. Gossom*, 18 B. Mon. (Ky.) 179.

trust estates as well as legal estates,¹ where the trust estate is an estate of inheritance, of which the wife had an equity that answered to a seisin at law of legal estates in possession.² And in all cases where curtesy is sought in an equitable estate, an equitable seisin is sufficient, and the receipt by the *cestui que trust* of the rents, issues, and profits, or an actual possession of the land by her trustee, will be sufficient seisin to uphold the estate by curtesy,³ but it is not sufficient seisin of a trust estate, that the wife had the rents and profits of the estate, if it was by the terms of the trust to her own separate use, because her seisin in such case would not inure to the benefit of the husband.⁴ A surviving husband takes an estate by the curtesy in lands to which his wife acquired an equitable title, and of which she took possession jointly with him, claiming for herself under her muniment of title.⁵

SEC. 741. **Same—Same—Same—Exception to the rule.**—But a mere naked seisin by the wife, or trustee, is not sufficient to entitle her husband to dower by the curtesy,⁶ even though she should become entitled to the reversion of the equitable estate after the equitable life estate of another, but dies before such intermediate estate is determined.⁷

¹ See: *Schermerhorn v. Miller*, 2 Cow. (N. Y.) 439;

Dunscombe v. Dunscombe's Exrs., 1 Johns. Ch. (N. Y.) 508;

Stoddard v. Gibbs, 1 Sumn. C. C. 263;

Robison v. Codman, 1 Sumn. C. C. 121;

Casborne v. Scarfe, 1 Atk. 603, 606;

Dodson v. Hay, 3 Bro. C. C. 404;

Chaplin v. Chaplin, 3 Pr. Wms. 229;

Watts v. Ball, 1 Pr. Wms. 108;

Sweetapple v. Bindon, 2 Vern. 536;

Cunningham v. Moody, 1 Ves. Sr. 174.

² *Robison v. Codman*, 1 Sumn. C. C. 121;

Davis v. Mason, 26 U. S. (1 Pet.) 503, 508; bk. 7 L. ed. 239, 241;

Hearle v. Greenback, 3 Atk. 695, 717;

Morgan v. Morgan, 5 Mad. 408;

Watts v. Ball, 1 Pr. Wms. 109;

Sweetapple v. Bindon, 2 Vern. 537, n. 3.

³ *Cushing v. Blake*, 30 N. J. Eq. (3 Stew.) 689;

Morgan v. Morgan, 5 Madd. 408;

4 Kent Com. (13th ed.) 31.

⁴ *Stewart v. Barclay*, 2 Bush (Ky.) 550;

Hearle v. Greenback, 3 Atk. 717;

Sweetapple v. Bindon, 2 Vern. 537, n. 3.

⁵ *Templeton v. Twitty*, 88 Tenn. 595.

⁶ See: *Rigler v. Cloud*, 14 Pa. St. 361;

Stockes v. McKibbin, 13 Pa. St. 267;

Chew v. Commissioners of Southwark, 5 Rawle (Pa.) 160.

⁷ *Chew v. Commissioners of Southwark*, 5 Rawle (Pa.) 160.

SEC. 742. **Same—Same—Actual entry.**—The general rule of law is that there must be an entry during coverture to enable the husband to claim a tenancy by the curtesy.¹ But where a descent is cast upon a married woman during coverture, entry by the wife is not necessary to support curtesy in the husband,² and in some of the states, such as Connecticut,³ Ohio,⁴ Pennsylvania,⁵ and perhaps other states, adverse possession does not necessitate an actual entry;⁶ but it is said in the case of *Mercer's Lessee v. Selden*,⁷ that the general rule is, that there must be an entry during coverture, to enable a husband to claim a tenancy by the curtesy.

SEC. 743. **Same—Same—Same—Wild, waste, and uncultivated lands.**—The right of possession of wild, waste, and uncultivated lands draws to it the possession, if the lands are not held adversely; consequently, where the other incidents necessary to the creation of the estate by curtesy exist, a husband becomes tenant by the curtesy of wild, waste, and uncultivated land, not held adversely by another, of which the wife had the legal seisin.⁸ The

¹ *Mercer's Lessee v. Selden*, 42 U. S. (1 How.) 37; bk. 11 L. ed. 38.

It was held by the Supreme Court of Kentucky in the case of *Vanarsdall v. Fauntleroy's Heirs*, 7 B. Mon. (Ky.) 401, that where a husband and wife execute a deed of the wife's unimproved land, purporting to pass the fee, and the deed is ineffective for want of a proper certificate of acknowledgment, the entry of the grantees under the deed is a sufficient seisin to support curtesy, and uphold, until the husband's death, the possession of the grantee.

A recovery in ejectment by the husband and wife has been held equivalent to an actual entry. *Ellsworth v. Cook*, 8 Paige Ch. (N. Y.) 643.

² *Carr v. Givens*, 9 Bush (Ky.) 679; s.c. 15 Am. Rep. 747; *Day v. Cochrane*, 24 Miss. 261; *Stephens v. Hume*, 25 Mo. 349; *Harvey v. Wickham*, 23 Mo. 112, 115; *Reaume v. Chambers*, 22 Mo. 36;

Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433;

Adair v. Lott, 3 Hill (N. Y.) 182; *Childers v. Bumgarner*, 8 Jones (N. C.) L. 297; *Chew v. Commissioners of Southwark*, 5 Rawle (Pa.) 160.

³ *Kline v. Beebe*, 6 Conn. 494; *Bush v. Bradley*, 4 Day (Conn.) 298.

⁴ *Merritt's Lessee v. Horne*, 5 Ohio St. 307; s.c. 67 Am. Dec. 298; *Borland's Lessee v. Marshall*, 2 Ohio St. 308.

⁵ *Stoolfoos v. Jenkins*, 8 Serg. & R. (Pa.) 175.

⁶ See: *Post*, § 745.

⁷ 42 U. S. (1 How.) 37; bk. 11 L. ed. 38.

⁸ *Wells v. Thompson*, 13 Ala. 793; s.c. 48 Am. Dec. 76;

Mettler v. Miller, 129 Ill. 630; s.c. 22 N. E. Rep. 529;

Malone v. McLaurin, 40 Miss. 161; s.c. 90 Am. Dec. 320;

Day v. Cochrane, 24 Miss. 277; *Jackson ex d. Beekman v. Sellick*,

8 John. (N. Y.) 262; *Jackson ex d. Swartwout v. John-*

general rule that there must be an entry, and the wife must have actual seisin during coverture to entitle the husband to curtesy,¹ is not applied to such lands in this country.² Where the wife is the owner of such lands, she is deemed in possession, so as to entitle her husband to curtesy, though there has been no actual possession,³ even though the husband states that he never owned the premises, and never went through the formal ceremony of putting his foot on the land.⁴

son, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433;

Merritt's Lessee v. Horne, 5 Ohio St. 307; s.c. 67 Am. Dec. 298;

McCorry v. King's Heirs, 3 Humph. (Tenn.) 267; s.c. 39 Am. Dec. 165;

Mercer's Lessee v. Selden, 41 U. S. (1 How.) 37, 54; bk. 11 L. ed. 38;

Green v. Litter, 12 U. S. (8 Cr.) 229, 249; bk. 3 L. ed. 545, 552.

Compare: Neely v. Butler, 10 B. Mon. (Ky.) 48.

In Alabama, a husband is said to be entitled to his curtesy in wild and uncultivated lands of which the wife died having only the legal seisin, where they were not held adversely to her and the other conditions of curtesy exist.

Wells v. Thompson, 13 Ala. 791; s.c. 48 Am. Dec. 76.

In Illinois, the common-law rule requiring actual possession as a precedent to curtesy does not apply to wild, vacant, or unoccupied lands of the wife.

Mettler v. Miller, 129 Ill. 630; s.c. 22 N. E. Rep. 529.

A different rule, however, prevails in Kentucky, where a *feme sole*, possessed of a large tract of wild and uncultivated land, married, and had issue, and afterwards died, her husband and child surviving, and where neither she nor her husband had actual possession of the land, but he had paid the taxes on it from the time of the marriage, and there was no claim of adverse possession, it was held, that as there was no actual seisin by the wife or husband during coverture, he

was not tenant by the curtesy, as actual seisin was necessary in that state to create that estate, and that the husband was bound to strengthen the title of his wife to lands by actual possession, so as to protect them against adversary claims.

Neely v. Butler, 10 B. Mon. (Ky.) 48.

¹ See: Mercer's Lessee v. Selden, 42 U. S. (1 How.) 37; bk. 11 L. ed. 38.

² See: Pierce v. Wanett, 10 Ired. (N. C.) L. 446;

Barr v. Galloway, 1 McL. C. C. 476.

Perception of the esplees.—An entry on wild land is not necessary to enable the husband to claim as tenant by the curtesy; because the perception of the esplees is evidence of seisin, but this is presumed under a deed. Barr v. Galloway, 1 McL. C. C. 476.

³ Jackson ex d. Beekman v. Sellick, 8 John. (N. Y.) 262;

Pierce v. Wanett, 10 Ired. (N. C.) L. 446;

McCorry v. King, 3 Humph. (Tenn.) 267; s.c. 39 Am. Dec. 165;

Davis v. Mason, 26 U. S. (1 Pet.) 506; bk. 7 L. ed. 239;

Green v. Litter, 12 U. S. (8 Cr.) 229, 249; bk. 3 L. ed. 545, 552.

A constructive seisin of wild lands, not adversely possessed, in a wife, whether claiming as heir by devise or deed, is sufficient to entitle the husband to curtesy.

McCorry v. King, 3 Humph. (Tenn.) 267; s.c. 39 Am. Dec. 165.

⁴ Pierce v. Wanett, 10 Ired. (N. C.) L. 446.

SEC. 744. **Same—Same—Time of seisin.**—The seisin of the wife necessary to entitle the husband to hold the estate by the curtesy must be some time during coverture. The time when the seisin commences, whether before or after issue born, is immaterial; for if a man marries a woman seized in fee, is disseized, and then has issue, and the wife dies, he shall enter and hold by the curtesy. The same is true where there is issue which dies before the descent of the lands on the wife.¹

SEC. 745. **Same—Same—Adverse possession.**—At common law a husband is not entitled to curtesy in lands of which his wife did not have the seisin; consequently possession by one claiming adverse title will preclude the husband's right of curtesy, if the seisin is not regained during coverture.² In this country the rules of the common law are not strictly enforced in this respect, and seisin in fact on the part of the wife is not essential to constitute the husband tenant by the curtesy; seisin in law, as we have already seen,³ being sufficient for that purpose.⁴ In some of the states where a wife was seized of land during her intermarriage, and there was issue of the marriage, the husband may be tenant by the curtesy, even if the land was adversely held during the coverture.⁵

SEC. 746. **Same—Same—Remainder and reversion.**—It is a general rule that the estate must be an estate in posses-

¹ Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 443;

1 Inst. 30a.

² Den ex d. Hopper v. Demarest, 21 N. J. L. (1 Zab.) 525.

In Rankin's Appeal, 138 Pa. 327; s.c. 16 Atl. Rep. 82; 2 L. R. A. 429, the court say that though, under the will, the executors had the power to sell the coal and mining privileges if they should deem it expedient, and though they paid taxes on the property, and sold coal from it, and the devisee never had actual possession, the surviving husband would be tenant by the curtesy upon the death of the wife, leaving issue of their marriage, as the power of sale was

not an interest in the property, the ownership of which was in the devisee.

³ See: *Ante*, §§ 727-729.

⁴ Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433.

⁵ Connecticut: Kline v. Beebe, 6 Conn. 494;

Bush v. Bradley, 4 Day (Conn.) 298. Ohio: Mitchell v. Ryan, 30 Ohio St. 377;

Merritt's Lessee v. Horne, 5 Ohio St. 307; s.c. 67 Am. Dec. 298; Borland's Lessee v. Marshall, 20 Ohio St. 308.

Pennsylvania: Stoolfoos v. Jenkins, 8 Serg. & R. (Pa.) 175.

Contra—Mercer's Lessee v. Sel-den, 42 U. S. (1 How.) 37; bk. 11 L. ed. 38.

sion to entitle the husband to curtesy; no such state existing in a reversion expectant on a life interest or other estate of freehold,¹ unless the estate be determined during the coverture;² but to defeat the right to curtesy the outstanding estate must be a freehold, for an outstanding term of years will not have that effect,³ however long it may be,⁴ for the tenant for years is vested with the term only, and not with the land, the possession of the termor being the possession of the husband and wife.⁵ Thus in *Carter v. Williams*⁶ a testator devised land to his wife *durante viduitate*, or until his son should arrive at the age of twenty-one years; and then devised the land to his children, one-third thereof on the death of the widow, and the other two-thirds upon her marriage. A daughter of the testator married, had issue and died, leaving a husband, before the son arrived at twenty-one. On the same attaining the age of twenty-one the husband of the deceased daughter claimed curtesy, and the court held that he was entitled to curtesy in two-thirds of the estate, the widow's interest therein being for years only; that is, until the son attained twenty-one, but that he was not entitled to curtesy in the third held by the widow for life, her estate therein being a freehold.⁷

¹ *Mackey v. Proctor*, 12 B. Mon. (Ky.) 433;

2 Bl. Com. 127;

Watk. Desc. (4th ed.) 111, 121.

See: *Post*, this chapter, sections II. & III.

² *Watkins v. Thornton*, 11 Ohio St. 367.

³ *Weir v. Humphries*, 4 Ired. (N. C.) Eq. 279.

⁴ *Lessee of Lowry v. Steele*, 4 Ohio 172.

See: *Carter v. Williams*, 8 Ired. (N. C.) Eq. 177;

Robertson v. Stevens, 1 Ired. (N. C.) Eq. 247.

⁵ See: 2 Bl. Com. 144;

1 Co. Litt. (19th ed.) 29a, Hargrave's note.

⁶ 8 Ired. (N. C.) Eq. 177.

⁷ The same doctrine was held in the case of *Robertson v. Stevens*, 1 Ired. (N. C.) Eq. 247.

Exception to the rule exists in those states where by statute, until dower is assigned, the widow

is entitled to remain in the mansion-house, and the mesuage and land thereto belonging, without being charged with rent. A died under such a statute leaving a widow and eight children, all infants but one. Dower was never assigned, and she remained in possession of the mansion-house and plantation until her death in 1866, cultivating and renting out the land in her own name, and using and disposing of the profits at her own pleasure; her children being with her, and supported by her until their death or marriage. B, one of the daughters, married C, had issue born alive, and died in the lifetime of her mother. The court held that C was not entitled to curtesy in the land, B not having been seized during her lifetime.

Carpenter v. Garrett, 75 Va. 129.

SEC. 747. **Same—3. Issue of marriage.**—The third requisite at common law to entitle a husband to an estate by the curtesy is issue of the marriage.¹ The basis upon which this doctrine rested was the theory that the husband's estate by the curtesy was only a continuation of the wife's estate of inheritance, entrusted to him for the benefit of the issue. During feudal times, on the birth of issue the husband did homage alone, and was called tenant by the curtesy initiate;² and although the custom of doing homage has long since ceased, the husband is still said to be tenant by the curtesy initiate upon the birth of issue alive, during the lifetime of the wife, and capable of inheriting.³ But to entitle a husband to an estate by the curtesy, such issue must have the following qualities, to wit: must—

a. Be born alive;

b. Be born in the lifetime of the mother; and

c. Be capable of inheriting the estate.

But all these qualities need not concur in time.

SEC. 748. **Same—Same—Change of rule by statute.**—The common-law rule requiring the birth of issue to entitle the husband to curtesy has been changed in some of the states of the Union, so that a surviving husband will be entitled to curtesy in the lands of which his wife was seized although there was no issue of the marriage.⁴ This is the case in Alabama,⁵ Minnesota,⁶ Michigan,⁷ Nebraska,⁸ Ohio,⁹ Oregon,¹⁰ and Pennsylvania,¹¹ since the passage of the married woman's act.¹²

¹ 2 Bl. Com. 127, 128;

1 Co. Litt. (19th ed.) 29b.

See: Taylor v. Smith, 54 Miss.

50;

Ferguson v. Tweedy, 56 Barb.

(N. Y.) 168;

Templeton v. Twitty, 88 Tenn.

595;

Mattocks v. Stearns, 9 Vt. 326.

² As to homage, see: *Ante*, § 714.

³ See: *Post*, §§ 749, 752, 753.

As a right of second husband to curtesy, see: *Post*, § 756.

⁴ See: 4 Kent Com. (13th ed.) 29.

⁵ Also Code 1876, tit. 5, c. 1, § 2714.

⁶ 1 Stat. at Large (Bissell ed. 1873), c. 32, § 164, p. 630.

⁷ 2 Mich. Comp. L. (1857), c. 89, § 30, p. 856.

⁸ Neb. Comp. Stat. (1881), c. 23, § 29, p. 215.

⁹ Ohio Rev. Stat. (1880), § 4176, p. 1046.

¹⁰ Oreg. Gen. Laws (1843-72), c. XVII., tit. II., § 30, p. 588.

¹¹ Dubs v. Dubs, 31 Pa. St. 154; Lancaster Co. Bank v. Stauffer, 10 Pa. St. 398;

Gamble's Estate, 5 Clark (Pa.) 4; s.c. 1 Parsons (Pa.) 489; 1

Sel. Eq. Cas. 489;

Dunlop's Laws, 510;

Rev. Stats. 1846, c. 403, p. 504.

¹² April 8, 1833.

SEC. 749. **Same—Same—a. Born alive.**—By the common law, to entitle the husband to curtesy, there must not only be issue of the marriage, but such issue must have been born alive;¹ and this rule of the common law prevails in all the states of the Union where birth of issue is not dispensed with by statute.² Consequently the delivery of a child, after the death of the mother, by means of the Cæsarian operation, will not give the husband a right to an estate by the curtesy, though such child is considered *in esse* before the birth, for its own benefit.³ By the old law it was deemed necessary not only that the child should be born alive, but that it should be heard to cry out; and the fact that it did so cry out was to be proved by the persons who actually heard it, not by those who learned of it by hearsay.⁴ This doctrine was probably based on the occurrence in a writ used in the eleventh year of the reign of Henry III. of the clause “*et ipse postmodum exæ prolem suscitaverit, cujus clamor auditus fuerit inter quatuor parietes.*” This is no longer in accord with the law, if it ever was, and the cry of the child is now simply regarded as one amongst other proofs of life.⁵ The burden of proof is on the person claiming as tenant by the curtesy to show an existence of independent separate life in the issue after birth;⁶ the declarations of the wife, made shortly after the birth of the child, that it had been born alive, are not competent evidence to establish her husband’s title to an estate by the curtesy.⁷ A child is born alive within the meaning of the rule as to curtesy, when it tries to breathe after being fully delivered external to the mother, although it is dead when the navel cord is cut.⁸

See : Pa. Rev. St. 1846, c. 403, p. 504.

¹ 2 Bl. Com. 127 ;

1 Co. Litt. (19th ed.) 29b.

² See : *Nicrosi v. Philippi*, 91 Ala. 299 ; s.c. 8 So. Rep. 561 ;

Porch v. Fries, 18 N. J. Eq. (3 C. E. Gr.) 204.

³ *Marsellis v. Thalhimier*, 2 Paige Ch. (N. Y.) 35 ; s.c. 21 Am. Dec. 66.

See : *Post*, § 750.

See : *Matter of Winne*. 1 Lans. (N. Y.) 513.

Compare : Tyl. Inf. & Cov. (2d ed.), § 281.

⁴ See : 2 Bl. Com. 127 ;

Bract. 458a ;

1 Co. Litt. (19th ed.) 29b ;

Prince’s Case, 8 Co. 24b ;

Holmes’ Case, Dyer 25b.

⁵ 2 Bl. Com. 127 ;

1 Co. Litt. (19th ed.) 29b.

⁶ *Doe v. Killen*, 5 Del. 14.

⁷ *Gardner v. Klutts*, 8 Jones (N. C.) L. 375 ; s.c. 80 Am. Dec. 331.

⁸ *Goff v. Anderson*, 15 S. W. Rep.

SEC. 750. **Same—Same—Same—Degree of development and vitality.**—An unborn child, after conception, is to be considered *in esse* for every purpose which is for its own benefit,¹ but not for another person.² Consequently, if the child is born in such an early state of pregnancy as to be incapable of living, it has been held that it is to be considered as if it had never been born or conceived. Children born within the first six months after conception are considered as incapable of living; and for that reason although they are apparently born alive, if they do not in fact survive so long as to rebut this presumption, they

866; s.c. 11 L. R. A. 825; 12 Ky. L. Rep. 888.

Doe v. Killen criticised.—In the case of *Goff v. Anderson*, *supra*, the court say: "Counsel has cited the case of *Doe v. Killen*, 5 Houst. (Del.) 14, where the judge, upon trial of an action of ejectment between the surviving husband and heirs at law, charged the jury that to find for the former they must believe that the child was born alive, having an independent circulation and existence of its own, apart from the mother, and by force of the child's own inherent vitality; and, though not directly so stated, it may be inferred the judge intended such independent circulation should exist after the navel cord was cut. We have been referred to no other authority for such view, and we cannot sanction it; for a child when delivered is either alive or dead for all purposes, and to make its legal existence date from the time a physician may in his wisdom see proper to cut the navel cord is without reason, and contrary to the plain meaning and intent of our statute. We think the court properly found the child in question was born alive, and that the appellee was entitled as tenant by the curtesy to the land owned by his wife."

¹ See: *Rawlins v. Rawlins*, 2 Cox Eq. Cas. 425;
In re Corlass, 1 Ch. D. 460, 463;
s.c. 45 L. J. Ch. 118;

Doe ex d. Clarke v. Clarke, 2 H. Bl. 399, 401; s.c. 3 Rev. Rep. 430;

Hale v. Hale, Prec. Ch. 50;

Burdet v. Hopegood, 1 Pr. Wms. 486;

Northbey v. Strange, 1 Pr. Wms. 342;

Beale v. Beale, 1 Pr. Wms. 245;

Thellusson v. Woodford, 4 Ves. 227; s.c. 4 Rev. Rep. 205; affirmed 11 Ves. 112; s.c. 1 Ros. & P. (N. R.) 357; 8 Rev. Rep. 104.

² A child is not considered *in esse* for another's benefit when it is afterwards born dead, or born too soon after conception to be capable of living, the maxim of the common law being *mortuus exitus non est exitus*.

Marsellis v. Thalhimier, 2 Paige Ch. (N. Y.) 35; s.c. Am. Dec. 66;

1 Co. Litt. (19th ed.) 29b.

While a child *en ventre sa mere* may, at the present day, be considered as *in esse* for all purposes (*Thellusson v. Woodford*, 4 Ves. 227; s.c. 4 Rev. Rep. 205; affirmed 11 Ves. 112; s.c. 1 Bos. & P. (N. R.) 357; 8 Rev. Rep. 104), yet one of the difficulties suggested by Lord Coke still exists, viz.: The estate during the interval succeeding the wife's death descends to her next heir, and is not divested *ab initio* by the subsequent birth of the child.

See: *Basset v. Basset*, 3 Atk. 207;

Goodtitle v. Newman, 3 Wils. 516.

will be incapable of inheriting so as to transmit the property to others.¹

SEC. 751. **Same—Same—Same—Death of issue.**—Where issue has been born alive, and capable of inheriting, during the lifetime of the mother, it matters not whether it dies before or after its mother, or how long it lives after its birth, for its existence, though but for an instant, clothes the husband with an estate by the curtesy initiate,² which is not divested by the death of the child before the mother's seisin accrues,³ because the essentials to entitle the husband to an estate by the curtesy need not coincide in point of time.⁴ Thus where land is devised in fee-tail to the testator's daughter, and on her death without issue to her executors, to be sold, and the daughter marries and has issue, which dies in her lifetime, her husband, surviving her, will be entitled to a tenancy by the curtesy, and the executors cannot sell the estate until after the determination of the life estate of the husband.⁵

¹ *Marsellis v. Thalhimer*, 2 Paige Ch. (N. Y.) 35; s.c. 21 Am. Dec. 66;

Code Napoleon, art. 312, 725, 906; Code La., art. 205;

Dig., lib. 38, tit. 16, l. 3, s. 12; lib. 1, tit. 5, l. 12;

Domat, Prel. B., tit. 2, s. 1, art. 5.

The civil law rule.—Although by the civil law of successions a posthumous child was entitled to the same rights as those who were born in the lifetime of the decedent, it was only on the condition that they were born alive and under such circumstances that the law presumed they would survive. The rules on this subject are found in Domat, in the Napoleon Code, and in the Civil Code of Louisiana. Children in the mother's womb are considered, in whatever relates to themselves, as if already born; but children born dead, or in such an early state of pregnancy as to be incapable of living, although they be not actually dead at the time of their birth, are considered as if they had never been born or conceived.

Civil Code La. 28, 29;

Code Napoleon, art. 725, 906;

Domat, Prel. B., tit. 2, s. 1, art. 4-6; pt. 2, lib. 2, tit. 1, s. 1, art. 6, 7.

Still-born children are not counted in the number of children who succeed; and although they were alive in the mother's womb at the time of the successions which concerned them fell, yet they have no share in them, for they are considered in the same manner as if they had never been born.

Marsellis v. Thalhimer, 2 Paige Ch. (N. Y.) 35, 41; s.c. 21 Am. Dec. 66, 69.

² See: *Ante*, § 715.

³ *Taliaferro v. Burwell*, 4 Cal. 321; *Bush v. Bradley*, 4 Day (Conn.) 298;

Phillips v. Phillips, 2 Duv. (Ky.) 549;

Malone v. McLaurin, 40 Miss. 161;

Hay v. Mayer, 8 Watts (Pa.) 203; *Templeton v. Twitty*, 88 Tenn. 595.

⁴ See: *Post*, § 758.

⁵ *Hay v. Mayer*, 8 Watts (Pa.) 203; s.c. 34 Am. Dec. 453.

SEC. 752. **Same—Same—b. In lifetime of wife.**—The estate by the curtesy being considered a continuance of the inheritance, given to the husband for the benefit of the issue of the marriage, it naturally followed that there must be issue born alive,¹ in the lifetime of the wife,² to entitle the husband to curtesy.³ Should the wife die in the pains of parturition, and the child be delivered by the Cæsarian operation, there could be no curtesy at common law, because the child was not born during the coverture.⁴ In such a case the husband had no title to curtesy because no issue of the marriage had been born, but the child *en ventre sa mere* is to be considered as in existence for the purposes of inheritance,⁵ and the land descended to the child, while in his mother's womb; and the estate being once so vested shall not be taken from him and his heirs.⁶

SEC. 753. **Same—Same—c. Be capable of inheriting.**—The estate by curtesy being considered, as we have seen, a continuation of the inheritance transferred to the husband for the benefit of the issue of the marriage, it is not only necessary that there should be issue of that marriage,⁷ born alive, during the lifetime of the wife, but also capable of inheriting the estate.⁸ Hence, where there is issue that could not by any possibility⁹ inherit the mother's estate as heir, as where a woman is seized in tail male, and has issue a daughter only, in that case

¹ See : *Ante*, § 749.

² 1 Co. Litt. (19th ed.) 29b.

³ 2 Bl. Com. 127, 128;

1 Co. Litt. (19th ed.) 29b.

See : *Porch v. Fries*, 18 N. J. Eq.

(3 C. E. Gr.) 204;

Paine's Case, 8 Co. 35a.

⁴ 2 Bl. Com. 130;

1 Co. Litt. (19th ed.) 29b.

See : *Ryan v. Freeman*, 36 Miss. 175;

Matter of Winne, 1 Lans. (N. Y.) 508; s.c. 2 Id. 21;

Marsellis v. Thalhimer, 2 Paige Ch. (N. Y.) 35, 42; s.c. 21 Am. Dec. 66;

Paine's Case, 8 Co. 35a.

The rule in Normandy, whence the estate of curtesy was probably derived, is thus stated : Il faut qu'il soit sorti du ventre de la mere, il ne suffiroit pas que la tete eut paru et qu'on pretendit

qu'il auroit donne des signes de vie par des cris ou autrement.

1 Flaust, Coutumes de Normandie, 613.

⁵ See : *Ante*, § 750.

⁶ 1 Inst. 29b.

See : *Marsellis v. Thalhimer*, 2 Paige, Ch. (N. Y.) 35; s.c. 21 Am. Dec. 66.

⁷ **Bastard issue of marriage when.**—Where a statute exists legitimizing issue born out of wedlock by the parents subsequently marrying, this issue fulfills the condition.

Hunter v. Whitworth, 9 Ala. 965.

⁸ *Heath v. White*, 5 Conn. 228, 236;

Taylor v. Smith, 54 Miss. 50;

Day v. Cochran, 24 Miss. 261;

Paine's Case, 8 Co. 34;

1 Co. Litt. (19th ed.) 29b.

⁹ *Paine's Case*, 8 Co. 35b.

the surviving husband could take no estate by the curtesy,¹ for the daughter cannot by possibility inherit the estate from her mother.²

SEC. 754. **Same — Same — Same — Seisin by wife.**—The general rule of law is that no person can be heir to an ancestor, unless such ancestor died seized; and from this rule, doubtless, sprang the doctrine which requires an actual seisin in the wife to entitle the husband to curtesy; for, without such an actual seisin, her issue would not be capable of inheriting from her.³ Another reason for this rule depriving the husband of curtesy unless the wife has actual seisin of all estates of which actual seisin could be had, is the fact that the husband had it in his power to obtain for his wife an actual seisin, and his neglect to do so is such negligence as to defeat his estate.

SEC. 755. **Same—Same—Same—Estate devised to wife and heirs.**—In a case where the devise was to a woman and her heirs, but if she died leaving issue, then to such issue and their heirs, and she died leaving issue, it was held that her surviving husband was not entitled to curtesy, as the children took by purchase, and the wife had not such an estate as could descend upon them.⁴

SEC. 756. **Same — Same — Same — Gives second husband curtesy.**—By the common law, where a woman seized in fee-simple married, had issue, after which her husband died, and she took another husband, by whom she also had issue, such second husband was tenant by the curtesy on the death of the wife, although the issue of the first husband was living, because his issue by possibility might inherit, should the issue of the first marriage die without issue.⁵ The fact that the lands are held adversely when

¹ 3 Bl. Com. 128;

1 Co. Litt. (19th ed.) 29b.

See: *Heath v. White*, 5 Conn. 228, 236;

Day v. Cochran, 24 Miss. 261;

Paine's Case, 8 Co. 35b.

² 2 Bl. Com. 31.

See: *Parker v. Carter*, 4 Hare 416.

³ 1 Cruise Real Prop. (4th ed.) 144, § 23.

See: *Jackson ex d. Swartwout v.*

Johnson, 5 Cow. (N. Y.) 74;

s.c. 15 Am. Dec. 433;

Graham v. Luddington, 1 Hun, (N. Y.) 251.

⁴ *Barker v. Barker*, 2 Sim. 249.

⁵ *Paine's Case*, 8 Co. 35b;

Menvil's Case, 13 Co. 23;

1 Co. Inst. 30a.

See: *Heath v. White*, 5 Conn. 233;

Jackson ex d. Swartwout v.

Johnson, 5 Cow. (N. Y.) 74;

s.c. 15 Am. Dec. 433.

the child is born does not defeat the husband's right.¹ Glanville² and Bracton³ both agree that the second husband was equally entitled with the first to the estate by curtesy. It seems that one Stephanus de Segrave, whose name we find among the justices itinerant in the reign of Henry III., had written a treatise, in which he had combated this opinion, as founded on a misconception of the meaning and design of this sort of estate. He thought there was an injustice in giving an estate *per legem Angliæ* to the second husband, more especially when there were children alive of the first marriage.⁴ The statute *De Donis* declared that the second husband of a woman to whom lands had been given in tail should not claim anything *per legem Angliæ*, in such conditional gift; nor the issue of such second husband claim anything by descent; but that immediately upon the death of a man and woman to whom land was so given, it should revert to their issue, or to the donor or his heir, so that the law, in this particular, as laid down both by Glanville and Bracton, was changed; and the opinion maintained by Stephanus de Segrave was established.⁵

SEC. 757. **Same—Same—Same—Wife's attainder.**—At common law, if the wife had issue, and was afterwards attainted of felony, the issue could not inherit from her, yet the husband held as tenant by the curtesy, because of the issue born before the felony, which by possibility might have inherited from the mother; but if the wife was attainted of felony before issue had, the husband could not be tenant by the curtesy, although she afterwards had issue.⁶ We have already seen that treason or felony does not work corruption of blood,⁷ and for this reason the rule of the common law has no application here.

It is said in the case of *Heath v. White*, 5 Conn. 236, that the husband's right of curtesy upon the birth of a child by him takes precedence over any claim by descent of a son of the wife by a prior marriage; but under the statute of Michigan a different doctrine prevails. *Hathorn v. Lyon*, 2 Mich. 93.

¹ *Jackson ex d. Swartwout v. John-*

son, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433.

See: *Guion v. Anderson*, 8 Humph. (Tenn.) 307.

² See: *Glanv. lib. 7, c. 18.*

³ See: *Bract. 487b.*

⁴ 1 Reeves' *Hist. Eng. L.* (2d ed.) 298.

⁵ 2 Reeves' *Hist. Eng. L.* (2d ed.) 165.

⁶ 1 Co. Inst. 40a.

⁷ See: *Ante*, §

SEC. 758. **Same—Same—d. Essentials need not coincide in point of time.**—The common-law essentials requisite to give to the husband an estate by the curtesy need not coincide in point of time,¹ and it is therefore immaterial whether the issue is born before or after the seisin of the wife; if it had lived, it would have inherited the estate, for its birth will entitle the husband to curtesy, even though it died before the wife acquired the estate.² Thus when, after issue is born, lands descend to the wife, be the issue dead or alive at the time of the descent, the husband shall be tenant by the curtesy. So if, after the death of the issue, the wife acquires land in fee, and dies without having had any other issue, her husband shall be tenant by curtesy; for the having issue, and being seized during the coverture, is sufficient, though it be at different times.³ In those states where bastards are legitimized by the subsequent marriage of their parents, where a child is born to a man and woman in an illicit connection, and they subsequently marry and have no other issue, the right of curtesy in all the land of which the wife may be seized during coverture will vest in the husband, because of the birth of such child.⁴ It not being necessary that the birth of issue and seisin be coincident, therefore where there is a seisin during coverture, and the land is conveyed by the wife, without her husband joining in the deed, before any child is born of the marriage, and a child is born after the conveyance, the husband will be entitled to curtesy, in such lands, because a wife cannot, by her sole deed, deprive her husband of his right to curtesy.⁵ Where the land is acquired after the death of the issue, the husband will be entitled to curtesy the same as though it had been acquired before the birth of the issue.⁶ Where adverse possession is taken of the wife's

¹ 1 Co. Litt. (19th ed.) 29b.

² Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74; s.c. 21 Am. Dec. 66;
2 Bl. Com. 128;

1 Co. Litt. (19th ed.) 29b.

³ Menvill's Case, 13 Co. 23;
Paine's Case, 8 Co. 35b.

⁴ Hunter v. Whitworth, 9 Ala. 965.

⁵ Comer v. Chamberlain, 88 Mass. (6 Allen) 166.

⁶ Heath v. White, 5 Conn. 235;
Phillips v. Phillips, 2 Duv. (Ky.) 549;

Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74; s.c. 21 Am. Dec. 66;

Guion v. Anderson, 8 Humph. (Tenn.) 298.

estate during coverture, and she then has issue and dies, her surviving husband will be entitled to curtesy in the land.¹

SEC. 759. **Same—4. Death of wife.**—The last requisite to confer curtesy upon the husband is the death of the wife. Until this event the estate is simply initiate,² is a contingent and not a vested estate.³ The other requisite conditions being present, upon the death of the wife the estate by curtesy is consummate.⁴ The estate by curtesy, though inchoate,⁵ is not *in esse* until the death of the wife, is merely a contingent and not a vested estate,⁶ even though while she lives he may be tenant of the freehold in her right.⁷ On the death of the wife the husband becomes tenant by the curtesy by operation of law,⁸ and without any assignment,⁹ and the land will be held by him subject to all incumbrances which would affect it in her possession, were she alive.¹⁰

SEC. 760. **Same—Same—Civil death and bigamy of wife.**—By the common law, civil death was death in law also,¹¹ but aside from statutory provisions to that effect¹² there is no civil death known to the American law,¹³ and the estate

¹ Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74; s.c. 21 Am. Dec. 66;

Guion v. Anderson, 8 Humph. (Tenn.) 307.

² Rice v. Hoffman, 35 Md. 344, 350; Foster v. Marshall, 22 N. H. (2 Fost.) 491, 493;

Matter of Winne, 2 Lans. (N. Y.) 21, 24;

Wilson v. Arentz, 70 N. C. 670, 673.

See: *Ante*, § 714.

³ Porter v. Porter, 27 Gratt. (Va.) 599, 606.

⁴ Watson v. Watson, 10 Conn. 83; Wheeler v. Hotchkiss, 10 Conn. 225, 230;

Witham v. Perkins, 2 Me. 400; Ferguson v. Tweedy, 56 Barb. (N. Y.) 168;

Matter of Winne, 2 Lans. (N. Y.) 21, 24;

Jones v. Davies, 7 Hurl. & N. 507, 508.

⁵ Rice v. Hoffman, 35 Md. 344, 350. See: *Post*, section II., this chap-

ter, "Nature, Incidents, and Duties."

⁶ Porter v. Porter, 27 Gratt. (Va.) 599, 606;

⁷ Oldham v. Henderson, 5 Dana (Ky.) 254.

⁸ Watson v. Watson, 13 Conn. 83, 86.

⁹ Rice v. Hoffman, 35 Md. 344, 350; Adair v. Lott, 3 Hill (N. Y.) 182.

¹⁰ Matter of Winne, 2 Lans. (N. Y.) 21.

¹¹ See: 1 Bl. Com. 132; 2 Id. 121; 4 Id. 380;

Bract., fol. 301b, 421b;

1 Co. Litt. (19th ed.) 130a, 132a-133a;

1 Steph. Com. 132.

¹² Estate of Nerac, 35 Cal. 392; s.c. 95 Am. Dec. 111;

Planter v. Sherwood, 6 John. Ch. (N. Y.) 118, 128.

¹³ It is said in the case of Baltimore v. Chester, 53 Vt. 315; s.c. 38 Am. Rep. 677, 679, that the dictum of Lord Coke (1 Co. Litt. (19th ed.) 130a), that "be-

of a person convicted and attainted of felony, and sentenced to imprisonment for life is not divested,¹ and even where civil death exists by virtue of local statute, such death does not give curtesy to the husband.² It is thought, however, that by provisions of statute the conviction of the wife of bigamy may be sufficient to invest the husband with an estate by curtesy.³

SECTION II.—NATURE, INCIDENTS, AND DUTIES.

- SEC. 761. Nature of estate by the curtesy.
 SEC. 762. Same—Tenure.
 SEC. 763. Same—Same—At common law.
 SEC. 764. Same—Same—Continuation of wife's estate.
 SEC. 765. Same—Has character of title by descent.
 SEC. 766. Same—When estate attaches.
 SEC. 767. Same—Same—Disclaimer.
 SEC. 768. Same—Same—Action by husband to recover.
 SEC. 769. Same—Same—Suspends descent.
 SEC. 770. Same—Same—Suspends statute of limitations.
 SEC. 771. Same—Proceeds of judicial sale—Curtesy in.
 SEC. 772. Same—Insurable interest.
 SEC. 773. Incidents of curtesy—Generally.
 SEC. 774. Same—1. Right to sell or lease.
 SEC. 775. Same—2. Subject to debts of the wife.
 SEC. 776. Same—3. Subject to debts of tenant.
 SEC. 777. Same—Same—Wife's right as creditor against curtesy.
 SEC. 778. Same—Same—Curtesy initiate.
 SEC. 779. Same—Same—Same—Under statute subjecting "any estate held by debtor."

sides men attainted in *præmunire*, every person that is attainted of high treason, petit treason, or felony, is disabled to bring any action, for he is *extra legem positus*, and is accounted in law *civiliter mortuus*," led Chancellor KENT to think, as he intimated in *Troup v. Sherwood*, 4 Johns. Ch. (N. Y.) 228, that every person attainted of felony was accounted in law *civiliter mortuus*; but in a later case, *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118, he said this dictum of Lord Coke "is not to be taken in the full latitude of expression," and after reference to other expressions of Lord Coke (1 Co. Litt. (19th ed.) 132a, b, 133a; 3 Inst. 215) he says: "The strict civil

death seems to have been confined to the cases of persons professed, or abjured, or banished the realm, and I do not find that it was ever carried further by the common law." This view is well sustained by authority.

See: *Banyster v. Trussel*, Cro. Eliz. 516;

Coppin v. Gunner, 2 Ld. Raym. 1572;

Ramsden v. MacDonald, 1 Wils. 217;

Foster Crown Cases, 61, 62, 63.

¹ *Platner v. Sherwood*, 6 Johns. Ch. (N. Y.) 118.

² *Woolridge v. Lucas*, 7 B. Mon. (Ky.) 49.

³ See: Md. Rev. Code 1878, p. 807, § 102.

- SEC. 780. Same—Same—Same—Under recent American statutes.
 SEC. 781. Same—4. Emblements—Tenant by curtesy entitled to.
 SEC. 782. Same—5. Improvements—No allowance to tenant for.
 SEC. 783. Same—6. Waste by tenant by curtesy—Liability for.
 SEC. 784. Same—Same—Liability of assignee.
 SEC. 785. Same—7. Partition.
 SEC. 786. Same—8. Power to sell, assign, or lease.
 SEC. 787. Same—Same—Effect of subsequent divorce.
 SEC. 788. Same—9. Suits with reference to.
 SEC. 789. Same—Same—Damages to reservation.
 SEC. 790. Duties of tenant by curtesy.

SECTION 761. **Nature of estate by curtesy.**—At common law the husband was entitled to curtesy in all the real estate of which the wife died seized, whether such estate was a separate estate or not.¹ Such an estate is a freehold estate for the term of the husband's natural life, and not a mere charge or incumbrance upon the land.² By the custom of Normandy an estate by the curtesy was determinable upon the second marriage of the tenant; and this is still the rule in gavelkind lands.³

SEC. 762. **Same—Tenure.**—With regard to the grounds on which the right to an estate by the curtesy rests there is a difference of opinion. Sir J. Jekeys maintained that the husband's tenancy by the curtesy has no moral foundation, and is therefore properly called a tenancy by the curtesy of England, that is, an estate by the favor of the law of England.⁴ Craig says that curtesy was granted out of respect to the former marriage, and to save the husband from falling into poverty; and he deduces curtesy from one of the rescripts of the Emperor Constantine.⁵ Others still base the right to curtesy in the husband on his obligation to support the children which are the issue of the marriage; but though the tenure by

¹ *Eldridge v. Preble*, 34 Me. 148, 151;
Dejarnette v. Allen, 5 Gratt. (Va.) 499;
Winkler v. Winkler, 18 W. Va. 455.

² *Heath v. White*, 5 Conn. 228, 235;
Foster v. Marshall, 22 N. H. (2 Fost.) 491;
Hatfield v. Sneden, 54 N. Y. 280;
Adair v. Lott, 3 Hill (N. Y.) 182;

1 Co. Litt. (19th ed.) 30a;

2 Bl. Com. 126;

Litt., § 35.

See, also: N. Y. Rev. Stat. (8th ed.), pp. 2600–2606.

³ See: *Ante*, § 711.

⁴ 2 Pr. Wms. 703.

⁵ *Craig, Jus. Feud.*, lib. 2;

Diag. 22, § 40;

4 Kent Com. (13th ed.) 28;

Wright on Tenures, 194.

curtesy may have originated from the husband's obligation to support his children, yet the extent of his interest is not measured by this reason for its introduction. He is entitled to hold for life, whether his children need his support or not, and whether they live an hour only, or to old age.¹

SEC. 763. **Same—Same—At common law.**—At common law there was a difference between the tenure of an estate by curtesy and the tenure of an estate in dower. The tenant by the curtesy held immediately of the superior lord, while tenant in dower held immediately of the heir, and was attendant on him for one-third of the services.² In this country curtesy is regarded as a continuation of the wife's estate.³

SEC. 764. **Same—Same—Continuation of wife's estate.**—The estate by the curtesy being regarded as a continuation of the wife's inheritance, the husband is therefore entitled to all those rights and privileges which his wife would have had if she were alive, and which were annexed to her estate ;⁴ and he will take it subject to the same incumbrances under which she held it.⁵ The husband's estate by curtesy being a continuance of the wife's estate, a tenant by the curtesy does not hold adversely to the wife or her heirs. Thus where, on a separation of a husband and wife, an agreement is made setting apart to her a third of land descended to her from her father, free from all claims of the husband, but there is no stipulation as to the residue, on which the husband continues to live, the latter is tenant by the curtesy and does not hold adversely to the wife or her heirs.⁶

SEC. 765. **Same—Has character of title by descent.**—An estate by curtesy accrues, by the mere operation of law, upon the death of the wife, and for that reason partakes more of the character of an estate acquired by descent

¹ *Heath v. White*, 5 Conn. 235.

² *Watk. Desc.* 104, 105.

³ See : *Post*, § 764.

⁴ *Walker's Case*, 3 Co. 22b.

⁵ See : *Post*, § 775.

⁶ *Dooley v. Baynes*, 86 Va. 644 ; s.c. 10 S. E. Rep. 974 ; 14 Va. L. J. 156.

than by purchase.¹ By marriage the husband derives an estate of freehold in the real estate of the wife; he is jointly seized with his wife, and during the existence of the coverture he is not tenant by the curtesy, and cannot be, unless he survive her.²

SEC. 766. **Same—When estate attaches.**—An estate by curtesy vests in the husband immediately on the death of the wife;³ no entry or other act on the part of the husband is necessary to complete the estate, for on the death of the wife the law adjudges the freehold to be in the husband immediately, as tenant by the curtesy.⁴ Thus where there was no one in actual possession of certain land, whose owner had died intestate, the land being wild, the husband of one of the heirs is to be regarded as in possession as tenant by the curtesy, though he states that he never owned the premises, and never went through the formal ceremony of putting his foot upon the land.⁵ But where a married woman dies before the expiration of a term of years for which she has leased her own estate, the lessee is entitled to remain undisturbed during the term, regardless of the husband's estate by curtesy, or any subsequent execution creditor's claim thereon.⁶

SEC. 767. **Same—Same—Disclaimer.**—We have already seen that an estate by curtesy partakes of the character of descent rather than purchase,⁷ and becomes consummate immediately upon the death of the wife,⁸ and the estate having so vested, it cannot be divested by a disclaimer, though made under hand and seal, duly witnessed, acknowledged, and recorded; the object and effect of a

¹ *Watson v. Watson*, 13 Conn. 83;
Pemberton v. Hicks, 1 Binn
(Pa.) 1;

1 Inst. 18b. 106;

4 Kent Com. (13th ed.), 373, note a.

² *Weisinger v. Murphy*, 2 Head
(Tenn.) 674.

³ *Watson v. Watson*, 13 Conn. 83.

⁴ *Witham v. Perkins*, 2 Me. 400;
Bro. Ab. Præcipe, 38.

But in the case of *Bedford v. Bedford*, 26 N. E. Rep. 662, aff'g 32
Ill. App. 455, it was held that

one who continues to occupy
his wife's lands after her death
without demanding or filing a
petition for the assignment of
dower under the Illinois statute
is liable to account to her heirs
for the rents and profits.

⁵ *Pierce v. Wannett*, 10 Ired. (N. C.)
L. 446.

⁶ *Forbes v. Sweesy*, 8 Neb. 520; s.c.
1 N. W. Rep. 571.

⁷ See: *Ante*, § 765.

⁸ See: *Ante*, §§ 714, 716, 766.

disclaimer being, not to transfer a title, but to prevent a transfer.¹

SEC. 768. **Same—Same—Action by husband to recover.**—In all cases where it appears that a wife, at the time of her death, owned land in her own right, and no state of facts then existed that would bar the surviving husband's right to curtesy therein, and the land is in the possession of another, the surviving husband has a right of action to recover the possession thereof;² and where a husband bringing ejectment for his curtesy dies, his administrator may be substituted, and recover mesne profits to the time of such death.³

SEC. 769. **Same—Same—Suspends descent.**—At common law the right of possession of the wife's lands did not accrue to the wife or those claiming under her until the cessation of the curtesy;⁴ and in this country, during the existence of an estate by curtesy, lands do not descend to the heirs so as to give them a right of entry;⁵ consequently one claiming land as heir of his mother cannot recover, in ejectment, against one claiming the land under his father, who is tenant by curtesy.⁶ And where one holds land as tenant by curtesy, those deriving title from his deceased wife cannot sue during his life.⁷ But the wife's heirs, being remaindermen in fee of the equitable estate, can compel the life tenant by the curtesy, or his assignee, by contract or by operation of law, with notice, to convey to them the legal estate in remainder.⁸

SEC. 770. **Same—Suspends statute of limitation.**—The existence of an estate by the curtesy not only suspends the

¹ *Watson v. Watson*, 13 Conn. 83.

² *Hall v. Hall*, 32 Ohio St. 184.

See: *Post*. § 788.

Trespasses to try title.—In Alabama a plaintiff claiming as tenant by the curtesy may recover possession of the premises in an action of trespass to try title.

Rochan v. Lecatt, 1 Stew. (Ala.) 609.

³ *Hart v. McGraw*, 11 Atl. Rep. 617; s.c. 10 Cent. Rep. 312.

⁴ See: *Dyer v. Wittle*, 89 Mo. 81; s.c. 58 Am. Rep. 85.

⁵ *Jackson ex d. Swartwout v. Johnson*, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433;

Bates v. Shraeder, 13 Johns. (N. Y.) 260.

A stranger in possession of land may not set up an estate in curtesy to bar the claim of an heir.

Adair v. Lott, 4 Hill (N. Y.) 182.

⁶ *Grout v. Townsend*, 2 Hill (N. Y.) 554.

⁷ *Miller v. Bledsoe*, 61 Mo. 96.

⁸ *Taylor v. Smith*, 54 Miss. 50.

descent of the land,¹ but during its continuance the statute of limitations will not run against the wife,² or her heirs;³ and where a plaintiff has been under disabilities, and the estate by curtesy arose before the disability was removed, the existence of the estate by curtesy at the time of the removal of the disabilities will stop the running of the statute.⁴

SEC. 771. Same—Proceeds of judicial sale—Curtesy in.—Where lands subject to curtesy are sold at judicial sale free and clear of the curtesy, the proceeds of the sale take the place of the land, and the interest thereon will belong to the husband for life;⁵ and if the wife's lands are sold after her death under a deed of trust, in which the husband joined, any surplus arising from such sale is regarded as real estate, in which the husband has curtesy.⁶

¹ See: *Ante*, § 769.

² **Bar of husband's estate by adverse possession—Effect on wife's rights.**—If the husband permit an adverse possession to bar his estate, yet the wife's reversion is not barred, and her right of action only accrues upon the death of her husband. See: *Foster v. Marshall*, 22 N. H. (2 Fost.) 491.

³ *Heath v. White*, 5 Conn. 228; *White v. Perkins*, 2 Me. (2 Greenl.) 400; *Miller v. Bledsoe*, 61 Mo. 96; *Meraman's Heirs v. Caldwell's Heirs*, 8 B. Mon. (Ky.) 32; s.c. 46 Am. Dec. 537; *Jackson ex d. Hardenburgh v. Schoonmaker*, 4 John. (N. Y.) 890; *Ege v. Medlar*, 82 Pa. St. 86.

In North Carolina the children of one entitled to an estate as tenant by the curtesy are allowed seven years from the death of their father before they are barred by the statute of limitations.

Childers v. Bumgarner, 8 Jones (N. C.) L. 297.

⁴ *Jackson ex d. Swartwout v. Johnson*, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433.

⁵ *Jacques v. Ennis*, 25 N. J. Eq. (10 C. E. Gr.) 402;

Dunscomb v. Dunscomb, 1 John. Ch. (N. Y.) 508; s.c. 7 Am. Dec. 504;

Ellsworth v. Cook, 8 Paige (N. Y.) 643.

In Estate of Tilghman, 5 Whart. (Pa.) 44, by a private act of the Legislature of Pennsylvania, A, who was tenant by the curtesy of certain town lots and lands, was authorized to sell the lots in fee, provided there should be reserved a perpetual ground rent of at least \$2 per annum, issuing out of, and charged on, every lot sold, to be paid to the said A during his life, with remainder in fee to the heirs of his deceased wife. Under this power, A sold divers lots, on which he reserved ground rents in the manner prescribed by the act, and for which he also received gross sums of money, in addition. The court held that these sums were to be considered as real estate, and, as such, went to the heirs of his deceased wife, and not to the administrator of a daughter who died in his lifetime.

A sale under an order of the orphans' court, without making the tenant by the curtesy a party to the proceedings, was held to be subject to the curtesy in *Jacques v. Ennis*, 25 N. J. Eq. (10 C. E. Gr.) 402.

⁶ *Robinson v. Lakeman*, 28 Abb. App. 135.

SEC. 772. **Same—Insurable interest.**—An insurable interest in property does not necessarily depend upon the ownership of the property, legal or equitable title not being necessary to give such an interest in the property; it may be a special or limited interest, disconnected with any title, lien, or possession.¹ Any person who has a right which may be enforced against the property, and which is so connected with it that any injury thereto necessarily results in a loss to him, has an insurable interest.² Thus a husband in possession and enjoyment with his wife of her real and personal property, with an inchoate right of curtesy, has an insurable

¹ *Lazarus v. Commonwealth Ins.*

Co., 36 Mass. (19 Pick.) 81;

German Insurance Co. v. Hyman,
Neb.; s.c. 52 N. W.

Rep. 401; 21 Inst. L. J. 941;

Rohrbach v. Germania Fire Ins.
Co., 62 N. Y. 47; s.c. 20 Am.

Rep. 451;

Porch v. Fries, 18 N. J. Eq. (3 C.
E. Gr.) 204;

Sturm v. Atlantic Mutual Ins.
Co., 38 N. Y. Sup. 281;

Lebanon Mutual Fire Ins. Co. v.
Erb, 112 Pa. St. 149; s.c. 4 Atl.

Rep. 8; 2 Cent. Rep. 783;

Humes v. Providence Washing-
ton Ins. Co., 23 S. C. 190;

Hancock v. Fishing Ins. Co., 3
Sumn. C. C. 132;

Hooper v. Robinson, 98 U. S. 528;
bk. 25 L. ed. 219;

Lucena v. Craufurd, 3 Bos. & P.
75; s.c. 2 Bos. & P. (N. R.) 269;

1 Taunt. 325; 6 Rev. Rep. 623;

Ebsworth v. Alliance Marine
Ins. Co., L. R., 8 C. P. 596, 623;

s.c. 42 L. J. C. P. 305; 7 Moak's

Eng. Rep. 155.

Insurable interest—Judge Story's defi-
nition.—In *Hancock v. Fishing*

Ins. Co., 3 Sumn. C. C. 132,
JUDGE STORY said: "An insur-

able interest is *sui generis*, and
peculiar in its texture and op-

eration. It sometimes exists
where there is not any present

property, or *jus in re* or *jus ad*
rem. Inchoate rights founded

on subsisting titles, unless pro-

hibited by the policy of the law,
are insurable."

Same—Justice Swayne's definition.—
In *Hooper v. Robinson*, 98 U.

S. 528; bk. 15 L. ed. 219, Justice

SWAYNE said: "A right of
property in a thing is not always
indispensable to an insurable
interest. Injury from its loss
or benefit from its preservation
to accrue to the assured may
be sufficient; and a contingent
interest thus arising may be
made the subject of a policy."

² *Home Protection of North Ala-*
bama v. Caldwell, 85 Ala. 607;

s.c. 5 So. Rep. 338;

Wainer v. Milford Mutual Ins.
Co., 153 Mass. 335; s.c. 26 N.

E. Rep. 877; 11 L. R. A. 598;

Rohrbach v. German Fire Ins.
Co., 62 N. Y. 47; s.c. 20 Am.

Rep. 451;

Lebanon Mutual Fire Ins. Co. v.
Erb, 112 Pa. St. 149; s.c. 4 Atl.

Rep. 8; 2 Cent. Rep. 783;

Mutual Fire Ins. Co. v. Wagner,
(Pa.) 1 Cent. Rep. 223.

Sole beneficial owner is sufficient.
Lebanon Mutual Fire Ins. Co.

v. Erb, 112 Pa. St. 149; s.c. 4
Atl. Rep. 8; 2 Cent. Rep. 783.

A mere qualified or equitable interest
in property is insurable.

Home Protection of North Ala-
bama v. Caldwell, 85 Ala. 607;

s.c. 5 So. Rep. 338.

A tenant by curtesy has an insur-
able interest in a house.

Kyte v. Commercial U. Assur.
Co., 144 Mass. 43; s.c. 10 N.

E. Rep. 518; 3 New Eng. Rep.
884.

A direct pecuniary interest which
will be damaged by the destruc-

tion of a building is insurable.
Mutual F. Ins. Co. v. Wagner,

(Pa.) 1 Cent. Rep. 223.

interest therein;¹ but it seems that he must specifically insure the right of using the property of his wife in order to entitle him to recover damages for loss of it.² On the other hand, it has been held in Indiana,³ Maine,⁴ and Michigan,⁵ that a husband has no insurable interest in the statutory property of his wife.

SEC. 773. *Incidents of curtesy*—Generally.—The interest of a tenant by curtesy is a vested legal estate, distinct from that of the wife, and is liable to all the incidents of any other freehold or life estate.⁶ The different stages of the estate, however, are governed by different rules. We have already seen that curtesy is divided into two kinds or classes, which are properly but stages;⁷ the one being known as curtesy initiate,⁸ and the other as curtesy consummate.⁹ The first stage in the estate, as already explained, commences either on the birth of issue,¹⁰ or seisin¹¹ of the wife during coverture, which ever takes place first.¹² Although the husband holds

¹ *Merrett v. Farmers' Ins. Co.*, 42 Iowa 11;

American Central Ins. Co. v. McLanathan, 11 Kan. 533;

Franklin Ins. Co. v. Drake, 2 B. Mon. (Ky.) 47;

Mutual Ins. Co. v. Deale, 18 Md. 26; s.c. 79 Am. Dec. 673;

Kyte v. Commercial Union Assurance Co., 144 Mass. 43; s.c. 10 N. E. Rep. 518; 3 New Eng. Rep. 884;

Williams v. Roger Williams Ins. Co., 107 Mass. 377; s.c. 9 Am. Rep. 41;

Trade Ins. Co. v. Barracliff, 45 N. J. L. (16 Vr.) 543; s.c. 46 Am. Rep. 792;

Porch v. Fries, 18 N. J. Eq. (3 C. E. Gr.) 204;

Harris v. York Ins. Co., 50 Pa. St. 341;

Cohn v. Virginia Ins. Co., 3 Hughes, C. C. 272;

Gaulstine v. Royal Ins. Co., 1 Fost. & F. 276.

Compare: Agricultural Ins. Co. v. Montague, 38 Mich. 548; s.c. 31 Am. Rep. 326.

² And where a husband, who has insured for himself without mention of his wife's ownership,

sues for damage by fire to his wife's estate, claiming an insurable interest, his declaration must set out his interest, and claim damage to that interest, or he cannot recover.

Cohn v. Virginia Fire, etc., Ins. Co., 3 Hughes C. C. 272.

³ *Traders' Ins. Co. v. Newman*, 120 Ind. 554; s.c. 23 N. E. Rep. 428. This case, however, was decided on a point in pleading.

⁴ *Clark v. Dwelling-House*, 81 Me. 373; s.c. 17 Atl. Rep. 303.

⁵ *Agricultural Ins. Co. v. Montague*, 38 Mich. 548; s.c. 31 Am. Rep. 326.

⁶ *Shortall v. Hinckley*, 31 Ill. 219.

⁷ See: *Ante*, § 714.

⁸ See: *Ante*, § 715.

⁹ See: *Ante*, § 716.

¹⁰ See: *Ante*, § 747.

¹¹ See: *Ante*, § 723, *et seq.*

¹² *Rice v. Hoffman*, 35 Md. 344, 350; *Foster v. Marshall*, 22 N. H. (4 Fost.) 491, 493;

Matter of Winne, 2 Lans. (N. Y.) 21, 24;

Wilson v. Arentz, 70 N. C. 670, 674.

See: *Ante*, §§ 151, 152, 156.

curtesy initiate in his own right,¹ yet he has no present tenancy by virtue of it,² and it in no way changes the incidents of his tenancy in his wife's right during coverture.³ Curtesy initiate is not a vested right,⁴ but a prior estate of things,⁵ and may be taken from the husband either by act of the Legislature or judgment of a court of law, or a decree in chancery.⁶ When tenancy by curtesy consummate vests, the husband becomes practically the owner for the time being, and may do with the estate as an owner in fee-simple could, except to transfer it in fee, or commit waste.⁷ The estate has all the rights and incidents of a conventional life estate.⁸ Thus the tenant by curtesy has a right to the possession of the premises,⁹ may prosecute,¹⁰ and defend suits in ejectment;¹¹ may recover damages for injuries to his estate;¹² has a right to take reasonable estovers;¹³ is entitled to work mines, quarries, and the like;¹⁴ has a right to sell¹⁵ or lease¹⁶ the premises, and is liable for waste.¹⁷

SEC. 774. **Same—1. Right to sell or lease.**—The interest of a tenant by the curtesy being a legal estate, with all the incidents of any other freehold or life estate, the tenant will have a right to sell or lease the premises, provided

¹ See: *Heath v. White*, 5 Conn. 228, 235;

Shortall v. Hinckley, 31 Ill. 219, 227.

² See: *Matter of Winne*, 2 Lans. (N. Y.) 21, 24;

Jones v. Davies, 5 Hurl. & N. 766; s.c. 7 Hurl. & N. 507, 508.

³ See: *Kibbie v. Williams*, 58 Ill. 30, 31;

Cole v. Van Riper, 44 Ill. 58, 66; *Winkler v. Winkler*, 18 W. Va. 455, 469.

⁴ *Heathon v. Lyon*, 2 Mich. 93, 95; *Matter of Winne*, 2 Lans. (N. Y.) 21, 24;

Sharpless v. West, 1 Grant (Pa.) 250, 260;

Porter v. Porter, 27 Gratt. (Va.) 599, 606.

Compare: Millinger v. Dosman, 45 Pa. St. 522, 529.

⁵ *Ironsides v. Ironsides*, 31 L. J. Ad. M. 129, 131.

⁶ See: *Star v. Pease*, 8 Conn. 541, 546.

⁷ See: *Ante*, § 670.

⁸ See: *Ante*, § 578, *et seq.*

⁹ See: *Ante*, §§ 578, 768.

¹⁰ *Hall v. Hall*, 32 Ohio St. 184.

¹¹ *Grout v. Townsend*, 2 Hill (N. Y.) 554.

¹² See: *Ante*, § 580, *et seq.*

¹³ *Armstrong v. Wilson*, 60 Ill. 226, 228.

See: *Ante*, §§ 582, 653–663.

¹⁴ See: *Ante*, § 583, *et seq.*

¹⁵ *Wells v. Thompson*, 13 Ala. 793; s.c. 48 Am. Dec. 76; *Bottoms v. Corley*, 5 Heisk. (Tenn.) 1, 5.

¹⁶ *Shortall v. Hinckley*, 31 Ill. 219, 226.

See: *Post*, § 774.

¹⁷ *Weise v. Welsh*, 30 N. J. Eq. (3 Stew.) 431, 434.

See: *Ante*, §§ 664, 704.

he does not grant a greater interest than he possesses, or convey for a longer period than his own life.¹

SEC. 775. Same—2. Subject to the debts of the wife.—Formerly the wife was classed with infants and persons of unsound mind in regard to her capacity to enter into contracts or incur debts,² not that she was less capable of contracting by reason of her marriage, but because by the ancient common law the wife was little better than a slave; the husband acquired her personal property, the rents and profits of her estate, the custody of her person, and the right to her services. She possessed nothing and could possess nothing independently of her husband. The law therefore deprived her of the capacity of contracting, because she had nothing in relation to which she could contract; consequently she could have no debts that were a lien upon her estate.³ The status of married women has been changed by the statutes in this country. On the death of the wife the estate by curtesy becomes consummate,⁴ and being considered simply as a continuance of the wife's inheritance,⁵ it passes to the husband and is held by him subject to all the debts and incumbrances under which the wife held it.⁶

SEC. 776. Same—Same—3. Subject to debts of tenant.—The estate by curtesy is subject to the debts of the husband or tenant, and is bound by a judgment against him, and may be taken and sold under a levy of execution on such judgment.⁷ Whether the estate be

¹ Shortall v. Hinckley, 31 Ill. 219, 226.

See: *Ante*, § 590, *et seq.*

² Forbes v. Sweesy, 8 Neb. 520; s.c. 1 N. W. Rep. 571.

³ 2 Bl. Com. 325.

See: Forbes v. Sweesy, 8 Neb. 520; s.c. 1 N. W. Rep. 571.

⁴ See: *Ante*, § 716.

⁵ See: *Ante*, § 705, *et seq.*, § 764.

⁶ See: Phillips v. Phillips, 2 Dev. (Ky.) 549;

Taylor v. Smith, 54 Miss. 50;

Forbes v. Sweesy, 8 Neb. 520; s.c. 1 N. W. Rep. 571.

⁷ Watson v. Watson, 13 Conn. 83;

Gay v. Gay, 122 Ill. 567; s.c. 13 N. E. Rep. 840; 11 West. Rep. 608;

Lang v. Hitchcock, 99 Ill. 550;

Jacobs v. Rice, 33 Ill. 369;

Shortall v. Hinckley, 31 Ill. 219;

Eldredge v. Preble, 34 Me. 151;

Gardner v. Hooper, 69 Mass. (3 Gray) 398;

Mechanics' Bank v. Williams, 34 Mass. (17 Pick.) 438;

Litchfield v. Cudworth, 32 Mass. (15 Pick.) 23;

Roberts v. Whiting, 16 Mass. 186;

Taylor v. Smith, 54 Miss. 50;

Day v. Cochran, 26 Miss. 261;

initiate¹ or consummate.² The levy may be made on the land directly;³ and a court of equity will not interfere in favor of the wife and children to prevent such a levy upon the curtesy initiate by creditors,⁴ unless the husband has forfeited his right thereto by such a breach of the marital contract as entitles the wife to a decree of separation.⁵ The husband cannot defeat the right of a

Forbes v. Sweesy, 8 Neb. 520 ;
s.c. 1 N. W. Rep. 571 ;

Van Duzer v. Van Duzer, 6 Paige
Ch. (N. Y.) 366 ; s.c. 31 Am.
Dec. 257 ;

Canby v. Porter, 12 Ohio 79 ;

Lancaster Bank v. Stauffer, 10
Pa. St. 398 ;

Burd v. Dansdale, 2 Binn. (Pa.)
80 ;

Mattocks v. Stearns, 9 Vt. 326 ;

Dejarnette v. Allen, 5 Gratt. (Va.)
499.

In Pennsylvania, the husband's es-
tate by curtesy cannot be levied
on under the statute.

Brightley Pru. Dig., p. 1007 ;

Curry v. Bott, 53 Pa. St. 400.

See : *Post*, § 780.

In Missouri, there is a question
how far the husband's estate by
curtesy is liable for his debts.

Harvey v. Wickham, 23 Mo. 112,
117 ;

Churchill v. Hudson, 34 Fed. Rep.
14.

See : *Post*, § 780.

In Massachusetts, it is said that
statutes permitting the wife to
cut off the husband's estate by
curtesy with his consent are
inconsistent with a right in
creditors to levy thereon, and
for that reason prevent a sale
of the estate on execution.

See : Staples v. Brown, 95 Mass.
(13 Allen) 64 ;

Silsby v. Bullock, 92 Mass. (10
Allen) 94.

¹ See : Plumb v. Sawyer, 21 Conn.
351 ;

Lang v. Hitchcock, 99 Ill. 550 ;

Shortall v. Hinckley, 31 Ill. 219,
227 ;

Anderson v. Tydings, 8 Md. 427,
443 ; s.c. 63 Am. Dec. 708 ;

Roberts v. Whiting, 16 Mass. 186 ;

Day v. Cochran, 24 Miss. 261, 275 ;
Matter of Winne, 2 Lans. (N. Y.)
21, 25 ;

. Canby v. Porter, 12 Ohio 79, 80 ;

Burd v. Dansdale, 2 Binn. (Pa.)
80 ;

Mattocks v. Stearns, 9 Vt. 326.

² See : Forbes v. Sweesy, 8 Neb.
520 ; s.c. 1 N. W. Rep. 571.

³ Roberts v. Whiting, 16 Mass. 186,
190.

See : Mechanics' Bank v. Wil-
liams, 34 Mass. (17 Pick.) 438,
441.

⁴ Lang v. Hitchcock, 99 Ill. 550 ;

Wickes v. Clarke, 8 Paige Ch.
(N. Y.) 161, 172 ;

Van Duzer v. Van Duzer, 6 Paige
Ch. (N. Y.) 366 ; s.c. 31 Am.
Dec. 257 ;

Matter of Winne, 1 Lans. (N. Y.)
514.

⁵ Renwick v. Renwick, 10 Paige
Ch. (N. Y.) 172 ;

Van Duzer v. Van Duzer, 6 Paige
Ch. (N. Y.) 366 ; s.c. 31 Am.
Dec. 257 ;

Hanke v. Finke, 9 Watts (Pa.)
336 ;

Gibson v. Gibson, 46 Wis. 458 ;
s.c. 1 N. W. Rep. 147 ;

Galligo v. Chevallie, 2 Bro. C. C.
285.

Breach of marital contract by hus-
band—Effect on curtesy.—Under

such circumstances it is but
just and equitable to the wife
that she should be permitted to
retain for her own use, and for
the education and support of the
children, if any, all the real and
personal estate which belongs
to her at the time of the mar-
riage, or which has come to her
since by gift, devise, or descent
from any of her relatives, and
which the husband had not
received and reduced to his
actual possession previous to
the commission of the offense.

Van Duzer v. Van Duzer, 6 Paige
Ch. (N. Y.) 366 ; s.c. 31 Am.
Dec. 257.

See : Renwick v. Renwick, 10
Paige Ch. (N. Y.) 455 ;

creditor to proceed against the estate by any disclaimer of his right to the curtesy.¹

SEC. 777. Same—Same—Wife's right as creditor against curtesy.—The estate by the curtesy will pass to the husband subject to the right of the wife as a creditor.² Thus in a case where a mortgage was made by the wife, with her husband, of her separate estate, and the husband used the money for his own purposes exclusively, without accounting to her, and subsequently by a deed of assignment, in which she joined, transferred all his estate for the benefit of creditors. The wife, after having devised her estate to her son, died, and her land was sold under the mortgage, leaving a balance after its payment. The court held that if the husband had any interest, as tenant by the curtesy, in the balance, the amount taken by him of the wife's money having been greater than such interest, her devisee was entitled to receive it, in preference to the husband's assignees. The fund having come from her separate estate, it would have been hers if living; her right did not depend upon subrogation, but was a legal right, to be enforced, unless the claimant under the husband could show a superior title, both in law and equity.³

SEC. 778. Same—Same—Curtesy initiate.—At common law the interest of a husband as tenant by the curtesy

Gibson v. Gibson, 46 Wis. 458; s.c. 1 N. W. Rep. 147;

Gallego v. Chevallie, 2 Bro. C. C. 285.

See: *Kashaw v. Kashaw*, 3 Cal. 312;

Foster v. Hall, 2 J. J. Marsh. (Ky.) 546;

McCracklin v. McCranklin, 2 B. Mon. (Ky.) 370.

Same—The husband forfeits all equitable rights to the wife's property by his violation of the marriage contract, and for that reason will be restored by courts of equity.

Renwick v. Renwick, 10 Paige Ch. (N. Y.) 420;

Fry v. Fry, 7 Paige Ch. (N. Y.) 461;

Holmes v. Holmes, 4 Barb. (N. Y.) 295, 297.

¹ *Watson v. Watson*, 13 Conn. 83; *Litchfield v. Cudworth*, 32 Mass. (15 Pick.) 23;

Roberts v. Whiting, 16 Mass. 186;

Day v. Cochran, 26 Miss. 261, 275;

Van Duzer v. Van Duzer, 6 Paige Ch. 366; s.c. 31 Am. Dec. 257;

Canby v. Porter, 12 Ohio 79;

Lancaster Bank v. Stauffer, 10 Pa. St. 398;

Burd v. Dansdale, 2 Binn. (Pa.) 80;

Mattocks v. Stearns, 9 Vt. 326.

See: *Ante*, § 767.

² *Platt's Estate*, 2 W. N. C. 468; s.c. *sub nom.* *Shippen's Appeal*, 80 Pa. St. 391.

³ *Shippen's Appeal*, 80 Pa. St. 391.

became initiate by the birth of a child,¹ or the acquisition of possession by the wife during coverture,² and was subject to the husband's debts as well as after it became consummate,³ and could be sold under a levy of execution,⁴ and the husband could not, by refusal to take the property, defeat the rights of his creditors therein.⁵ The estate by the curtesy may be set off by appraisement, or the rents and profits may be levied on, at the election of creditors.⁶

SEC. 779. **Same—Same—Same—Under statute subjecting "any estate held by debtor."**—Under a statute making liable to execution "any estate held by the debtor in his own right, or for his own life, or the life of another, paying no rent therefor," the Supreme Court of Vermont⁷ held an estate by the curtesy initiate liable to execution. The court say: "We see no difficulty in considering this an estate which the debtor held in his own right. The title was indeed derived through the right of his wife; but, by virtue of the marriage, he, as husband, acquired certain rights, among which the use of the freehold estate on inheritance of the wife during the coverture is one. After issue born alive, this estate is enlarged, and extends not only during the coverture,

¹ See: *Ante*, §§ 747, 773.

² See: *Ante*, §§ 723, 773.

³ *Roberts v. Whiting*, 16 Mass. 186;
Burd v. Dansdale, 2 Binn. (Pa.) 80;

Mattocks v. Stearns, 9 Vt. 326.

⁴ *Plumb v. Sawyer*, 21 Conn. 351;
Watson v. Watson, 13 Conn. 83;
Litchfield v. Cudworth, 32 Mass. (15 Pick.) 23;

Roberts v. Whiting, 16 Mass. 186;
Day v. Cochrane, 24 Miss. 261;
Harvey v. Wickham, 23 Mo. 112, 117;

Bunn v. Daly, 24 Hun (N. Y.) 526;

Van Duzer v. Van Duzer, 6 Paige Ch. (N. Y.) 366; s.c. 31 Am. Dec. 257;

Matter of Winne, 1 Lans. (N. Y.) 508;

Canby v. Porter, 12 Ohio 79;

Lancaster Bank v. Stauffer, 10 Pa. St. 398;

Burd v. Dansdale, 2 Binn. 80;

Mattocks v. Stearns, 9 Vt. 326.

A judgment against a tenant by the curtesy initiate, after issue born, binds his estate in his wife's lands which have been ordered to be appraised in proceedings in partition, but which have not been accepted or sold at the date of the recovery of the judgment; and this lien continues to bind securities given for the wife's share of the valuation.

Lancaster County Bank v. Stauffer, 10 Pa. St. 398.

⁵ *Watson v. Watson*, 13 Conn. 83.
See: *Ante*, § 767.

⁶ *Roberts v. Whiting*, 16 Mass. 186.
But the widow of the execution creditor is not entitled to dower in such estate.

Gillis v. Brown, 5 Cow. (N. Y.) 388.

⁷ *Mattocks v. Stearns*, 9 Vt. 326.

but till the death of the husband, except in one event, which will be named hereafter. This, in England, after the death of the wife, was denominated an estate by the curtesy, but is strictly an estate, which the husband holds in his own right, whether before or after the death of the wife. He may bring trespass or ejectment in his own name for any injury to the usufruct during the continuance of the estate. The next inquiry is whether this is an estate for the life of the debtor. It is undoubtedly true that this estate might be terminated by a divorce *a vinculo*,¹ before the death of either husband or wife. But this is a contingency of so remote expectation, as not to enter into the ordinary calculations of the duration of the relation of married life. It is one of those extreme cases which, like earthquakes and tempests in the natural world, or like public executions in the history of individual existence, do, indeed, sometimes occur, but which no one feels bound to expect or provide against."

SEC. 780. **Same—Same—Under recent American statutes.**—The passage in many of the states of what are known as "Married Women's Acts" has abolished curtesy initiate, and in those states there cannot of course be a levy upon the husband's estate in the wife's lands in her lifetime; for his estate does not arise until after his wife's death, and until that event occurs, his interest is a mere expectancy of an estate in such lands as remain upon the wife's death, and this is too uncertain and indefinite a property to be subject to levy and sale on execution.² In those states where married women's acts have been passed and where tenancy by curtesy initiate is still recognized, the statutes have the effect to restrain a levy upon, or the sale of, the curtesy initiate by virtue of a writ of execution, postponing all actions by the husband's creditors until the estate becomes consummate by the wife's death.³ Under these statutes the courts hold that

¹ See: *Post*, §§ 814, 817.

² See: *Jones v. Carter*, 73 N. C. 148; *Williams v. Baker*, 71 Pa. St. 476.

³ *Staples v. Brown*, 95 Mass. (13 Allen) 64;

Silsby v. Bullock, 92 Mass. (10 Allen) 94;

Clarke's Appeal, 79 Pa. St. 376; *Woodward v. Wilson*, 68 Pa. St. 208;

as the wife's estate cannot be taken in execution for the husband's debts, on account of his curtesy, he cannot alienate it during coverture.¹

SEC. 781. **Same—4. Emblements—Tenant by curtesy entitled to.**—We have already seen² that among the incidents which attach to an ordinary life estate is a right to the possession and usufruct, or annual produce, of the land³ during the continuance of the life estate. The rights of a tenant by the curtesy in this regard are not different from those of any other life tenant.⁴

SEC. 782. **Same—5. Improvements—No allowance to tenant for.**—We have heretofore seen that an ordinary life tenant is not permitted to burden the reversioner or remainderman with the expense of permanent improvements.⁵ In respect to such improvements the life tenant is under the same inhibitions as ordinary life tenants, and has no right to make improvements at the expense of the heirs or remaindermen;⁶ and where such tenant makes permanent improvements upon the land, neither he nor any one who claims through him is entitled to an allowance for the increased value of the premises by virtue of the buildings and improvements made by such tenant by the curtesy.⁷ There is an exception to this rule, however, in those cases where there is a partition of the estate.⁸

SEC. 783. **Same—6. Waste by tenant by curtesy — Liability for.**—That an ordinary tenant for life is liable for waste has already been pointed out.⁹ A tenant by the curtesy being a tenant for life merely, since the statute of Gloucester,¹⁰ is liable for waste;¹¹ and where he has as-

Curry v. Bott, 53 Pa. St. 400;
Churchill v. Hudson, 34 Fed. Rep.
14;

Mass. Gen. St., c. 108, § 1;

Rev. St. Mo., § 3295;

Act. Pa. Apr. 22, 1850, § 2; P. L.
553.

¹ Williams v. Baker, 71 Pa. St. 476.

² See : *Ante*, § 578.

³ See : *Ante*, bk. III., c. XVI., section V., "Emblements."

⁴ Armstrong v. Wilson, 60 Ill. 226.

⁵ See : *Ante*, § 610.

⁶ Bedford v. Bedford, 26 N. E. Rep.
662, aff'g s.c. 32 Ill. App. 455.

⁷ Runey v. Edmands, 15 Mass. 291.

⁸ See : *Post*, § 785.

⁹ See : *Ante*, bk. III., c. XVI., section VII., "Waste."

¹⁰ 6 Edw. I., c. 5.

¹¹ Armstrong v. Wilson, 60 Ill. 226;
Bates v. Shraeder, 13 John. (N. Y.)
260.

signed his interest in the estate by curtesy, and waste is committed by his assignee, the original tenant by curtesy is still liable to an action by the heir for such waste.¹ We shall hereafter see that a tenant by curtesy may forfeit his estate by being guilty of waste.² At common law it was doubtful whether a tenant by the curtesy was punishable for waste. To remedy this defect the statute of Gloucester³ was passed. This statute enacted that a writ of waste might be brought against a tenant by the curtesy, and that such tenant should incur the same penalties for committing waste as any other tenant for life.⁴

SEC. 784. **Same—Same—Liability of assignee.**—At common law the assignee of a tenant by curtesy could not be sued in waste; the action had to be brought against the tenant himself by the heirs, whereby he recovered the loss against the assignee, for the privity was between the heir and the tenant by the curtesy;⁵ hence, in the absence of statutory regulation, where a tenant by the curtesy grants over his estate the privity of action remains between the heir and such tenant, and he shall have an action of waste against such tenant for waste committed after the assignment; but if the heir grant over the reversion, then the privity of action is destroyed and the grantee cannot have any action of waste except against the tenant; for between them there is privity in estate, and between them and the tenant by the curtesy there is no privity at all; so that in law if the tenant is suable in waste there must be a privity of estate.⁶

SEC. 785. **Same—7. Partition.**—Tenants for life in possession are entitled to have a partition of the estate as between themselves and all persons entitled to the reversion and the remainder.⁷ A tenant by the curtesy, being a tenant for life in the lands of his deceased wife, is,

¹ *Bates v. Shraeder*, 13 John. (N. Y.) 260.

See: 2 Bac. Abr. 230;

2 Inst. 301.

² See: *Post*, section V., this chapter.

⁶ See: *Bates v. Shraeder*, 13 John. (N. Y.) 260, 263.

³ 6 Edw. I., c. 5.

⁴ Inst. 145, 301, 352.

⁷ See: *Jenkins v. Fahey*, 73 N. Y. 355.

⁵ *Walker's Case*, 3 Co. 23.

when such lands are held in co-tenancy, entitled to have a partition thereof;¹ and even a tenant by the curtesy initiate has a sufficient estate in the lands upon which to base a partition suit.² And it has been held that even the grantee of a tenant by the curtesy initiate has a sufficient estate in lands upon which to base a partition suit.³ It is said by the Supreme Court of Kentucky, in the case of *Russell v. Russell*,⁴ that whereupon the death of some of the children of a tenant by the curtesy, their interest in their mother's estate vests absolutely in the husband, and there is a partition made between him and the other children, it is proper to deduct any enhanced value to the entire estate arising from improvements made by the husband.

SEC. 786. *Same*—8. *Power to sell, assign, or lease.*—A tenant by curtesy, like any other tenant for life,⁵ may sell, assign, or lease his interest as such tenant,⁶ whether he be tenant by curtesy, consummate or initiate,⁷ or has simply an inchoate interest which attaches on the death of the wife.⁸ Where the husband as such tenant conveys by a deed of bargain and sale, no greater interest passes than

¹ *Tilton v. Vail*, 42 Hun (N. Y.) 638;
Riker v. Darke, 4 Edw. Ch. (N. Y.)
668;

Sears v. Hyer, 1 Paige Ch. (N. Y.)
483, 486;

Otley v. McAlpine's Heirs, 2
Gratt. (Va.) 340;

Hutchinson's Case, 4 Dane's Abr.
662;

1 Co. Litt. (19th ed.) 175a.

See: *Weise v. Welsh*, 30 N. J.
Eq. (3 Stew.) 431;

Darlington's Appropriation, 13
Pa. St. 430;

Walker v. Dilworth, 2 U. S. (2
Dall.) 257; bk. 1 L. ed. 372.

In *Massachusetts*, a tenant by the
curtesy is entitled to, and liable
to, the process of petition for
partition.

Hutchinson's Case and *Brad-
bury's Case*, 4 Dane's Abr. 662.

In *Pennsylvania*, it is questionable
whether he can maintain a writ
of partition.

Walker v. Dillworth, 2 U. S. (2
Dall.) 257; bk. 1 L. ed. 372.

² *Riker v. Darke*, 4 Edw. Ch. (N. Y.)

668;

Otley v. McAlpine's Heirs, 2
Gratt. (Va.) 343.

³ *Riker v. Darke*, 4 Edw. Ch. (N. Y.)
668;

Matter of Winne, 1 Lans. (N. Y.)
515.

See: 2 Van Santv. Pl. 6.

⁴ 12 S. W. Rep. 709; s.c. 11 Ky. L.
Rep. 547.

⁵ See: *Ante*, § 590, *et seq.*

⁶ *Wells v. Thompson*, 13 Ala. 793;
s.c. 48 Am. Dec. 76;

Shortall v. Hinckley, 31 Ill. 219;
Meraman v. Caldwell, 8 B. Mon.

(Ky.) 32; s.c. 46 Am. Dec. 537;
Central v. Copeland, 18 Md. 305,

320;
Flagg v. Bean, 25 N. H. (5 Fost.)
49;

Klotenbrock v. Cracraft, 36 Ohio
St. 584;

Briggs v. Titus, 13 R. I. 136;

Gillespie v. Worford, 2 Cold.
(Tenn.) 632.

⁷ *Briggs v. Titus*, 13 R. I. 136.

⁸ See: *Hitz v. Metropolitan Bank*,
111 U. S. 722; bk. 28 L. ed. 577.

the estate which he holds, that is, his life interest therein ;¹ and if in such a conveyance the wife joins only to release her right of dower, nothing passes from her to the grantee.² If the husband conveys his curtesy and afterwards joins with his wife in the conveyance of the entire estate, such joint conveyance will carry the wife's remainder only, and not affect the former conveyance.³ A conveyance by the husband of his estate by the curtesy in fraud of creditors will be void, the same as a similar conveyance by a tenant in fee ;⁴ and a voluntary settlement by the husband of such an estate upon his wife and children will be void as to creditors injuriously affected ;⁵ but where the husband is indebted to the wife, he may convey his inchoate interest as tenant by the curtesy in her lands to a trustee for the benefit of such wife and her children, and his indebtedness to her will constitute a valuable consideration for the conveyance, although he is indebted at the same time to others.⁶

SEC. 787. **Same—Same—Effect of subsequent divorce.**—Where a husband conveys his estate by the curtesy initiate in his wife's lands, for a good and valuable consideration, and subsequently is divorced from her for causes arising after the sale was made, and which did not affect the validity of the original marriage contract, such divorce will not affect the vendee's interest in the estate.⁷

¹ *Flagg v. Bean*, 25 N. H. (5 Fost.) 49 ;

Meraman v. Caldwell, 8 B. Mon. (Ky.) 32 ; s.c. 46 Am. Dec. 537.

² *Flagg v. Bean*, 25 N. H. (5 Fost.) 49.

Thus it is said in the case of *Klotenbrock v. Cracraft*, 36 Ohio St. 584, that, where the husband becomes seized of an estate by the curtesy, and during the life of his wife assumes to convey the fee of the land, and put his grantee in possession, the conveyance of the husband is a valid transfer to the extent of his estate, and if he survives her, the statute of limitations does not commence to run against her heirs until the termination of his life estate.

In case of such conveyance the statute of limitations does not commence to run against the heirs of the wife until the death of the husband.

Meraman v. Caldwell, 8 B. Mon. (Ky.) 32 ; s.c. 46 Am. Dec. 537.

³ *Shortall v. Hinckley*, 31 Ill. 219.

⁴ *Stehman v. Huber*, 21 Pa. St. 260.

⁵ *Wickes v. Clarke*, 8 Paige Ch. (N. Y.) 161 ;

Van Duzer v. Van Duzer, 6 Paige Ch. (N. Y.) 366 ; s.c. 31 Am. Dec. 257.

⁶ *Hitz v. Metropolitan Bank*, 111 U. S. 722 ; bk. 28 L. ed. 577.

⁷ *Gillespie v. Worford*, 2 Cold. (Tenn.) 632.

As to effect on husband's breach of marital contract on his right of curtesy, see : *Ante*, § 776.

SEC. 788. **Same—9. Suits with reference to.**—An estate by curtesy having the incidents of a conventional life estate,¹ a tenant by curtesy may maintain and defend actions relating thereto;² thus he may recover the same in an action of ejectment,³ and he may defend suits brought by the heirs of his wife to eject him therefrom.⁴ In all actions or suits relating to or affecting the estate by curtesy, the wife is not a necessary party and need not be joined.⁵

SEC. 789. **Same—Same—Damages to reversion.**—The right of a tenant by the curtesy to maintain and defend actions in regard to the estate is limited to his individual interest therein;⁶ consequently a tenant by curtesy of a reversion, expectant upon the determination of an estate in dower, cannot maintain trespass *de bonis* for trees or other things severed and removed by the doweress; the property in the trees severed and removed belongs to the owner of the inheritance, by whom the action for damages must be brought.⁷

SEC. 790. **Duties of tenant by curtesy.**—After what has already been said in this chapter regarding the nature and character of an estate by the curtesy, it is scarcely neces-

¹ Shortall v. Hinckley, 31 Ill. 219, 227;

Rice v. Hoffman, 35 Md. 350, 354;

Miller v. Bledsoe, 61 Mo. 96, 105.

See: *Ante*, § 578, *et seq.*

² See: *Ante*, § 768.

In the case of Muldowney v. Morris & Essex R. R. Co., 42 Hun (N. Y.) 444, a railroad company for several years occupied land in which A had an outstanding estate of curtesy. After A and the railroad company first learned of the existence of A's estate, A brought an action to compel payment to him of his just proportion of the rents and profits. The court held, that he was entitled to the relief sought.

³ Lecatt v. Merchants' Insurance Co., 16 Ala. 177; s.c. 50 Am. Dec. 169;

Rochon v. Lecatt, 1 Stew. (Ala.) 609;

Muldowney v. Morris & E. R. Co.; 42 Hun (N. Y.) 444;

Hall v. Hall, 32 Ohio St. 184.

In Alabama—Trespass to try title.—

A plaintiff, claiming as tenant by the curtesy, may recover possession of the premises, in Alabama, in the common form of an action of trespass to try title.

Rochon v. Lecatt, 1 Stew. (Ala.) 609.

⁴ Grout v. Townsend, 2 Hill (N. Y.) 554.

⁵ Shortall v. Hinckley, 31 Ill. 219, 227.

⁶ The writ of right at common law, or as recognized by statute in Alabama, does not lie in favor of a tenant by the curtesy.

Lecatt v. Merchants' Insurance Co., 16 Ala. 177; s.c. 50 Am. Dec. 169.

⁷ Mathews v. Bennett, 20 N. H. 21.

sary to add that tenants by curtesy hold their estates subject to the duties, limitations, and obligations which attach to those of ordinary tenants for life, which have already been fully discussed.¹ Thus, at common law, the tenant by the curtesy shall be attendant on the lord paramount for the services due in respect of the lands that he holds by his title ;² and at the present day a man who is tenant by the curtesy of an estate charged with the payment of a sum of money is bound to keep down the interest ; and on his failure to do so, the person entitled to the inheritance can compel him to keep down the interest, the same as he could any other tenant for life.³

SECTION III.—BARRING CURTESY.

- SEC. 791. Barring curtesy—By agreement of parties.
- SEC. 792. Same—By attainder of wife.
- SEC. 793. Same—By divesture of wife on breach of covenant.
- SEC. 794. Same—By judicial proceedings under statute.
- SEC. 795. Same—By consent of husband to wife's will.
- SEC. 796. Same—By statute of limitations.
- SEC. 797. Same—By statutory enactment.
- SEC. 798. Same—By husband's conveyance.
- SEC. 799. Same—Same—In lands purchased with proceeds.
- SEC. 800. Same—By fine and recovery.
- SEC. 801. Same—By conveyance by wife during coverture.
- SEC. 802. Same—By settlement in trust.
- SEC. 803. Same—By instrument creating equitable estate.
- SEC. 804. Same—Same—Provisions excluding curtesy.
- SEC. 805. Same—By separate use for wife.
- SEC. 806. Same—Not by deed or will of grantor.
- SEC. 807. Same—Not by will of wife.
- SEC. 808. Same—Not by decree enjoining husband.
- SEC. 809. Same—Not by attainder of wife after issue.
- SEC. 810. Same—Not by ante-nuptial deed.
- SEC. 811. Same—Not by ante-nuptial gift.
- SEC. 812. Same—Not by abandonment of possession to co-tenant in common.
- SEC. 813. Forfeiture—By alienage.
- SEC. 814. Same—By decree of divorce.
- SEC. 815. Same—Same—1. Decree of nullity.
- SEC. 816. Same—Same—2. Decree *nisi*.
- SEC. 817. Same—Same—3. Decree *a vinculo*.

¹ See : *Ante*, bk. III., c. XVI., section II., "Duties Incident to Life Estates." ² *Paine's Case*, 8 Rep. 36a ; 2 Inst. 302.

³ 1 Atk. 606.

- SEC. 818. Same—Same—Same—At suit of wife.
 SEC. 819. Same—Same—Same—At suit of husband.
 SEC. 820. Same—Same—Same—Rights of third parties.
 SEC. 821. Same—Same—4. Decree *a mensa*.
 SEC. 822. Same—By adultery.
 SEC. 823. Same—By abandonment of wife.
 SEC. 824. Same—By failure to provide.
 SEC. 825. Same—By bigamy.
 SEC. 826. Same—By wrongful alienation.
 SEC. 827. Same—By attainder of husband of treason or felony.

SECTION 791. Barring curtesy—By agreement of parties.—The right of the husband to an estate by the curtesy in his wife's estates of inheritance may be barred in several ways, and among others by a voluntary agreement of both parties,¹ enforceable in equity,² made either before or

¹ See: *Charles v. Charles*, 8 Gratt. (Va.) 486; s.c. 56 Am. Dec. 155; *Rochon v. Lecatte*, 2 Stew. (Ala.) 429;

Mason v. Deese, 30 Ga. 308.

See: *Parsons v. Ely*, 45 Ill. 232;

Hutchins v. Dixon, 11 Md. 29;

Townsend v. Mathews, 10 Md.

251;

Waters v. Tazewell, 9 Md. 291;

Jones v. Brown, 1 Md. Ch. 191;

Lawrence v. Bartlett, 84 Mass.

(2 Allen) 36;

Williams v. Claiborne, 15 Miss.

(7 Smed. & M.) 488;

Glidden v. Blodgett, 38 N. H. 74;

DeBarante v. Gott, 6 Barb. (N. Y.)

349;

Matter of Leefe, 4 Ed. Ch. (N. Y.)

395;

Hooks v. Lee, 7 Ired. (N. C.) Eq.

83;

McBride v. Williams, 4 Jones

(N. C.) Eq. 268;

Tillinghast v. Coggs, 7 R. I.

383;

Baskins v. Giles, 1 Rich. (S. C.)

Eq. 315;

Eidson v. Fontain, 9 Gratt. (Va.)

286;

Hume v. Hor, 5 Gratt. (Va.)

374;

Robinson v. Brock, 1 Hen. & M.

(Va.) 213;

Pickett v. Chilton, 5 Munf. (Va.)

467.

The provision of a marriage settlement, that the wife's property "never be subject to the control, contracts, or liabilities of the husband," excludes the

husband as well after the death of the wife as during her life.

Mason v. Deese, 30 Ga. 308;

Waters v. Tazewell, 9 Md. 291.

² See: *Wormley v. Wormley*, 98 Ill. 544, 553;

Sims v. Rickets, 35 Ind. 181, 192;

s.c. 9 Am. Rep. 679;

McC Campbell v. McC Campbell, 2

Lea (Tenn.) 661, 664;

Moore v. Page, 111 U. S. ; bk.

28 L. ed. ;

Murray v. Glasse, 23 L. J. Ch.

126, 127.

Construing marriage settlements.—

In construing and enforcing marriage settlements, the court will interpret them liberally, free from restraint of technical rules, so as to carry out the presumed intention of the parties.

See: *May v. May*, 7 Fla. 207;

Stratton v. Rogers, 11 La. Ann. 380;

Hutchins v. Dixon, 11 Md. 29;

Williams v. Claiborne, 1 Smed. &

M. Ch. (Miss.) 355;

Dominick v. Michael, 4 Sand. Ch.

(N. Y.) 374;

Hooks v. Lee, 8 Ired. (N. C.) Eq.

157;

Gause v. Hale, 2 Ired. (N. C.) Eq.

241;

Dupree v. McDonald, 4 Desau.

(S. C.) L. 209;

Smith v. Maxwell, 1 Hill Ch.

(S. C.) Eq. 101;

Gaillard v. Parcher, 1 McM.

(S. C.) Ch. 358;

Fabb v. Archer, 3 Hen. & M. (Va.)

399.

after marriage. At common law all contracts between a husband and wife after marriage are void for want of proper parties,¹ and the inability of the wife to contract,²

Same—Made in foreign stat. —

A marriage settlement made in another state by parties residing there at the time will be construed by the laws of the state where made.

Laffitte v. Lawton, 25 Ga. 305;

Sherrod v. Callegahan, 9 La. Ann. 510;

Carroll v. Renich, 15 Miss. (7 Smed. & M.) 798;

Decouch v. Savitier, 3 Johns. Ch. (N. Y.) 190;

Scheferling v. Huffman, 4 Ohio St. 241.

A proper consideration for such voluntary agreement must be shown as a foundation to support it.

See: *Post*, p. 648, footnote 4.

Same — Massachusetts doctrine. —

Thus it is said by the Supreme Judicial Court of Massachusetts in the case of *Whitney v. Closson*, 138 Mass. 49; s.c. 19 Cent. L. J. 449, that although the laws of a state confer upon married women the freedom of contract possessed by *femes sole*, an agreement between husband and wife upon valuable consideration, by which each agrees to make no claim upon the estate of the other in case of death, is not binding.

¹ The wife's identity being merged in the personality of her husband, they together constituted but one person.

Wells v. Caywood, 3 Colo. 487, 491;

Hoker v. Boggs, 63 Ill. 161;

Barnett v. Harshbarger, 105 Ind. 410; s.c. 5 N. E. Rep. 718;

Haas v. Shaw, 91 Ind. 384; s.c. 46 Am. Rep. 607;

Long v. Kinney, 49 Ind. 235, 238;

O'Farrall v. Simplot, 4 Iowa 381, 389;

Trader v. Lowe, 45 Md. 1, 14;

Potter v. Wakefield, 146 Mass. 25, 27;

Woodward v. Spurr, 141 Mass. 283, 284;

Kneil v. Eggleston, 140 Mass. 202; s.c. 4 N. E. Rep. 573;

Whitney v. Closson, 138 Mass. 49;

Fowle v. Torrey, 135 Mass. 87;

Bassett v. Bassett, 112 Mass. 99;

Ingham v. White, 86 Mass. (4 Allen) 412;

Lord v. Parker, 85 Mass. (3 Allen) 127;

Burdeno v. Amperse, 14 Mich. 91, 92;

Frissell v. Rozier, 19 Mo. 448, 449;

Winebrinner v. Weisiger, 3 T. B. Mon. (Ky.) 32, 34;

Aultman v. Obermeyer, 6 Neb. 260, 263;

Patterson v. Patterson, 45 N. H. 164;

People v. Palmer, 109 N. Y. 110, 118; s.c. 16 N. E. Rep. 529;

Bartles v. Nunan, 92 N. Y. 152, 160;

Meeker v. Wright, 76 N. Y. 262, 270;

Winans v. Peebles, 32 N. Y. 423;

White v. Wager, 25 N. Y. 328;

Chambovet v. Cagney, 35 N. Y. Super. Ct. (J. & S.) 474;

Corn Exchange Ins. Co. v. Babcock, 57 Barb. (N. Y.) 231;

Kelso v. Tabor, 52 Barb. (N. Y.) 125;

Savage v. O'Neil, 42 Barb. (N. Y.) 374;

Simmons v. McElwain, 26 Barb. (N. Y.) 419, 420;

Voorhees v. Presbyterian Church of Amsterdam, 17 Barb. (N. Y.) 103;

Dempsey v. Tylee, 3 Duer (N. Y.) 73;

Johnson v. Rogers, 35 Hun (N. Y.) 267;

Shepard v. Shepard, 7 Johns. Ch. (N. Y.) 57;

Barron v. Barron, 24 Vt. 375, 398;

Firebrass v. Pennant, 2 Wils. 254.

The intention of the Legislature to change the rule of the common law in the passage of statutes affecting the status of married women will not be presumed from doubtful provisions; the presumption is that no such change was intended, unless the statute is explicit and clear in the direction. *People v. Palmer*, 109 N. Y. 110.

² *Gebb v. Rose*, 40 Md. 387, 393; *Burton v. Marshall*, 4 Gill (Md.) 487, 493.

and want of power to convey ;¹ but courts of equity have always recognized both the duality of the husband and wife,² and the capacity of the latter to contract,³ and give effect to contracts by the husband with her without the intervention of a trustee,⁴ if the intervention of a third

¹ *Stone v. Gazzam*, 46 Ala. 269, 273, 275 ;

Frierson v. Frierson, 21 Ala. 549, 555 ;

Pillow v. Wade, 31 Ark. 678 ;

Dibble v. Hutton, 1 Day (Conn.) 221 ;

Hoker v. Boggs, 63 Ill. 161 ;

Scarborough v. Watkins, 9 B. Mon. (Ky.) 540 ; s.c. 50 Am. Dec. 528 ;

Johnson v. Stillings, 53 Me. 427 ;

Allen v. Hooper, 50 Me. 371, 374 ;

Martin v. Martin, 1 Me. (1 Greenl.) 394, 398 ;

Preston v. Fyer, 38 Md. 221, 225 ;

Roby v. Phelon, 118 Mass. 541 ;

Jenne v. Marble, 37 Mich. 319, 323 ;

Frissell v. Rozier, 19 Mo. 448 ;

Aultman v. Obermeyer, 6 Neb. 260, 264 ;

Patterson v. Patterson, 45 N. H. 164, 166 ;

White v. Wager, 25 N. Y. 328, 332 ;

Fowler v. Treboin, 16 Ohio St. 493, 497 ;

Johnston v. Johnston, 31 Pa. St. 450, 453 ; s.c. 1 Grant Cas. (Pa.) 468 ;

Barron v. Barron, 24 Vt. 375, 398 ;

Sweat v. Hall, 8 Vt. 187, 189 ;

Putnam v. Bicknell, 18 Wis. 333, 335 ;

Wallingsford v. Allen, 35 U. S. (10 Pet.) 583, 593 ; bk. 9 L. ed. ;

Beard v. Beard, 3 Atk. 72.

² *Morrison v. Thistle*, 67 Mo. 596, 600 ;

Livingston v. Livingston, 2 Johns. Ch. (N. Y.) 539.

Barron v. Barron, 24 Vt. 375, 398 ;

Arundell v. Phipps, 10 Ves. 144, 149 ;

Cannel v. Buckel, 2 Pr. Wms. 243, 244 ;

Pybus v. Smith, 4 Brown Ch. 485.

By the civil law the fiction of the merge of the wife's identity in the personality of the hus-

band was unknown ; husband and wife were treated as distinct persons capable of contracting, in a limited sense, with each other, and the wife could contract with other persons and have separate debts and interests.

Livingston v. Livingston, 2 Johns. Ch. (N. Y.) 539 ;

Arundell v. Phipps, 10 Ves. 144 ;

1 *Burge Col. & For. L.* 206, 263.

³ See : *Price v. Bingham*, 7 Har. & J. (Md.) 296, 318.

She may even sell her separate estate to her husband for a valuable consideration, and the sale will be upheld in equity.

Tallinger v. Mandeville, 113 N. Y. 427, 432 ; s.c. 21 N. E. Rep. 125 ;

Boyd v. De La Montagnie, 73 N. Y. 498 ;

Hunt v. Johnson, 44 N. Y. 27 ;

Winans v. Peebles, 32 N. Y. 423 ;

White v. Wager, 25 N. Y. 328.

⁴ *Sims v. Rickets*, 35 Ind. 181, 191 ; s.c. 9 Am. Rep. 679 ;

Jones v. Clifton, 101 U. S. 225, 229 ; bk. 25 L. ed. 908.

See : *Deming v. Williams*, 26 Conn. 226 ;

Edwards v. Sheridan, 24 Conn. 165 ;

Hawley v. Burgess, 22 Conn. 284 ;

Winton v. Barnum, 19 Conn. 171 ;

The Fourth Ecclesiastical Society v. Mather, 15 Conn. 587 ;

Morgan v. Thames Bank, 14 Conn. 99 ;

Cornwall v. Hoyt, 7 Conn. 420 ;

Fitch v. Ayer, 2 Conn. 143 ;

Ward v. Crotty, 4 Met. (Ky.) 50 ;

Gains v. Poor, 3 Met. (Ky.) 503 ;

Stockett v. Holliday, 9 Md. 480 ;

Bowie v. Stonestreet, 6 Md. 413 ;

Whitten v. Whitten, 57 Mass. (3 Cush.) 191 ;

Adams v. Brackett, 46 Mass. (5 Met.) 280 ;

Phelps v. Phelps, 37 Mass. (30 Pick.) 556 ;

Stanwood v. Stanwood, 17 Mass. 57 ;

party would have made the transaction a valid one.¹ To entitle a contract between husband and wife to be enforced in equity, it must be fairly made,² equitable,³ and based upon a proper consideration.⁴

SEC. 792. **Same—By attainder of wife.**—At common law the attainder of the wife before the birth of issue would defeat the estate of the husband by the curtesy,⁵ and a subsequent pardon of the wife would not entitle the husband to claim curtesy, except as to an estate of inheritance subsequently acquired by the wife;⁶ but the attainder of the wife subsequent to the birth of issue would not deprive the husband of his right to curtesy.⁷

SEC. 793. **Same—By divesture of wife on breach of covenant.**—The husband will be barred of a right to curtesy in the estates of inheritance of his wife by the divesture of the wife's estate on breach of condition in the deed creating the estate, on which breach the grantor or his heirs enter; because in such cases the donor resumes his prior

- Wilder v. Brooks, 10 Min. 50;
 Simmons v. McElwain, 26 Barb.
 (N. Y.) 419, 420;
 Shepard v. Shepard, 7 Johns. Ch.
 (N. Y.) 57;
 Neufville v. Thompson, 3 Ed. Ch.
 (N. Y.) 92;
 Livingston v. Livingston, 2 John.
 Ch. (N. Y.) 237;
 Williams v. Latourette, 1 Barb.
 (N. Y.) 9;
 Wood v. Warden, 20 Ohio 518;
 Huber v. Huber, 10 Ohio 371;
 Jones v. Obenchain, 10 Gratt.
 (Va.) 259;
 Wallingsford v. Allen, 35 U. S.
 (10 Pet.) 583; bk. 9 L. ed. ;
 Sexton v. Wheaton, 21 U. S. (8
 Wheat.) 229; bk. 5 L. ed. ;
 Lucas v. Lucas, 1 Atk. 270;
 More v. Freeman, Bunb. 205;
 Walter v. Hodge, 2 Swanst. 97;
 Battersbee v. Farrington, 1
 Swanst. 106;
 Freemantle v. Bankes, 5 Ves. 79.
¹ Huber v. Huber, 10 Ohio 371;
 Barron v. Barron, 24 Vt. (1 Deane)
 375, 398;
 More v. Freeman, Bunb. 205.
² Helms v. Franciscus, 2 Bland's
 Ch. (Md.) 544, 546; s.c. 20 Am.
 Dec. 402.

- ³ Jenne v. Marble, 37 Mich. 319,
 323.

See: Morrison v. Thistle, 67 Mo.
 596, 600.

- ⁴ Loomis v. Brush, 36 Mich. 40,
 46.

Contract for separation.—A husband and wife have an inviolable right to the aid, comfort, and society of each other, and cannot enter into an agreement between themselves for a separation which will be enforced in common law or equity, in the absence of statutory provisions.

Helms v. Franciscus, 2 Bland's
 Ch. (Md.) 544; s.c. 20 Am.
 Dec. 402;

Whitney v. Classon, 138 Mass.
 49; s.c. 19 Cent. L. J. 449,
 and note;

Head v. Head, 3 Atk. 550;
 Westmeath v. Westmeath, Cond.
 Ch. 60;

Warrall v. Jacob, 3 Merv. 368.

- ⁵ Gillespie v. Worford, 1 Co. Litt.
 (19th ed.) 40a;
 2 Co. Litt. (19th ed.) 351a;
 4 Hawk. Pl. Cr. 785.

- ⁶ Gate v. Wiseman, Dyer 140b;
 2 Co. Litt. (19th ed.) 392.

- ⁷ See: Post, § 809.

estate, and the derivative estate by the curtesy falls with the estate of the wife, of which it was derived ; but until such entry by the grantor or his heirs, the husband's interests attach. A distinction is to be made between a case in which the estate of the wife is determined by entry, or proceedings instituted upon the breach of a condition contained in the deed, and one in which a limited fee is determined in accordance with the provisions of the instrument creating it. In the latter case, on the determination of the wife's estate, the husband's interests exist, notwithstanding the expiration of the fee to which it is attached.¹ This distinction is recognized by Lord MANSFIELD in *Buckworth v. Thirkell*,² where it was held that curtesy attached to an estate given a wife and her heirs, but in case she died before the age of twenty-one, and without issue, then over, the wife having had issue, who died before her, and then died under the age of twenty-one. There is some conflict in the decisions upon this question, but it is thought that the true distinction rests on the circumstances, that in the case of an entry for a condition broken destroys the estate, but in case of the determination of the estate in accordance with the terms of the instrument creating it, a new estate arises by the limitation, which is to be postponed by the prior rights of the previous estate, one of which is the estate by curtesy.³

SEC. 794. **Same—By judicial proceedings under statute.**—The right of a husband to curtesy in the land of his wife may be barred by judicial proceedings under the statute in an action where he is a party, as where the land is ordered to be sold free from the curtesy, and the interest on the proceeds to be given to the husband ;⁴ but if the husband is not made a party to the proceedings in which the adjudication is made in reference to him and his estate, his curtesy will not be barred.⁵ It is thought that where

¹ 2 Co. Litt. (19th ed.) 241a, Butler's note, 170.

² 3 Bos. & P. 632, note.

³ Boothby v. Vernon, 9 Md. 147 ;

4 Kent Com. (13th ed.) 33 ;

Prest. Ab., tit. 384.

⁴ Jacques v. Ennis, 25 N. J. Eq. (10 C. E. Gr.) 402.

⁵ Id.

property subject to a tenancy by the curtesy is ordered by a court to be sold, that the proceeds of the sale will take the place of the land and be subject to the burden of the curtesy ; but if these proceeds are reinvested by the husband as guardian, and the title to the land taken to himself as guardian of his children, that his right to curtesy will thereby be barred.¹

SEC. 795. Same—By consent of husband to wife's will.—

At common law a married woman was incapable of making a will, but in most if not all of the states this rule has been changed by statute. Under these statutes a married woman cannot by her will, as a general rule, bar her husband's right to an estate by the curtesy² in her real property, unless he gives his assent by joining her in the instrument, or gives his written consent thereto ; in either of which cases the instrument will have that effect, the joinder serving as a relinquishment of his interest in favor of the donee.³ But it is thought that in case the husband is insolvent at the time of giving his assent to the will of his wife, it will be inoperative as to persons injuriously affected thereby ; because it will have the nature of a voluntary conveyance of his interest in his wife's real estate, and for that reason be fraudulent

¹ *Bogy v. Roberts*, 48 Ark. 17 ; s.c. 3 Am. St. Rep. 211 ; 2 S. W. Rep. 186 ;

Kemp v. Cossart, 47 Ark. 62 ;
Robinson v. Robinson, 45 Ark. 481 ;

Milner v. Freeman, 40 Ark. 62.

Advancement is presumed from the purchase of land by a father in the name of his children, and the equitable as well as legal estate vests in them.

Bogy v. Roberts, 48 Ark. 17 ; s.c. 3 Am. St. Rep. 211 ; 2 S. W. Rep. 186 ;

Kemp v. Cossart, 47 Ark. 62 ;
Robinson v. Robinson, 45 Ark. 481 ;

Milner v. Freeman, 40 Ark. 62 ;

Finch v. Finch, 15 Ves. 50 ; s.c. 10 Rev. Rep. 12 ;

Grey v. Grey, 2 Swanst. 594.

Same—Rebuttal.—This presumption as to advancement may be rebutted ; but does not give way to slight circumstances.

Finch v. Finch, 15 Ves. 50 ; s.c. 10 Rev. Rep. 12.

² See : *Post*, § 807.

³ See : *George v. Bussing*, 15 B. Mon. (Ky.) 563 ;

Burke v. Colbert, 144 Mass. 160, 161 ;

Burroughs v. Nutting, 105 Mass. 228 ;

Silsby v. Bullock, 92 Mass. (10 Allen) 94 ;

McBride's Estate, 81 Pa. St. 303.

Consent of court.—Under some statutes giving to married women power to dispose of their real property by will, she may do so by applying to a court and securing such power, in case of the sickness, insanity, or absence from the state of the husband, or for other good cause shown, as under the Mass. Gen. Stat., c. 108, § 3.

See : *Staples v. Brown*, 95 Mass. (13 Allen) 64.

and void as to existing creditors.¹ Where the husband has given his consent to the will of his wife devising her real estate, and thereby rendering it valid, he may revoke such assent any time before the probate of the will.²

SEC. 796. **Same—By statute of limitations.**—The right of the husband to an estate by the curtesy may be barred by the statute of limitations.³ Thus it has been held that a husband will not be heard to assert his right as tenant by the curtesy to the lands of his deceased wife after a delay of twelve years, wholly unexplained, even though during that time he claimed the lands and received the rents as guardian of his infant child.⁴

SEC. 797. **Same—By statutory enactment.**—The husband's estate by curtesy initiate in the lands of his wife is only an inchoate interest, and does not become a vested right until after the death of the wife;⁵ it may therefore be taken away or impaired by legislative enactment.⁶

SEC. 798. **Same—By husband's conveyance.**—We have already seen⁷ that a husband has power to convey or

¹ *Silsby v. Bullock*, 95 Mass. (10 Allen) 94, 96.

² *George v. Bussing*, 15 B. Mon. (Ky.) 558, 563;

Silsby v. Bullock, 95 Mass. (10 Allen) 94, 96.

The Supreme Court of Indiana say in the case of *Roach v. White*, 94 Ind. 510, that a husband's consent to his wife's devise of her real estate to her child by a former marriage estops him from claiming title to one-third of the premises given him by Ind. Rev. St. 1881, § 2485.

³ *Shortall v. Hinckley*, 31 Ill. 219, 227; *Owens v. Dunn*, 85 Tenn. (1 Pick.) 131; s.c. 2 S. W. Rep. 29;

Atkyn's Lessee v. Horde, 1 Burr. 60.

See: *Carter v. Cantrell*, 16 Ark. 154;

Neal v. Robertson, 2 Dana (Ky.) 86;

Thompson v. Green, 4 Ohio St. 216;

Weisinger v. Murphy, 2 Head (Tenn.) 674;

Doe d. Wright v. Plumtre, 3

Barn. & Ald. 474; s.c. 5 Eng. C. L. 275.

⁴ *Owens v. Dunn*, 85 Tenn. (1 Pick.) 131; s.c. 2 S. W. Rep. 29.

⁵ *Hill v. Chambers*, 30 Mich. 422, 427;

Porter v. Porter, 27 Gratt. (Va.) 599.

⁶ *Strong v. Clem*, 12 Ind. 37, 41; *Hill v. Chambers*, 30 Mich. 422, 427;

Hathon v. Lyon, 2 Mich. 93, 95; *Thurber v. Townsend*, 22 N. Y. 517;

Billings v. Baker, 28 Barb. (N. Y.) 343, 346;

Matter of Winne, 1 Lans. (N. Y.) 508; s.c. 2 Lans. (N. Y.) 21, 26;

Denny v. McCabe, 35 Ohio St. 576, 580;

Mellinger v. Bausman, 45 Pa. St. 522, 529;

Sharpless v. Borough of Westchester, 1 Grant (Pa.) 257, 260;

Alexander v. Alexander, 7 S. E. Rep. 355; s.c. 1 L. R. A. 121;

Kingsley v. Smith, 14 Wis. 360, 365;

⁷ See: *Ante*, § 786.

lease his estate in the lands of his wife, and he may of course release it to any one where he does not thereby impair the rights of third persons.¹ Such a release of the estate by curtesy is effected by joining with his wife in a deed of conveyance,² because such joinder acts as a relinquishment in favor of the grantee.³ Such joint deed may convey the interest of the husband as a tenant by the curtesy, although ineffective to convey the wife's interest, because the certificate of acknowledgment is defective in that she was not examined separate and apart from her husband, as the statute requires.⁴ But to bar the curtesy the husband's joinder in the deed must be in the manner prescribed by law.⁵

SEC. 799. Same—Same—In land purchased with proceeds.—A husband who is tenant by the curtesy initiate joining with his wife in the conveyance of her lands, and permitting the proceeds thereof to be invested in property in trust for her and her children by a former husband, thereby bars all his right to curtesy in the land thus acquired;⁶ and it has been held that where a husband, as guardian of his children, sells his interest in the land of which he is tenant by the curtesy, and invests the proceeds of the sale in other lands, taking the title in his children, his right of curtesy is thereby barred.⁷

SEC. 800. Same—By fine and recovery.—After the vesting

¹ See : *Watson v. Watson*, 13 Conn. 83, 86.

² *Haines v. Ellis*, 24 Pa. St. 253.
See : *Carpenter v. Davis*, 72 Ill. 14 ;

Stewart v. Ross, 50 Miss. 776 ;

Jacques v. Ennis, 25 N. J. Eq. (10 C. E. Gr.) 402 ;

Gilmore v. Gilmore, 7 Oreg. 374

Houck v. Ritter, 76 Pa. St. 280.

³ *McBride's Estate*, 81 Pa. St. 303.

⁴ *Mettler v. Miller*, 129 Ill. 630 ; s.c. 22 N. W. Rep. 529 ;

Jackson v. Hodges, 2 Tenn. Ch. 276.

A conveyance under a power of attorney by husband and wife of all the right, title, and interest of the husband and wife in land, will pass the estate by curtesy of the husband, and the children of the wife cannot sue

for the land, after the death of the wife, until after the husband's death.

Jackson v. Hodges, 2 Tenn. Ch. 276.

⁵ Thus where the husband's joinder in the conveyance was not evidenced by a deed, it was held that the curtesy was not barred, and that no estoppel would arise against the husband by reason of the fact that the wife, with his consent, took in part payment for the land a promissory note made by her husband to a third person.

Houck v. Ritter, 76 Pa. St. 280.

⁶ *Carpenter v. Davis*, 72 Ill. 116.

⁷ *Bogy v. Roberts*, 48 Ark. 17 ; s.c. 3 Am. St. Rep. 211 ; 2 S. W. Rep. 186.

of the husband's estate by curtesy initiate, it may be defeated by a recovery of the wife's lands in an action against the husband and wife, or by a valid fine levied,¹ or recovery suffered by the husband and wife.²

SEC. 801. **Same—By conveyance by wife during coverture.**—Most if not all of the states have passed statutes enabling women to hold property free from marital rights, and to deal with the same as though they were *femes sole*, and under these statutes the common-law right of curtesy still exists, subject, however, to be defeated by the conveyance to a third person ; should she die without exercising her right during life, the husband's common-law right to curtesy will attach.³

SEC. 802. **Same—By settlement in trust.**—The separate property of the wife may be so settled upon her by statute,⁴ or by deed,⁵ or devise,⁶ that the husband's estate by the curtesy may never arise, or where it does arise, may be defeasible by deed, duly executed by the wife before death,⁷ or by will ;⁸ and it has been said that a secret settlement made by an intended wife on the eve of her marriage, and without the knowledge of her future husband, conveying her property to her separate use for life, with remainder to her children born, and to be born, is valid ;⁹ but the better opinion is thought to be that

¹ As to fine, see : *Ante*, § 530, *et seq.*

² As to common recovery, see : *Ante*, § 533.

³ *Hatfield v. Sneden*, 54 N. Y. 280 ; *Thurber v. Townsend*, 23 N. Y. 517 ;

Clark v. Clark, 24 Barb. (N. Y.) 581.

In some of these statutes, as for instance the New York statute, the tenancy by the curtesy vests only where the land remains undisposed of by a deed or by will, and a devise of the lands, as well as a conveyance, will therefore defeat the tenancy.

See : *Ryder v. Hulse*, 24 N. Y. 372 ;

Burke v. Valentine, 52 Barb. (N. Y.) 412 ;

Scott v. Guernsey, 60 Barb. (N. Y.) 163.

⁴ *Tong v. Marvin*, 15 Mich. 60, 70, 73 ;

Porch v. Fries, 18 N. J. Eq. (3 C. E. Gr.) 204, 208.

See : *Post*, bk. III., c. VII., section IV.

⁵ *Hutchins v. Dixon*, 11 Md. 29, 37.

⁶ *Id.*

⁷ See : *Pool v. Blakie*, 53 Ill. 495, 502 ; *Porch v. Fries*, 18 N. J. Eq. (3 C. E. Gr.) 204, 208.

⁸ *Stewart v. Ross*, 50 Miss. 776, 791 ; *Stokes v. McKibbin*, 13 Pa. St. 267, 269.

⁹ *Anonymous*, 34 Ala. 430 ; s.c. 73 Am. Dec. 461 ;

Taylor v. Pugh, 1 Hare ; s.c. 23 Eng. Ch. 608.

In *Anonymous*, 34 Ala. 430 ; s.c. 73 Am. Dec. 461, at the time of the settlement the woman was pregnant by her intended husband.

such a settlement in fraud of the husband's rights may be avoided by him,¹ except in those cases where the husband is apprised before the marriage of the disposition which his intended wife has made respecting her property.²

SEC. 803. Same — By instrument creating equitable estate.—Where such is the intention of the parties, a deed or devise giving an equitable estate may be so drawn as to exclude the husband's right to estate by the curtesy;³ and the husband will be excluded from such estates wherever there is a manifest intention to exclude him.⁴

SEC. 804. Same—Same—Provisions excluding curtesy.—In order that a husband may be excluded from his estate by the curtesy in the trust estate of his wife, the intention of the parties must be manifest,⁵ and the words of exclusion plain; it is not enough that the estate is granted to the wife for her sole and separate use,⁶ even though the

In the case of *Lowry v. Steel*, 4 Ohio, 170, where a woman, in contemplation of marriage, granted a term of seventy-five years of her estate to a trustee, in trust for her own use during the contemplated coverture, her husband was held to be entitled to the estate as tenant by the curtesy.

¹ See: *Tucker v. Andrews*, 13 Me. 24;

Baker v. Jordan, 73 N. C. 145;
England v. Dowes, 2 Beav. 522;
2 Kent Com. (13th ed.) 174.

² See: *Cheshire v. Payne*, 16 B. Mon. (Ky.) 618;

Cole v. O'Neil, 3 Md. Ch. 174;
Terry v. Hopkins, 1 Hill (S. C.) L. 19;
Fletcher v. Ashley, 3 Gratt. (Va.) 184, 332, 607.

³ See: *Rigler v. Cloud*, 14 Pa. St. 361;

Stokes v. McKibbin, 13 Pa. St. 267;

Cockran v. O'Hern, 4 Watts & S. (Pa.) 95;

Baker v. Heiskell, 1 Cald. (Tenn.) 641;

Hearle v. Greenback, 3 Atk. 716;
Roberts v. Dixwell, 1 Atk. 606;

Bennet v. Davis, 2 Pr. Wms. 316.

Compare: Morgan v. Morgan, 2 Madd. 208.

⁴ *Bennet v. Davis*, 2 Pr. Wms. 316.

⁵ *Tremmel v. Kleiboldt*, 6 Mo. App. 82, 549.

⁶ *Payne v. Payne*, 11 B. Mon. (Ky.) 138;

Cushing v. Blake, 30 N. J. Eq. (3 Stew.) 689;

Mullaney v. Mullaney, 4 N. J. Eq. (3 H. W. Gr.) 16, 18; s.c. 31 Am. Dec. 238;

Stewart v. Stewart, 7 Johns. Ch. (N. Y.) 229;

Dubs v. Dubs, 31 Pa. St. 149;

Cockran v. O'Hern, 4 Watts & S. (Pa.) 95.

A father gave land in trust for his daughter, to be at her disposition, the trust to cease on the death of her husband, and the legal title to vest in the daughter; the daughter died before her husband, and the court held that the latter was entitled to curtesy.

Payne v. Payne, 11 B. Mon. (Ky.) 138.

Where a testator devised in trust for his daughter, and her heirs, to her and their sole and separate use, "free from the control of any husband to whom she

instrument creating the trust is executed by a husband, or an intended husband, for the benefit of his wife or intended wife.¹ Every presumption is in favor of curtesy as a natural incident of a wife's estate, either legal or equitable, and for this reason the intent to exclude curtesy must clearly appear.² The mere expression that the purpose of a trust is a promotion of the interest of a married woman and her children, separate and apart from that of her husband, following a trust for the sole and separate use of the wife and her children, is not sufficient to destroy the husband's estate by the curtesy;³ neither is a devise to a married woman in tail, with a provision that on her death without issue, the executors

may be married, and without any power of her or her husband aliening or disposing of the estate," the daughter being unmarried, and not contemplating any particular marriage at the time, it was held that this provision did not bar curtesy in her subsequent husband.

Dubs v. Dubs, 31 Pa. St. 149.

Where a trust was created for the sole, separate, and peculiar use, benefit, and disposal of the wife, stipulating that "the same or any part thereof shall not in any wise be subject or liable to the disposal, intermeddling, control, engagement, debts, or incumbrances of the husband," and that "it is the intention and meaning of these presents that nothing herein contained shall be taken and treated, either in law or in equity, to pass any title, claim or charge whatsoever" in the husband,—the court held that the intent to exclude the husband's estate by the curtesy was sufficiently clear.

Cockran v. O'Hern, 4 Watts & S. (Pa.) 95.

¹ *Rochon v. Lecatt*, 2 Stew. (Ala.) 429 ;

Cushing v. Blake, 29 N. J. Eq. (3 Stew.) 399, affirmed 30 N. J. Eq. (3 Stew.) 689.

Compare: "Pennsylvania doctrine," below.

Curtesy should be favored rather than otherwise where a gift is made by the husband to the

wife for her benefit; and it is thought that there is nothing unreasonable in a provision of law, that under such circumstances the husband should at the death of his wife, without having disposed of the property, have the same right to an estate by the curtesy he would have had if the property had been a gift from some one else, or had been purchased with her own money.

Cushing v. Blake, 29 N. J. Eq. (3 Stew.) 399, affirmed 30 N. J. Eq. (3 Stew.) 689 ;

Frazier v. Hightower, 2 Heisk. (Tenn.) 94.

Same — *Pennsylvania doctrine*. — Chief Justice GIBSON says in *Stokes v. McKibbin*, 13 Pa. St. 267, that the moving cause of a settlement for the benefit of a wife is generally to protect her and her issues from extravagancies and necessities of the husband, and that the presumption is especially strong that such was the motive where the husband himself puts his estate in trust for his wife, and that this furnishes an additional argument that the intent was to exclude the estate by the curtesy.

See, to same effect: *Rigler v. Cloud*, 14 Pa. St. 301.

² *Jones v. Brown*, 1 Md. Ch. 191 ; *Tremmel v. Kleiboldt*, 6 Mo. App. 549.

³ *Ege v. Medlar*, 82 Pa. St. 86.

shall sell the land for the benefit of the testator's nephew.¹ And the reservation by the wife of the rents and profits to her estate to her sole and separate use during her life does not amount to an expression of an intention on her part to exclude her husband from curtesy therein after her death.² The giving of a power of sale to the wife is not such an expression of intention to bar the husband's curtesy as to destroy it;³ so also a settlement in chancery, by which a trust is created for the wife, her heirs and assigns, giving her the control and possession of the property, with a power of appointment, does not destroy the husband's curtesy, where the wife dies without exercising the power.⁴

SEC. 805. Same—By separate use for wife.—Where the wife is entitled to sole and separate use of her estate, not only as regards the income, but also as regards the corpus, free and clear of the control of her husband and without being subject to his debts, liabilities, or engagements, any conveyance or devise of her estate by the wife will bar the husband's right of curtesy.⁵

SEC. 806. Same—Not by deed or will of grantor.—A husband's right to an estate by the curtesy in the lands of his wife is so inherent in all legal estates that it cannot be barred by any words of restraint or limitation of the deviser or grantor of the estate,⁶ because the incidents of an estate do not depend upon the intention of it; they are

¹ Hay v. Mayer, 8 Watts (Pa.) 203.

² Tillinghast v. Coggeshall, 7 R. I. 383.

See: Pitt v. Jackson, 2 Bro. C. C. 51;

Morgan v. Morgan, 5 Madd. 248;

Bennet v. Davis, 2 Pr. Wms. 316.

³ The execution of the power conferred, however, may have that effect.

Ege v. Medlar, 82 Pa. St. 86.

⁴ Baker v. Heiskell, 1 Cold. (Tenn.) 641.

⁵ Monroe v. Van Meter, 100 Ill. 347;

Pool v. Blakie, 53 Ill. 495;

Stokes v. McKibbin, 13 Pa. St. 267;

Cooper v. MacDonald, 7 Ch. Div. 288, overruling Moore v. Web-

ster, L. R. 3 Eq. 267;

Bennet v. Davis, 2 Pr. Wms. 316.

Express words are necessary in some states to cut off the husband's curtesy.

See: Carter v. Dale, 3 Lea (Tenn.) 710.

⁶ Mullaney v. Mullaney, 4 N. J. Eq. (3 H. W. Gr.) 16, 18; s.c. 31 Am. Dec. 238;

Rank v. Rank, 120 Pa. St. 191;

s.c. 13 Atl. Rep. 827; 12 Cent.

Rep. 434; 21 W. N. C. 397;

Johnson v. Fritz, 44 Pa. St. 449;

Thornton's Exrs. v. Kreeps, 37

Pa. St. 391;

Buchanan v. Shiffer, 2 Yeates

(Pa.) 374;

Morgan v. Morgan, 5 Madd. 408;

DeHart v. Dean, 2 McCa. D. C. 60.

engrafted on it by law, and generally, at least, without any regard to the intention of the grantor, and even in disregard of it.¹ Thus it has been held that an estate by the curtesy is not barred by a deed of land to a daughter "and her heirs and assigns, exclusively of her husband."²

SEC. 807. Same—Not by will of wife.—We have already seen³ that at common law a wife could not dispose of her property by will. In many of the states, however, statutes have been passed enabling married women to dispose of their property, real and personal, by last will and testament, in the same manner as if they were unmarried; but such statutes do not enable the wife to deprive the husband of his right as tenant by the curtesy,⁴ and even where the will is made with the consent and approval of the husband.⁵ The failure of the husband to renounce a provision for him in his wife's will does not bar his right to curtesy, but bars his right to a distributive share.⁶

SEC. 808. Same—Not by decree enjoining husband.—A decree made during the wife's lifetime, enjoining the husband from intermeddling with an estate of which the sole control is vested in the wife, will not bar the husband's right to curtesy in the property.⁷

¹ Thornton's Exrs. v. Kreeps, 37 Pa. St. 391.

² Rank v. Rank, 120 Pa. St. 191; s.c. 13 Atl. Rep. 827; 12 Cent. Rep. 434; 21 W. N. C. 397.

³ See: *Ante*, § 795.

⁴ Roach v. White, 94 Ind. 510; Middleton v. Stewart, 47 N. J. Eq. (2 Dick.) 293; s.c. 20 Atl. Rep. 846; 14 N. J. L. J. 15; Hall v. Hall, 32 Ohio St. 184; Re Teacle's, 132 Pa. St. 533; s.c. 19 Atl. Rep. 274; 25 W. N. C. 379.

⁵ Roach v. White, 94 Ind. 510; Middleton v. Stewart, 47 N. J. Eq. (2 Dick.) 293; s.c. 20 Atl. Rep. 846; 14 N. J. L. J. 15.

⁶ Cunningham v. Cunningham, 30 W. Va. 599; s.c. 5 S. E. Rep. 139. Husband's consent to wife's will—Massachusetts doctrine.—The husband's consent is not necessary

to give validity to a will executed by the wife, or to affect its operation, except as it may deprive him of his right as tenant by the curtesy.

Burke v. Colbert, 144 Mass. 160; s.c. 10 N. E. Rep. 753; 3 N. Eng. Rep. 788;

Burroughs v. Nutting, 105 Mass. 228;

Silsby v. Bullock, 92 Mass. (10 Allen) 94.

Same—Indiana doctrine.—A husband's consent to his wife's devise of her real estate to her child by a former marriage estops him from claiming title to one-third of the premises given him by Ind. Rev. St. 1881, § 2485. Roach v. White, 94 Ind. 510.

⁷ Rochon v. Lecatt, 2 Stew. (Ala. 429.

SEC. 809. **Same—Not by attainder of wife after issue.**—We have already seen that at common law the attainder of the wife before the birth of issue would defeat the estate of the husband by the curtesy ;¹ but after the estate has become initiate by the birth of issue, it will not be barred by the attainder of the wife, or any other thing or act of the wife that works a forfeiture of the estate.²

SEC. 810. **Same — Not by ante-nuptial deed.**—We have already seen that a conveyance made by the wife prior to marriage, in fraud of the husband's marital rights, may be avoided by him,³ except in those cases where he has notice of the disposition.⁴ Thus where a woman, on the eve of her marriage, without the knowledge or consent of her contemplated husband, conveyed her property,⁵ without consideration,⁶ it was held to be a fraud upon the rights of the husband and void as to him.⁷

SEC. 811. **Same—Not by ante-nuptial gift.**—The husband's right to curtesy in his wife's estate of inheritance will not be barred by a gift of her lands by the wife before marriage ; because at common law, a party having contracted with another to marry, cannot give away his or her property without the consent of the other party to the marriage contract,⁸ it being in derogation of the marital rights and just expectations of such other party.⁹ Notice to one party to a marriage con-

¹ See : *Ante*, § 792.

² *Wells v. Thompson*, 13 Ala. 793 ; s.c. 48 Am. Dec. 76 ; *Stewart v. Ross*, 50 Miss. 776.

³ See : *Ante*, § 802.

⁴ *Chandler v. Hollingsworth*, 3 Del. Ch. 99 ;

Welch v. Chandler, 13 B. Mon. (Ky.) 420 ;

Hobbs v. Blandford, 7 T. B. Mon. (Ky.) 469 ;

Williams v. Carle, 10 N. J. Eq. (2 Stock.) 543 ,

Spencer v. Spencer, 3 Jones (N. C.) Eq. 404 ;

Robinson v. Buck, 71 Pa. St. 386.

⁵ See : *Chandler v. Hollingsworth*, 3 Del. Ch. 99 ;

Hobbs v. Blandford, 7 T. B. Mon. (Ky.) 469 ;

Williams v. Carle, 10 N. J. Eq.

(2 Stock.) 543 ;

Spencer v. Spencer, 3 Jones (N. C.) Eq. 404.

⁶ *Robinson v. Buck*, 71 Pa. St. 386.

⁷ The fact that the grantee afterwards bequeathed a legacy to the wife, which she, with the assent of her husband, received was held not to estop him from claiming his curtesy in the land after his wife's death.

Robinson v. Buck, 71 Pa. St. 386.

⁸ *Freeman v. Hartman*, 45 Ill. 57 ; s.c. 92 Am. Dec. 193 ;

Poston v. Gillespie, 5 Jones (N. C.) Eq. 258 ; s.c. 75 Am. Dec. 437.

See : *Freeman v. Dunn*, 45 Ill. 61.

⁹ *Freeman v. Hartman*, 45 Ill. 57 ; s.c. 92 Am. Dec. 193 ;

Tucker v. Andrews, 13 Me. 124, 125 ;

tract that the other has given away property after entering into the contract, but before marriage, will not hinder the injured party from insisting on the invalidity of the gift.¹ There is an exception to the rule, however, in the case of a gift made by a woman to her children by a former husband, on the eve of her marriage, when her second husband knew of the gift before the marriage; and this is true even though she was indebted at the time when the gift was made, if he was cognizant of that fact, and there was no fraudulent concealment by her.²

SEC. 812. **Same—Not by abandonment of possession to co-tenant in common.**—A husband occupying premises as a tenant by the curtesy does not lose his estate by abandoning the possession of the land to a co-tenant in common. Thus where a tenant by the curtesy of an undivided portion of land abandoned the land for more than forty years, leaving it in the possession of another tenant in common, whose occupancy was not an ouster; this was held not to be a forfeiture of the estate, and that the reversioner of such undivided portion had no right of entry upon the tenant in possession, during the life of the tenant by the curtesy.³

SEC. 813. **Forfeiture—By alienage.**—At common law the alienage of the husband was an insuperable bar to his right of curtesy in his wife's estates of inheritance.⁴ So strict was this rule that where an alien husband made his preliminary declaration of his intention to become a citizen before the death of his wife, and completed his naturalization after her death, he was not entitled to an

Logan v. Simmons, 3 Ired. (N. C.) Eq. 487;

England v. Downs, 2 Beav. 522;

Strathmore v. Bowes, 1 Ves. Jr. 22; s.c. 1 Rev. Rep. 76.

The doctrine of the common law was that the burthens to which a husband is liable are a consideration for his marital rights, upon which therefore fraud may be committed.

Strathmore v. Bowes, 1 Ves. Jr.

22; s.c. 1 Rev. Rep. 76.

¹ Poston v. Gillespie, 5 Jones (N. C.) Eq. 258; s.c. 75 Am. Dec. 437.

² McClure v. Miller, 1 Bail. (S. C.) Eq. 107; s.c. 21 Am. Dec. 522.

³ Witham v. Perkins, 2 Me. (2 Greenl.) 400.

⁴ Foss v. Crisp, 37 Mass. (20 Pick.) 121;

Reese v. Waters, 4 Watts & S. (Pa.) 145.

See: Post, § 834.

estate by the curtesy.¹ The reason for this is the fact that the law will do nothing in vain, and therefore it will not cast an estate upon one who cannot by law hold it.² But the former rule as to disability because of alienage has been largely done away with by statute in this country.³

SEC. 814. **Same—By decree of divorce.**—The tendency of a decree of divorce is to destroy the relations of the husband and wife, and all interests growing out of such relation. Such a decree may be either a decree declaring the alleged marriage to be null, that is a nullage decree; a temporary decree granted in some jurisdictions, that is a decree *nisi*; a decree *a vinculo matrimonii*, which has the effect of dissolving absolutely the bonds of matrimony; or a decree *a mensa et thoro*, which has the effect of separating the parties from bed and board merely. Each of these decrees has a different effect upon the relations of the parties and their property rights.⁴

SEC. 815. **Same—Same—1. Decree of nullity.**—A decree of nullity is a judicial declaration that no marriage exists; it is not, properly speaking, a decree of divorce, and does not make an alleged marriage void, but declares that it was void from the beginning.⁵ If the pretended marriage is a nullity, no rights ever arose under it, and the woman will be entitled to her property as a single individual, the same as though no relation whatever had existed.⁶

¹ Foss v. Crisp, 37 Mass. (20 Pick.) 121.

² Foss v. Crisp, 37 Mass. (20 Pick.) 121;

Wilber v. Tobey, 33 Mass. (16 Pick.) 177, 179.

Compare: Lumb v. Jenkins, 100 Mass. 527;

Ross v. Ross, 129 Mass. 243, 259.

³ See: Post, bk. III., c. XVII., section V.

⁴ See: 65 Am. Dec. 365, note.

⁵ See: Rawdon v. Rawdon, 28 Ala. 565;

Brown v. Westbrook, 27 Ga. 102;

Powell v. Powell, 18 Kan. 371; Succession of Mineville, 15 La. Ann. 342;

Chase v. Chase, 55 Me. 21;

Lincoln v. Lincoln, 6 Robt. (N. Y.) 525;

Wightman v. Wightman, 4 John. Ch. (N. Y.) 343;

Smith v. Morehead, 6 Jones (N. C.) Eq. 360.

⁶ Cage v. Acton, 1 Ld. Raymond, 515.

See: 65 Am. Dec. 355, note.

Third persons misled by the supposed relation will probably not

SEC. 816. **Same—Same—2. Decree nisi.**—Where a decree *nisi* is granted and is afterwards made absolute, it has the effect of a decree of divorce, and has full virtue both as to the status of the parties and as to their property rights.¹

SEC. 817. **Same—Same—3. A vinculo.**—A divorce *a vinculo matrimonii* of itself destroys not only the husband's estate during coverture,² but also terminates his estate by curtesy initiate,³ and destroys the relation the hus-

be debarred of their rights by the decree.

See: Perry v. Meddowcraft, 10 Beav. 122;

Clews v. Bathurst, 2 Stra. 960;

DeCoster v. Villa, 2 Stra. 961;

Harrison v. Southampton, 17 Eng. L. & Eq. 364.

See: 65 Am. Dec. 355, note.

Though a marriage be *ipso facto* void, yet it is proper that there should be a judicial decision to that effect by some court of competent jurisdiction.

Wightman v. Wightman, 4 John. Ch. (N. Y.) 343, 345;

Ex parte Turing, 1 Ves. & B. 140.

¹ See: Moors v. Moors, 121 Mass. 233;

Ansey v. Ansey, 45 L. J. Mat. Cas. 56;

Ravencroft v. Ravencroft, 41 L. J. Mat. Cas. 28;

Hulsey v. Hulsey, 41 L. J. Mat. Cas. 19;

Whitmore v. Whitmore, 35 L. J. Mat. Cas. 52;

Harding v. Harding, 34 L. J. Mat. Cas. 9;

Stoate v. Stoate, 32 L. J. Mat. Cas. 120;

Bolton v. Bolton, 31 L. J. Mat. Cas. 115;

Fowler v. Fowler, 31 L. J. Mat. Cas. 31;

Master v. Master, 31 L. J. Mat. Cas. 7;

Boody v. Boody, 30 L. J. Mat. Cas. 95;

Alexander v. Alexander, L. R. 2 P. & D. 691;

Deming v. Deming, L. R. 1 P. & D. 531;

Noble v. Noble, L. R. 1 P. & D. 691;

Walton v. Walton, L. R. 1 P. & D. 227.

See: 65 Am. Dec. 355, note.

² Howey v. Goings, 13 Ill. 95, 108; s.c. 54 Am. Dec. 427;

Porter v. Porter, 27 Gratt. (Va.) 599, 602, 604.

³ Boykin v. Rain, 28 Ala. 332, 343; s.c. 65 Am. Dec. 349;

Wheeler v. Hotchkiss, 10 Conn. 225, 230;

Townsend v. Griffin, 4 Har. (Del.) 440, 442;

Emmert v. Hays, 89 Ill. 11, 18;

Clark v. Lott, 11 Ill. 105, 114;

Doe v. Brown, 5 Blackf. (Ind.) 309, 310;

Hays v. Sanderson, 7 Bush (Ky.) 489, 490;

Oldham v. Henderson, 5 Dana (Ky.) 254, 256;

Barber v. Root, 10 Mass. 260, 271;

Clark v. Slaughter, 38 Miss. 64, 68;

Gould v. Crow, 57 Mo. 200, 204;

Renwick v. Renwick, 10 Paige Ch. (N. Y.) 420, 424;

Sackett v. Giles, 3 Barb. Ch. (N. Y.) 204;

Schoch's Appeal, 33 Pa. St. 351, 355;

Burt v. Hulburt, 16 Vt. 292;

Mattocks v. Stearns, 9 Vt. 326, 336;

Gould v. Webster, 1 Tyl. (Vt.) 409, 415.

Compare: Gillespie v. Worford, 2 Cold. (Tenn.) 632, 639.

Subsequently acquired lands.—A divorced husband is not entitled to a tenancy by the curtesy in lands acquired by his wife after the dissolution of the marriage. Schultz v. Moll, 10 N. Y. Supp. 703.

Foreign divorces.—Massachusetts doctrine.—As to foreign divorces, it is well settled in Massachusetts that a decree of divorce

band and wife have the same as if it was dissolved by death,¹ and restores the wife to her former status and makes her a *feme sole*,² and restores her realty to her absolutely³ and entire;⁴ and all realty belonging to her held by the husband after such decree of divorce is held by him as a trustee.⁵

SEC. 818. **Same—Same—Same—At suit of wife.**—In some of the states, a dissolution of the marriage by decree of court at the suit of the wife for the fault of the husband will take away the husband's estate by curtesy, because the husband by his violation of the marriage contract forfeits all equitable right to the wife's property; even when the property belonged to her before the separation, and has not been reduced into actual possession by the husband; and it will be restored to her by a court of equity.⁶

rendered in another state, in which the legal domicile of the parties is at the time, and according to its laws, even for a cause which is not a ground of divorce by the Massachusetts statutes, and although their marriage took place while they were domiciled in Massachusetts, is valid there and conclusive in a suit concerning the husband's interest or the wife's dower in lands of that commonwealth.

See: *Ross v. Ross*, 129 Mass. 243, 248, 259;

Sewall v. Sewall, 122 Mass. 156;

Burlen v. Shannon, 115 Mass. 438;

Hood v. Hood, 110 Mass. 463;

Hood v. Hood, 93 Mass. (11 Allen) 196;

Clark v. Clark, 62 Mass. (8 Cush.) 385;

Barber v. Root, 10 Mass. 260.

¹ *Clarke v. Lott*, 11 Ill. 105;

Whitsell v. Mills, 6 Ind. 229;

McCreary v. McCreary, 5 Iowa 232;

Hays v. Sanderson, 7 Bush (Ky.) 489, 490;

Webster v. Webster, 58 Me. 139;

Barber v. Root, 10 Mass. 260, 271;

Hunt v. Thompson, 61 Mo. 148;

People v. Hovey, 5 Barb. (N. Y.) 117;

Hull v. Hull, 2 Strobb. (N. C.) Eq. 174;

Miltimore v. Miltimore, 40 Pa. St. 151;

Estate of Kentzinger, 2 Ashm. (Pa.) 265;

Porter v. Porter, 27 Gratt. (Va.) 599.

² *Piper v. May*, 51 Ind. 283.

³ *Wheeler v. Hotchkiss*, 10 Conn. 225, 235;

Hays v. Sanderson, 7 Bush (Ky.) 489, 490.

⁴ *Wheeler v. Hotchkiss*, 10 Conn. 225, 235;

Howey v. Goings, 13 Ill. 95; s.c. 54 Am. Dec. 427;

Doe v. Brown, 5 Blackf. (Ind.) 309;

Barber v. Root, 10 Mass. 260, 271;

Renwick v. Renwick, 10 Paige Ch. (N. Y.) 420, 424;

Branford v. Branford, 4 Oreg. 30;

Flowry v. Beeker, 2 Pa. St. 470;

Estate of Rentzing, 2 Ashm. (Pa.) 455;

Byrne v. Byrne, 3 Tex. 366;

Gould v. Webster, 1 Tyl. (Vt.) 314, 409;

Porter v. Porter, 27 Gratt. (Va.) 599.

⁵ *Schoch's Estate*, 33 Pa. St. 351.

⁶ *Renwick v. Renwick*, 10 Paige Ch. (N. Y.) 420, 424;

Holmes v. Holmes, 4 Barb. (N. Y.) 295, 297.

SEC. 819. **Same — Same — Same — At suit of husband.**—Where a husband obtains an absolute divorce from his wife for a cause other than adultery, he has no interest in the divorced wife's land as tenant by the curtesy, because she becomes entitled to the immediate possession of all her realty the same as if he were dead.¹ In some of the states, however, it is provided by statute that a divorce *a vinculo* for the adultery of the wife does not affect the husband's right to curtesy in her estate of inheritance.²

SEC. 820. **Same—Same—Same—Rights of third persons.**—The destruction of the husband's estate by the curtesy by decree of divorce *a vinculo*, at the suit of the wife, destroys all his interest in her property ;³ and all subsequent assignments by him will convey no greater or better rights in and to such property than he himself has.⁴ If the wife's lands have been improperly assigned by the husband, the decree of divorce will restore the same to her ;⁵ but it is thought that such a decree will not be allowed to affect the interests of third parties which were acquired in good faith of the husband's estate by the curtesy. Thus it was held in *Gillespie v. Worford*,⁶ that a divorce for a cause arising after marriage and not affecting its validity, would not divest the husband's curtesy in the hands of a *bona fide* purchaser prior to the decree of the divorce.

SEC. 821. **Same—Same—4. A mensa.**—A decree of divorce *a mensa et thoro* does not dissolve the marriage, although it separates the parties and establishes separate interests between them ;⁷ therefore, in the absence of statutory provisions, such a decree of divorce will not destroy the estate by curtesy of the husband in the wife's realty.⁸

¹ *Moran v. Somes*, 28 N. E. Rep. 152.

See : *Ante*, § 817.

² *Neb. Comp. Stat.* 1881, c. 25, § 24.

See : *Mass. Pub. Stat.*, c. 146, § 24.

³ See : *Ante*, § 817.

⁴ *Boykin v. Rain*, 28 Ala. 332, 343 ;
s.c. 65 Am. Dec. 349 ;

Starr v. Pease, 8 Conn. 541, 545 ;

Hays v. Sanderson, 7 Bush (Ky.)

489, 490.

Compare : *McConnell v. Wenrich*, 16 Pa. St. 365, 371.

⁵ *Kruger v. Day*, 19 Mass. (2 Pick.) 316.

⁶ 2 Cold. (Tenn.) 632.

⁷ *Dean v. Richmond*, 22 Mass. (5 Pick.) 461, 465.

⁸ *Rochon v. Lecatt*, 2 Stew. (Ala.) 429 ;

In the absence of statutory enactment, or a provision to that effect in the decree, it will not restore to the wife the interest in her real estate.¹

SEC. 822. **Same—By adultery.**—At common law the husband's estate by the curtesy is not forfeited by adultery on the part of the husband.² The husband's estate in the lands of his wife differs in this respect from the estate of the wife in the lands of her husband. The reason for this difference is the fact that the statute of Westminster II.³ expressly ordained the forfeiture of dower on the adultery of the wife, but did not make such misconduct on the part of the husband work a forfeiture of his curtesy.⁴ This rule of the common law has been altered by statutes in several states of the Union so as to make adultery on the part of the husband work a forfeiture of his curtesy.⁵

SEC. 823. **Same—By abandonment of wife.**—At common law the husband does not forfeit his right to curtesy in the lands of his wife by abandoning her and living in adultery with another woman;⁶ but by statutes in many of the states curtesy is lost by willful desertion of the wife.⁷

- Smoot v. Lecatt, 1 Stew. (Ala.) 590;
 Clark v. Clark, 6 Watts & S. (Pa.) 85.
¹ Dean v. Richmond, 22 Mass. (5 Pick.) 461;
 Holmes v. Holmes, 2 Barb. (N. Y.) 297;
 Meehan v. Meehan, 2 Barb. (N. Y.) 377.
² Wells v. Thompson, 13 Ala. 793; s.c. 48 Am. Dec. 76;
 Smoot v. Lecatt, 1 Stew. (Ala.) 590;
 Sidney v. Sidney, 3 Pr. Wms. 276;
 Buckworth v. Thirkell, 3 Bos. & P. 652, note;
 2 Co. Litt. (19th ed.) 241a, Butler's note 170;
 4 Kent Com. (13th ed.) 341;
 3 Prest. Abb., tit. 384.
³ 13 Edw. I., c. 134.
⁴ Wells v. Thompson, 13 Ala. 793; s.c. 48 Am. Dec. 76, 81.
⁵ Kreiger v. Day, 19 Mass. (2 Pick.) 316;
 Barber v. Root, 10 Mass. 260;
 Teague v. Downs, 69 N. C. 280;
 Long v. Graeber, 64 N. C. 431.
⁶ Smoot v. Lecatt, 1 Stew. (Ala.) 590;
 Sidney v. Sidney, 3 Pr. Wms. 276.
 See: *Ante*, § 822.
⁷ In Pennsylvania willful desertion of the wife by the husband for a year or more preceding her death deprives him of his right of curtesy under act of May 4th, 1855.
 Bealor v. Hahn, 117 Pa. St. 169; s.c. 11 Atl. Rep. 776; 9 Cent. Rep. 599; 20 W. N. C. 195;
 Rees v. Waters, 9 Watts (Pa.) 90.
Same—In New York the same principle prevails.
 See: Dumond v. Magee, 4 John. (N. Y.) 318.
Same—"Guilty intent," in willful and malicious desertion, is manifest when, without cause or consent, the husband withdraws from the residence.

unless the desertion be justified by the same cause that would support a decree of divorce *a vinculo matrimonii*, or *a mensa et thoro*.

SEC. 824. **Same—By failure to provide.**—In some of the states, by statutory provision, if a husband wilfully neglects or refuses to provide for his wife for a year or more previous to her death, he thereby forfeits his right to an estate by the curtesy in her lands.¹

SEC. 825. **Same—By bigamy.**—In some of the states it has been provided by statute that the estate of the husband by curtesy in the lands of his wife shall be forfeited on the commission of bigamy.²

SEC. 826. **Same—By wrongful alienation.**—At common law a husband forfeited his estate by the curtesy in his wife's land by wrongful alienation, tending to the disherison of the reversioner or remainderman;³ but to have this effect the conveyance must be a tortious one, as making a feoffment, levying a fine, importing a grant in fee, suffering a common recovery, joining the *mise* in a writ of right, and the like.⁴ Although this rule is still enforced in this country in regard to feoffments,⁵ where-
ever they still obtain, unchanged by statute, yet merely leasing or conveying in fee will not have that effect; such conveyance will not carry a greater interest than the tenant possesses.⁶

Bealor v. Hahn, 117 Pa. St. 169 ;
s.c. 11 Atl. Rep. 776 ; 9 Cent.
Rep. 599 ; 20 W. N. C. 195 ;
McClurg's Appeal, 66 Pa. St. 366 ;
Ingersoll v. Ingersoll, 49 Pa. St.
249.

¹ Such, for instance, as under the Pennsylvania act of May 4th, 1855, § 5 ; P. L. 431.

² See : Md. Rev. Code 1878, art. 72, § 102, p. 807.

³ Wells v. Thompson, 13 Ala. 793 ;
s.c. 48 Am. Dec. 76 ;

French v. Rollins, 21 Me. (8 Shep.)
372 ;

2 Inst. 309 ;

4 Kent Com. (13th ed.) 84.

⁴ Id.

⁵ It has been held that even a feoffment by the husband during the life of the wife will not work a forfeiture, but will give the feoffee an estate for the life of the husband.

Pemberton v. Hicks, 1 Binn. (Pa.) 1.

⁶ See : Boykin v. Rain, 28 Ala. 332 ;
s.c. 65 Am. Dec. 349 ;

Wells v. Thompson, 13 Ala. 79 ;
s.c. 48 Am. Dec. 46 ;

Junction Railroad v. Harris, 9
Ind. 184 ;

Butterfield v. Beall, 3 Ind. 203 ;

Meraman's Heirs v. Caldwell's
Heirs, 8 B. Mon. (Ky.) 32 ; s.c.
46 Am. Dec. 537 ;

SEC. 827. **Same—By attainder of husband of treason or felony.**—At common law a tenant by the curtesy forfeited his estate by felony or attainder of treason;¹ on such attainder of felony or treason, however, the estate was not forfeited to the commonwealth, but passed to the wife and her heirs discharged of the curtesy.²

SECTION IV.—CURTESY UNDER STATUTE.

SEC. 828. Statutes—Generally.

SEC. 829. Same—Construction of statutes.

SEC. 830. Same—Married women's acts.

SEC. 831. Same—Effect of statutes—On curtesy initiate.

SEC. 832. Same—Same—On curtesy consummate.

SECTION 828. **Statutes—Generally.**—The husband's estate by the curtesy in the lands of his wife has been very much modified by statute in this country. This has been done principally by the increase of the power over and management of their property given to married women. The husband's estate by the curtesy in the statutes of some of the states is expressly given,³ and by implication in

French v. Rollins, 21 Me. (8 Shep.) 372;

Dennett v. Dennett, 40 N. H. 505;

Flagg v. Bean, 25 N. H. (4 Fost.) 49;

Grout v. Townsend, 2 Hill (N. Y.) 554;

Johnson v. Bradley, 9 Ired. (N. C.) 362;

Pemberton v. Hicks, 1 Binn. (Pa.) 1;

M'Kee's Lessee v. Pfout, 3 U. S. (3 Dall.) 486; bk. 1 L. ed. 690;

Munnerbyn v. Munnerbyn, 2 Brev. (S. C.) 2;

Miller v. Miller, 1 Meigs (Tenn.) 484.

Compare: French v. Rollins, 21 Me. (8 Shep.) 372;

Koltenbrock v. Cracraft, 36 Ohio St. 584.

The common-law rule was that such a conveyance would forfeit the tenant's estate.

French v. Rollins, 21 Me. (8 Shep.) 372;

Koltenbrock v. Cracraft, 36 Ohio St. 584;

2 Inst. 309;

4 Kent Com. (13th ed.) 84.

This law is now obsolete, and a conveyance in fee, by a tenant by the curtesy, though by indenture duly recorded, and with a covenant of special warranty, is not a forfeiture of the estate.

M'Kee's Lessee v. Pfout, 3 U. S. (3 Dall.) 486; bk. 1 L. ed. 690.

See: *Dennett v. Dennett*, 40 N. H. 505;

Miller v. Miller, 1 Meigs (Tenn.) 184.

¹ *Foster v. Marshall*, 22 N. H. (2 Fost.) 491;

Pemberton's Lessee v. Hicks, 4 U. S. (4 Dall.) 168; bk. 1 L. ed. 785; s.c. 1 Binn. (Pa.) 1.

² *Pemberton's Lessee v. Hicks*, 4 U. S. (4 Dall.) 168; bk. 1 L. ed. 785.

³ Kentucky Rev. Stat. 1871, p. 527, § 1;

Maine Rev. Stat. 1871, p. 758, § 15;

Massachusetts Gen. Stats., c. 108, § 310, p. 538;

Michigan Rev. Stats. 1882, §§ 5770, 5783;

others ;¹ in some states curtesy is expressly abolished,² and abrogated by implication in others ;³ in some of the states curtesy is incidentally mentioned as existing,⁴ while in others no mention is made of it at all ;⁵ and in some of the states the husband's estate by the curtesy never existed.⁶ Where the estate by the curtesy is expressly given by statute, it is sometimes simply declaratory of the common law, as in West Virginia ;⁷ but it is more often expressly modified and made a different estate, as by requiring that birth of issue shall not

Nebraska Comp. L. 1881, pp. 215, 255 ;

New Hampshire Gen. L. 1878, pp. 435, 475 ;

North Carolina Bat. Rev. 1873, pp. 530, 531, 592 ;

Ohio Rev. Stat. 1880, §§ 2852, 3198, 4176, 4177 ;

Oregon Gen. L., c. 64, § 3, p. 788 ;

Vermont Rev. L. 1880, §§ 2229, 2230 ;

West Virginia Rev. Stat. 1879, pp. 20, 25, § 15, p. 556, §§ 17, 18.

¹ Colorado, where the wife may not leave away from her husband more than one-half of her estate without his consent in writing. Colorado Gen. L., c. 64, § 4, p. 614.

Florida, where the husband takes an heir's share. Thomp. Dig. Fla. L., div. II., tit. V., c. 1, § 7.

Georgia, where the wife leaves children. Ga. Code 1873, c. 3, art. 1, § 2448.

² California Civil Code 1881, § 173 ; Florida Dig. 1881, p. 471 ; Illinois Rev. Stat. 1880, c. 41, § 1, p. 425 ;

Indiana Rev. Stat. 1881, § 2482 ; Iowa Rev. Code 1880, § 2440 ;

Shields v. Keys, 24 Iowa 298 ; Kansas Comp. L. 1881, §§ 21, 29 ;

Minnesota Act 1875, c. 40, § 5 ; Stats. 1878, c. 46, § 3 ;

Mississippi Rev. Code 1880, c. 42, § 1170, p. 339 ;

Nevada Comp. L. 1873, § 157.

³ As in Michigan, Tong v. Marvin, 14 Mich. 60. See : Brow v. Clarke, 44 Mich. 309.

⁴ Connecticut Gen. Stat. 1875, p. 392, § 28 ;

Delaware Rev. Code 1874, p. 478, § 1, pp. 479, 484 ;

Maryland Rev. Code 1878, p. 397, § 2, p. 412, §§ 59, 60, p. 807, § 102.

New Jersey Rev. Stat. 1877, p. 638, § 9, p. 639, § 14, p. 298, § 6,

p. 1235, § 2 ;

New York, 4 N. Y. Rev. Stats. (8th ed.), p. 2466, § 20 ; 1 Rev.

Stat. Codes & L. 860, § 20 ;

Pennsylvania Pru. Dig. 1876, p. 1007, § 13, p. 1008, § 23 ;

Rhode Island Pub. Stats. 1882, p. 424, § 14, p. 471, § 3, p. 190, § 8 ;

Tennessee Rev. Stat. 1873, §§ 2486, 3263.

⁵ As in Alabama, Arkansas, Colorado, Georgia, Minnesota, Missouri, and South Carolina.

⁶ In Louisiana the principles of the common law are not recognized, neither do the principles of the civil law of Rome furnish the basis of their jurisprudence. They have a system of jurisprudence peculiar to themselves, adopted by their statutes, which embody much of the civil law, some of the principles of the common law, and, in a few instances, the statutory provisions of other states. This system may be called the civil law of Louisiana, and is peculiar to that state.

Parsons v. Bedford, 28 U. S. (3 Pet.) 433, 450 ; bk. 7 L. ed. 732, 738.

In Texas the common law is declared by statute to be in force, but community of property prevails and curtesy is unknown. Tex. Rev. Stat. 1873, § 3128.

⁷ See : Winkler v. Winkler, 18 W. Va. 455.

be necessary to the vesting of the estate ;¹ by requiring that the wife shall leave children ;² by requiring that the wife shall die seized ;³ by requiring that the wife shall die intestate ;⁴ by providing for forfeiture of the estate for desertion⁵ or bigamy ;⁶ by providing that where the wife shall die leaving issue by a former husband, to whom the estate might descend, that such issue shall hold it discharged of the curtesy of the husband.⁷ Where the husband's estate by the curtesy is expressly abolished by statute another estate is usually given in place of it, as in Illinois⁸ and Iowa,⁹ where the husband has dower like the wife, or in Indiana,¹⁰ where the husband takes an estate in fee-simple of one-third of the lands possessed by his wife at the time of her death ; and in Maine, where the husband takes a life estate in one-third of his wife's lands where she leaves issue, and a life estate in one-half of her lands where there is no issue.¹¹

SEC. 829. **Same — Construction of statutes.**—We have already seen¹² that the common-law estate by the curtesy is not to be considered as abolished except by the express language of the Legislature. Where estate by the curtesy is not expressly given or abolished by the statute it exists as a part of the common law,¹³ in all those states

¹ Michigan, 2 Comp. L. 1857, c. 90, § 30, p. 856 ; Comp. L. 1871, c. 151, § 30.

See : Hill v. Chambers, 30 Mich. 422 ;

Hathon v. Lyon, 2 Mich. 93 ;

Ohio Rev. Stat. 1880, § 4176, p. 1046 ;

Oregon Gen. L. 1872, § 30, p. 588.

² Georgia Code 1873, c. 3, art. 1, § 2484.

³ Ky. Rev. Stat., art. 4, c. 47, p. 23 ; Miss. Code 1871, c. 23, §§ 1786, 1787 ;

W. Va. Rev. Stat. 1879, § 15, p. 502 ;

Wis. Rev. Stat. 1878, c. 98, § 2180, p. 628.

⁴ Ala. Code 1876, tit. 5, c. 1, § 2714 ;

Wis. Rev. Stat. 1876, § 2180.

⁵ Minn. Rev. Stat. 1878, p. 565.

See : Ante, § 823.

⁶ Md. Rev. Code 1878, art. 72,

§ 102, p. 807.

See : Ante, § 825.

⁴ Mich. Rev. Stat. 1882, § 5770 ;

Miss. Code 1871, c. 23, §§ 1786, 1787 ;

Stewart v. Ross, 50 Miss. 776 ;

Neb. Comp. Stat. 1881, c. 23, § 29, p. 215 ;

Forbes v. Sweesy, 8 Neb. 520 ; s.c. 1 N. W. Rep. 571 ;

Ohio Rev. Stat. 1880, § 2229 ;

Tilden v. Barker, 40 Ohio St. 411 ;

Denney v. McCabe, 35 Ohio St. 576.

See : Hershizer v. Florence, 39 Ohio St. 516, 528 ;

Wis. Rev. Stats. 1878, c. 98, § 2180, p. 628.

⁸ Ill. Rev. Stat. 1880, p. 425, § 1.

⁹ Ia. Rev. Stat. 1880, § 2440.

¹⁰ Ind. Rev. Stat. 1881, § 2485.

¹¹ Me. Rev. Stat. 1871, tit. 9, c. 103, § 15, p. 758.

¹² See : Ante, § 713.

¹³ Reaume v. Chambers, 22 Mo. 36, 51 ;

where the common law obtains.¹ The general tendency, however, even in the married women's acts,² is not to abolish the estate by curtesy. In some of the states the estate is expressly preserved by statute, in others it is preserved by construction, while in others still the statutes have the effect to destroy curtesy initiate,³ without depriving the husband of his right to the estate by curtesy consummate in his wife's lands after her death.

SEC. 830. Same — Married women's acts.—The statutes passed by the various states for the more effectual protection of married women, giving them exclusive control and ownership of their property, and providing that they shall hold the same to their sole and separate use, and not subject to the disposal of their husbands, nor be liable for their debts, do not affect the common-law rights of the husband as tenant by the curtesy.⁴ These acts, while they may exclude the husband from any control over the wife's separate property during her life, leave to him the right of curtesy in so much of his wife's estates of inheritance as remains undisposed of by deed and unbequeathed.⁵ Where the statute gives the wife

Denney v. McCabe, 35 Ohio St. 576, 578.

¹ The common law never was in force in Louisiana (*Pearson v. Bedford*, 28 U. S. (3 Pet.) 433, 450; bk. 7 L. ed. 732, 738), and it is questionable whether it ever was in Iowa.

O'Ferrall v. Simplot, 4 Iowa 381, 391.

In Texas the common law is declared to be in force, but community of property prevails.

See: *Tex. Rev. Stat.* 1873, § 3128.

² See: *Post*, § 830.

³ *Naylor v. Field*, 29 N. J. L. (5 Dutch.) 289, 292;

Ross v. Adams, 28 N. J. L. (4 Dutch.) 160;

Porch v. Fries, 18 N. J. Eq. (3 C. E. Gr.) 204;

Johnson v. Cummings, 16 N. J. Eq. (1 C. E. Gr.) 97; s.c. 84 Am. Dec. 142;

Breeding v. Davis, 77 Va. 639; s.c. 46 Am. Rep. 740.

⁴ *Naylor v. Field*, 29 N. J. L. (5 Dutch.) 287;

Ross v. Adams, 28 N. J. L. (4 Dutch.) 160;

Johnson v. Cummings, 16 N. J. Eq. (1 C. E. Gr.) 97; s.c. 84 Am. Dec. 142.

⁵ *Neelly v. Lancaster*, 47 Ark. 175; s.c. 58 Am. Rep. 752;

Bozarth v. Largent, 128 Ill. 95; s.c. 21 N. E. Rep. 218;

Martin v. Robson, 65 Ill. 129; s.c. 16 Am. Rep. 578;

Armstrong v. Wilson, 60 Ill. 226;

Freeman v. Dunn, 45 Ill. 61;

Freeman v. Hartman, 45 Ill. 57; s.c. 92 Am. Dec. 193;

Cole v. Van Riper, 44 Ill. 58;

Luntz v. Greve, 102 Ind. 173;

Keyte v. Perry, 25 Mo. App. 394;

Forbes v. Sweesy, 8 Neb. 520;

s.c. 1 N. W. Rep. 571;

Prall v. Smith, 31 N. J. L. (2 Vr.)

244;

Cushing v. Blake, 30 N. J. Eq. (4

Stew.) 697;

Naylor v. Field, 29 N. J. Eq. (5

Dutch.) 287;

Ross v. Adams, 22 N. J. L. (4

Dutch.) 160;

power to alienate her property either by deed or by will, the husband has an estate by the curtesy subject to be defeated by such alienation.¹

SEC. 831. **Same—Effect of statute—On curtesy initiate.**—A husband's estate by the curtesy does not become a vested interest until consummated by the death of the wife.² Prior to that time his estate is merely initiate,³ and simply a contingent and not a vested estate,⁴ consisting simply of a *status*, which is never a vested right,⁵ and for that reason may be modified or entirely destroyed by statute at any time before it becomes consummate by the death of the wife.⁶ But in the absence of any refer-

- Porch v. Fries, 18 N. J. Eq. (3 C. E. Gr.) 204 ;
 Belford v. Crane, 16 N. J. Eq. (1 C. E. Gr.) 273 ; s.c. 84 Am. Dec. 155 ;
 Bertles v. Nunan, 92 N. Y. 152, 160 ; s.c. 44 Am. Rep. 361 ;
 Hatfield v. Sneden, 54 N. Y. 280 ;
 Barnes v. Underwood, 47 N. Y. 351 ;
 Ransom v. Nichols, 22 N. Y. 110 ;
 Burke v. Valentine, 5 Abb. Pr. (N. Y.) N. S. 164 ; s.c. 52 Barb. (N. Y.) 412, aff'd by Court of Appeals, 6 Alb. L. J. 167 ;
 Vallance v. Bausch, 3 Abb. Pr. (N. Y.) 638 ; s.c. 28 Barb. (N. Y.) 633 ; 17 How. Pr. (N. Y.) 243 ;
 Clark v. Clark, 24 Barb. (N. Y.) 581 ;
 Smith v. Colvin, 17 Barb. (N. Y.) 157 ;
 Hurd v. Cass, 9 Barb. (N. Y.) 366 ;
 Jaycox v. Collins, 26 How. Pr. (N. Y.) 496, 497 ;
 Leach v. Leach, 21 Hun (N. Y.) 381, 382 ;
 Zimmerman v. Schoenfeldt, 3 Hun (N. Y.) 692 ;
 Matter of Winne, 2 Lans. (N. Y.) 21 ; s.c. 1 Id. 508 ;
 Beamish v. Hoyt, 2 Robt. (N. Y.) 307 ;
 Morris v. Morris, 94 N. C. 613 ;
 Houston v. Brown, 7 Jones (N. C.) L. 161 ;
 Leggett v. McClelland, 39 Ohio St. 624 ;
 Bruner v. Briggs, 39 Ohio St. 478 ;
 Houck v. Ritter, 76 Pa. St. 280 ;
 Brone's Admr. v. Bockover, 84 Va. 424 ; s.c. 4 S. E. Rep. 745 ;
 Breeding v. Davis, 77 Va. 639 ; s.c. 46 Am. Rep. 740 ;
 Kingsley v. Smith, 14 Wis. 360.
¹ Stewart v. Ross, 50 Miss. 776, 791 ;
 Porch v. Fries, 18 N. J. Eq. (3 C. E. Gr.) 204, 208.
² Wheeler v. Hotchkiss, 10 Conn. 225, 230 ;
 Hill v. Chambers, 30 Mich. 422, 427 ;
 Matter of Winne, 2 Lans. (N. Y.) 21, 24 ;
 Porter v. Porter, 27 Gratt. (Va.) 599, 606 ;
 Jones v. Davies, 7 Hurl. & N. 507, 508.
³ Rice v. Hoffman, 35 Md. 344, 350. See : *Ante*, § 715.
⁴ Porter v. Porter, 27 Gratt. (Va.) 599, 606.
⁵ See : Levins v. Sleator, 2 Greene (Iowa) 604, 609 ;
 Reiff v. Horst, 55 Md. 42.
⁶ See : Duncan v. Terre Haute, 85 Ind. 108 ;
 Strong v. Clem, 12 Ind. 37, 41 ; s.c. 74 Am. Dec. 200 ;
 Hill v. Chambers, 30 Mich. 422, 427 ;
 Hathon v. Lyon, 2 Mich. 93, 95 ;
 Thurber v. Townsend, 22 N. Y. 517 ;
 Billings v. Baker, 15 How. Pr. (N. Y.) 525, aff'd 28 Barb. (N. Y.) 343, 346 ;
 Matter of Winne, 2 Lans. (N. Y.) 21, 26 ;
 Denny v. McCabe, 35 Ohio St. 576, 580 ;
 Mellinger v. Bausman, 45 Pa. St. 522, 529 ;
 Sharpless v. West, 1 Grant (Pa.) 257, 260 ;

ence specifically in the statute to existing rights or conditions, it will be applied only to those rights and conditions which arise after its enactment,¹ because all statutes are presumptively prospective, and affect only interests arising after their passage;² but they are sometimes given retroactive force;³ such as statutes which go to form existing rights and are in furtherance of an existing remedy, by curing defects and by adding to existing obligations, when just, reasonable, and conducive to the good welfare, even though they may in some degree infringe upon vested rights.⁴

Kingsley v. Smith, 14 Wis. 360, 365.

¹ *Porter v. Bowers*, 55 Md. 213, 215.

² See: *Aldridge v. Tuscumbia, C. & D. Ry. Co.*, 2 Stew. & P. (Ala.) 199; s.c. 23 Am. Dec. 307;

Plumb v. Sawyer, 21 Conn. 351, 355;

Re Tuller, 79 Ill. 99;

Noel v. Ewing, 9 Ind. 37, 55;

Knowlton v. Redenbaugh, 40 Iowa 114;

Cumberland v. Washington County Court, 10 Bush (Ky.) 564;

Thornton v. McGrath, 1 Duv. (Ky.) 349;

Rogers v. Greenbush, 58 Me. 390;

Herbert v. Gray, 38 Md. 529;

Williams v. Johnson, 30 Md. 500;

Clark v. Baltimore, 29 Md. 277;

Hopkins v. Frye, 2 Gill (Md.) 269, 365;

Medford v. Learned, 16 Mass. 215;

Harrison v. Metz, 17 Mich. 377;

Garrett v. Beaumont, 24 Miss. 377;

Brown v. Wilcox, 22 Miss. (14 Smed. & M.) 127;

State v. Ferguson, 62 Mo. 77;

State v. Auditor, 41 Mo. 13, 25;

Colony v. Dublin, 32 N. H. 432;

Baldwin v. Newark, 38 N. J. L. (9 Vr.) 158;

Drake v. Gilmore, 52 N. Y. 389;

Norris v. Beyea, 13 N. Y. 273;

Bay v. Gage, 36 Barb. (N. Y.) 447;

Sayre v. Wisner, 8 Wend. (N. Y.) 661;

Dash v. Von Kleeck, 7 John. (N. Y.) 477;

Merwin v. Ballard, 66 N. C. 398;

Allbyer v. State, 10 Ohio St. 588;

Haley v. City of Philadelphia, 68 Pa. St. 45; s.c. 8 Am. Rep. 153;

Price v. Mott, 52 Pa. St. 315;

Tyson v. School Directors, 51 Pa. St. 9;

Clawson v. Hutchinson, 11 S. C. 323;

Graham v. Graham, 13 Rich. (S. C.) 277;

Sturgis v. Hull, 48 Vt. 302;

State v. Atwood, 11 Wis. 422;

Marsh v. Higgins, 9 Mon. & G. (C. B.) 551, 567; s.c. 67 Eng. C. L. 551;

Moon v. Durden, 2 Exch. 22, 41.

³ *Curtis v. Leavitt*, 15 N. Y. 9;

Town of Danville v. Pace, 25 Gratt. (Va.) 1; s.c. 18 Am. Rep. 663.

⁴ *Oriental Bank v. Freeze*, 18 Me. 109;

Rich v. Flanders, 39 N. H. 304;

Syracuse City Bank v. Davis, 16 Barb. (N. Y.) 188;

Schenly v. Commonwealth, 36 Pa. St. 29;

Bleakney v. Farmers & Mechanics' Bank, 17 Serg. & R. (Pa.) 64;

Tate v. Stoolitzfoos, 16 Serg. & R. (Pa.) 35;

Underwood v. Lilly, 10 Serg. & R. (Pa.) 101;

Bell v. Perkins, Peck. (Tenn.) 261, 266;

Townsend v. Townsend, Peck. (Tenn.) 1;

Langdon v. Strong, 2 Vt. 234;

Town of Danville v. Pace, 27 Gratt. (Va.) 1; s.c. 18 Am. Rep. 663;

Watson v. Mercer, 33 U. S. (8 Pet.) 88; bk. 8 L. ed. 876;

Wilkinson v. Leland, 27 U. S. (2 Pet.) 627; bk. 7 L. ed. 542.

SEC. 832. **Same — Same — On curtesy consummate.**—The estate of a husband by curtesy becomes consummate on the death of the wife, is a vested interest, and cannot be modified or taken away by statutory enactments. Such an estate is regarded as an estate acquired by descent,¹ and, like estates by descent, is to be determined by the law existing at the time of the wife's death.

SECTION V.—WHO MAY BE TENANTS BY THE CURTESY.

SEC. 833. Tenants by the curtesy—Generally.

SEC. 834. Same—Alienage.

SEC. 835. Same—Same—Naturalization.

SEC. 836. Same—Attainder of treason or felony.

SECTION 833. **Tenants by the curtesy—Generally.**—At common-law, as a general rule, all persons are capable of holding freehold estates ;² the principal exception to this rule being the disability arising from alienage,³ and attainder of treason or felony.⁴ As to who may be tenant by the curtesy, it is sufficient to observe that any one who may hold a freehold estate may acquire an estate by the curtesy.

SEC. 834. **Same—Alienage.**—At common law an alien cannot take or hold an estate in lands by operation of law,⁵ although he may by act of the parties, or by purchase or devise,⁶ and hold it against all the world until

¹ See : *Watson v. Watson*, 13 Conn. 83, 86 ;

Rice v. Hoffman, 35 Md. 344, 350 ;

Brown v. Clark, 44 Mich. 309,

311 ; s.c. 6 N. W. Rep. 679 ;

Stewart v. Ross, 50 Miss. 776,

790.

² See : *Bancroft v. Consen*, 95 Mass. (13 Allen) 50 ;

Harmon v. James, 15 Miss. (7

Smed. & M.) 111 ; s.c. 45 Am.

Dec. 296 ;

Huss v. Stephens, 52 Pa. St. 282 ;

Hileman v. Bouslaugh, 13 Pa.

St. 344 ; s.c. 53 Am. Dec. 474 ;

1 Bl. Com. 466 ;

1 Co. Litt. (19th ed.) 2.

³ See : *Ante*, § 813 ;

Post, § 834.

⁴ See : *Ante*, §§ 792, 827 ;

Post, § 836.

⁵ See : *Apthorp v. Backus*, Kirby (Conn.) 407 ; s.c. 1 Am. Dec. 26 ;

Judd v. Lawrence, 55 Mass. (1

Cush.) 531, 534 ;

Slater v. Nason, 32 Mass. (15

Pick.) 345, 349 ;

Fox v. Southack, 12 Mass. 143 ;

Montgomery v. Dorion, 7 N. H.

475 ;

Jackson ex d. Smith v. Adams, 7

Wend. (N. Y.) 367 ;

Fairfax v. Hunter's Lessee, 11 U.

S. (7 Cr.) 603 ; bk. 3 L. ed.

Compare : *Lumb v. Jenkins*, 100

Mass. 527.

⁶ See : *Kershaw v. Kelsey*, 100

Mass. 561, 574 ;

Fox v. Southack, 12 Mass. 142 ;

Wadsworth v. Wadsworth, 12

N. Y. 376 ;

office found.¹ Consequently, at common law, an alien cannot be a tenant by the curtesy.² The law will not do a useless or vain thing,³ and therefore will not give to the husband an estate which he cannot hold.⁴ The rule of the common law has been changed by statute in most, if not all, the states.

SEC. 835. **Same — Same — Naturalization.**—The disability of alienage is removed by naturalization, because this makes the alien a citizen. But to enable an alien to hold lands by the curtesy the naturalization must be complete, because he does not become a citizen until actually or completely naturalized.⁵ We have already seen that where an alien husband makes the preliminary declaration of his intention to become a citizen before the death of his wife, and completes his naturalization after her death, that he is not entitled to an interest in her

- Doe ex d. Gouverneur's Heirs v. Robertson*, 24 U. S. (11 Wheat.) 332; bk. 6 L. ed. 488;
Orr v. Hodgson, 17 U. S. (4 Wheat.) 453, 460; bk. 4 L. ed. 613, 615;
Craig v. Radford, 16 U. S. (3 Wheat.) 594, 597; bk. 4 L. ed. 467;
Craig v. Leslie, 16 U. S. (3 Wheat.) 563, 589; bk. 4 L. ed. 460, 466;
Martin, Heir of Fairfax v. Hunter's Lessee, 14 U. S. (1 Wheat.) 304; bk. 4 L. ed. 97;
Fairfax's Devisee v. Hunter's Lessee, 11 U. S. (7 Cr.) 603, 630; bk. 3 L. ed. 453, 462;
Knight v. Duplessis, 2 Ves. 360; 1 Co. Litt. (19th ed.) 2;
Powell on Dev. 315.
¹ See: *Kershaw v. Kelsey*, 100 Mass. 561, 574;
Judd v. Lawrence, 55 Mass. (1 Cush.) 531, 534;
Waugh v. Riley, 49 Mass. (8 Met.) 290;
Foss v. Crisp, 37 Mass. (20 Pick.) 121, 124;
Wilbur v. Tobey, 33 Mass. (16 Pick.) 177, 179, 180;
Fox v. Southack, 12 Mass. 142, 143;
Storer v. Batson, 8 Mass. 431;
Sheaffe v. O'Neil, 1 Mass. 256;
Goodrich v. Russell, 42 N. Y. 177;
 43
Wadsworth v. Wadsworth, 12 N. Y. 376;
Jackson ex d. Smith v. Adams, 7 Wend. (N. Y.) 367, 368;
Doe ex d. Gouverneur's Heirs v. Robertson, 24 U. S. (11 Wheat.) 332; bk. 6 L. ed. 488;
Craig v. Radford, 16 U. S. (3 Wheat.) 594; bk. 4 L. ed. 467;
Fairfax's Devisee v. Hunter's Lessee, 11 U. S. (7 Cr.) 602, 603; bk. 3 L. ed. 453;
 2 Kent Com. (13th ed.) 54, 61.
² *Foss v. Crisp*, 37 Mass. (20 Pick.) 121;
Hatfield v. Sneden, 54 N. Y. 280, 285;
Copeland v. Sauls, 1 Jones (N. C.) L. 70;
Reese v. Waters, 4 Watts & S. (Pa.) 145.
 See: *Ante*, § 813.
Compare: *Mussey v. Pierre*, 24 Me. 559;
Doe ex d. Miller v. Rogers, 1 Car. & K. 390; s.c. 47 Eng. C. L. 390;
Calvin's Case, 7 Co. 254.
³ *Foss v. Crisp*, 37 Mass. (20 Pick.) 121, 124;
Slater v. Nason, 32 Mass. (15 Pick.) 345, 349.
⁴ *Id.*
 See: *Ante*, § 813.
⁵ *Foss v. Crisp*, 37 Mass. (20 Pick.) 121, 177.

land as a tenant by the curtesy.¹ The reason for this is the fact that the naturalization does not relate back so as to remove the disability from the time of filing the preliminary declaration.²

SEC. 836. **Same—Attainder of treason or felony.**—At common law, persons attainted of treason or felony cannot be tenants by the curtesy ; for, being *extra legem positi*, they are become incapable of deriving any benefit from the law ; and, by consequence, of this in particular, which intended to give the inheritance only to those who were capable of holding it during their lives.³ The matter is regulated by statute in this country.

SECTION VI.—WHAT PROPERTY SUBJECT TO CURTESY.

- SEC. 837. Ancient rule.
- SEC. 838. At common law.
- SEC. 839. In estates-tail.
- SEC. 840. Same—On failure of issue.
- SEC. 841. Same—In this country.
- SEC. 842. In separate estate—At common law.
- SEC. 843. Same—Under statute.
- SEC. 844. In equitable estates of inheritance.
- SEC. 845. Same—Intention of grantor.
- SEC. 846. In estate of former husband.
- SEC. 847. In lands recovered.
- SEC. 848. In lands deeded to which is taken in wife's name.
- SEC. 849. In lands of which wife seized by direct gift.
- SEC. 850. In lands conveyed to wife by husband.
- SEC. 851. In lands conveyed to trustee—By husband.
- SEC. 852. Same—By the wife.
- SEC. 853. Same—By third person.
- SEC. 854. Same—Same—Express exclusion of husband.
- SEC. 855. In lands held by guardian.
- SEC. 856. In wild lands.
- SEC. 857. In lands cast by descent.
- SEC. 858. In lands devised in trust.
- SEC. 859. In lands of beneficiary under will.
- SEC. 860. In mortgaged estate.
- SEC. 861. In trust estate.
- SEC. 862. In fee with conditional limitation.
- SEC. 863. In fees determinable.

¹ See : *Ante*, § 813.

² *Foss v. Crisp*, 37 Mass. (20 Pick.) 121, 126 ;

³ Bro. Ab. Curtesy, 15 ;

1 Cruise Real Prop. (4th ed.) 145, § 28.

See : *Ante*, §§ 792, 827.

- SEC. 864. In estate in remainder.
 SEC. 865. In estate in reversion.
 SEC. 866. In lands held in joint tenancy.
 SEC. 867. In estates in coparcenary.
 SEC. 868. In merged estates.
 SEC. 869. In money when.
 SEC. 870. In incorporeal hereditaments.

SECTION 837. **Ancient rule.**—It appears from Glanville¹ that the right to curtesy was originally confined to the *maritagium*² of the wife. But the right was afterwards extended, so that when Bracton wrote the right attached to all lands whereof the wife was seized, whether she acquired them by inheritance, or as a *maritagium*, or by donation,³ and Littleton's description of curtesy extends to all estates in fee-simple.⁴

SEC. 838. **At common law.**—At common law, the husband was entitled to curtesy in all the real estate of which the wife died seized, whether such estate was separate estate or not,⁵ whether seized in fee-simple or fee-tail in possession;⁶ and this is the general rule in the United States.⁷ In order that curtesy may attach, the estate of the wife must be a freehold of inheritance;⁸ but it applies to qualified as well as absolute estates in fee.⁹ The estate must also be an estate in possession, because there can be no curtesy in an estate in reversion expectant on a life interest or other estate of freehold.¹⁰ If a woman, tenant in

¹ Glanv., lib. 7, c. 18.

² As to *maritagium*, see: *Ante*, § 272.

³ Bract. 437b, 8a.

⁴ 1 Co. Litt. (19th ed.) 29a, *et seq.*

⁵ See: *Winkler v. Winkler*, 18 W. Va. 455.

⁶ *Barker v. Barker*, 2 Sim. 249;

2 Bl. Com. 126;

1 Co. Litt. (19th ed.) 29a, *et seq.*;

Id. 40a, *et seq.*

⁷ See: *Nesbitt v. Trindle*, 64 Ind. 183;

Matter of Creiger, 1 Barb. Ch. (N. Y.) 596; s.c. 45 Am. Dec. 416;

Buchanan v. Duncan, 40 Pa. St. 82;

Dubs v. Dubs, 31 Pa. St. 149;

Beirne v. Beirne, 33 W. Va. 663; s.c. 11 S. E. Rep. 46;

Winkler v. Winkler, 18 W. Va. 455.

In *Kentucky*, a husband never actually seized of land of the wife, during coverture, has no interest whatever in it after her death.

Petty v. Malier, 15 B. Mon. (Ky.) 591.

^{*} *Mullany v. Mullany*, 4 N. J. Eq. (3 H. W. Gr.) 16; s.c. 31 Am. Dec. 238;

Simmons v. Gooding, 5 Ired. (N. C.) Eq. 328;

Sumner v. Partridge, 2 Atk. 47;

Mildway's Case, 6 Co. 40;

Boothby v. Vernon, 9 Mod. 147.

⁹ *Paine's Case*, 8 Co. 34;

4 Kent Com. (13th ed.) 82.

¹⁰ 2 Bl. Com. 127;

Watk. Desc. (4th ed.) 111, 121.

See: *Post*, § 888.

tail after possibility of issue extinct, takes a husband, has issue, and the fee-simple descends upon her, the husband will be entitled to curtesy ; because, by the descent of the fee, the estate-tail after possibility was merged, and the wife became tenant in fee-simple executed.¹

SEC. 839. *In estates-tail.*—Conditional fees² were subject to curtesy before the statute *De Donis*,³ and when that statute converted them into estates-tail,⁴ the husbands were allowed to be tenants by the curtesy in estates-tail also.

Where lands were given, before the statute *De Donis*, to a man and a woman, and the heirs of their bodies to be begotten, the course of descent was, in some degree, changed by their having issue ; for then the lands became descendible to all the heirs of the donee's body, and also liable to the curtesy of a second husband. To prevent this, it was enacted by the statute *De Donis* that where lands were given in this manner, a second husband should not be tenant by the curtesy.⁵

SEC. 840. *Same—On failure of issue.*—It was formerly doubted whether a man could be tenant by the curtesy of an estate-tail, after failure of issue capable of inheriting the estate, which in fact determined the estate-tail, and the donor's right to the reversion accrued ; but it is now well established that in a case of this kind the husband has an estate by the curtesy.⁶ Thus at common law, if lands were given to a woman and the heirs of her body, and she took a husband and had issue, and the issue died, and the wife then died without issue, whereby the inheritance of the land reverted to the donor, the estate of the wife

¹ Bro. Ab. Estate, 25.

² See : *Ante*, bk. III., c. X., § 431, *et seq.*

³ See : *Ante*, § 456.

⁴ See : *Ante*, bk. III., c. XIII., § 452, *et seq.*

⁵ Paine's Case, 8 Co. 35b ;

2 Inst. 336.

In Vermont, since the passage of the act of October 31, 1823, a husband does not become tenant by the curtesy of the land

of his deceased wife, held by her in fee-tail.

Giddings v. Cox, 31 Vt. 607.

Littleton's description of curtesy is confined to women seized as heirs in special tail. There can be no doubt, however, but that the husband of a woman donee in special tail would be also entitled to curtesy.

1 Cruise Real Prop. (4th ed.) 146.

⁶ 1 Cruise Real Prop. (4th ed.) 146.

was determined by the failure of issue, and yet the husband was entitled to curtesy ; for that was tacitly implied in the gift. The estate by the curtesy was not derived merely out of the estate of the wife, but was given to the husband by the privilege and benefit of the law ; for, as soon as the husband had issue, his title became initiate, and could not afterwards be defeated by the death of the issue, which, being the act of God, ought not to turn to his prejudice.¹

SEC. 841. **Same—In this country.**—In this country estate by the curtesy is an incident so inseparably annexed to estates-tail that it cannot be restricted by any proviso or condition whatever, in those states where an estate-tail is still recognized,² and it has not been otherwise provided by statute. The matter is now regulated by statute in most, if not all, of the states. Thus, in Vermont, there has been no curtesy in an estate-tail since the passage of the act of October 31, 1823, which, by expressly mentioning curtesy in estates in fee-simple, excluded the ordinary common-law rule ;³ and the fact that the statute converts the estate-tail into a fee-simple in the hands of the issuing tail does not entitle the husband of the wife in tail to curtesy, because the change in the character of the estate does not take place during coverture, and while the wife still was seized.⁴

SEC. 842. **In separate estate—At common law.**—At common law the husband's curtesy is one of the legal incidents of the wife's estate of inheritance, and he will not be excluded from rights in property springing from the marital relation except by words that leave no doubt of the intention of the parties to deprive him of such rights,⁵ and therefore the husband will be tenant by the curtesy

¹ Cruise Real Prop. (4th ed.) 162, 163 ;
Paine's Case, 8 Rep. 34 ;

1 Inst. 30a.

² See : 6 Co. 41a ;
1 Inst. 224.

³ Giddings v. Cox, 31 Vt. 607.

⁴ Haynes v. Bourn, 42 Vt. 686.

⁵ Cushing v. Blake, 30 N. J. Eq. (3
Stew.) 689 ;
Douglas v. Cruger, 80 N. Y. 15 ;
Hardy v. Van Harlingen, 7 Ohio

St. 208 ;

Ege v. Medlar, 82 Pa. St. 86 ;

Stokes v. McKibben, 13 Pa. St.
267 ;

Baker v. Heiskell, 1 Coldw.
(Tenn.) 642 ;

Frazer v. Hightower, 12 Heisk.
(Tenn.) 94 ;

Carter v. Dale, 3 Lea (Tenn.)
710 ; s.c. 31 Am. Rep. 660 ;

Burnet v. Davis, 2 Pr. Wms. 316.

in his wife's separate estate, notwithstanding the fact that he is cut off from any participation in the rents and profits during coverture.¹

SEC. 843. *Same—Under statute.*—Estate by curtesy in the separate estate of the wife remains in the husband, unimpaired by statutes for the better securing of property of married women, which declare that she shall hold the property to her sole and separate use, and that it shall not be subject to the disposal of her husband, nor be liable for his debts.²

¹ *Payne v. Payne*, 11 B. Mon. (Ky.) 138 ;

Comer v. Chamberlain, 88 Mass. (6 Allen) 166 ;

Tremmel v. Kleiboldt, 75 Mo. 225, affirmed 6 Mo. App. 549 ;

Cushing v. Blake, 30 N. J. Eq. (3 Stew.) 689 ;

Johnson v. Cummins, 16 N. J. Eq. (1 C. E. Gr.) 97 ; s.c. 84 Am. Dec. 142 ;

Johnson v. Fritz, 44 Pa. St. 449 ;

Dubs v. Dubs, 31 Pa. St. 149 ;

Wightman v. Pettis, 29 Pa. St. 280, 283 ;

Tillinghast v. Coggeshall, 7 R. I. 383 ;

Stovall v. Austin, 16 Lea (Tenn.) 700 ;

Carter v. Dale, 3 Lea (Tenn.) 710 ; s.c. 31 Am. Rep. 660 ;

Steadman v. Pulling, 3 Atk. 423 ;

De Hart v. Dean, 2 McCa. 60 ;

Morgan v. Morgan, 5 Madd. 248.

Compare : *Post*, § 873.

The contrary doctrine, however, is held in some of the cases. Thus in *Beecher v. Hicks*, 5 Lea (Tenn.) 207, where land was conveyed to a married woman for her sole and separate use, and to her children, and she died leaving children, it was held that the husband took no estate of curtesy. In *Haight v. Hall*, 74 Wis. 152 ; s.c. 42 N. W. Rep. 109 ; 3 L. R. A. 857, it was held that a deed to a married woman, "to her sole and separate use and free from the interference or control of her said husband or any husband, and her heirs and assigns, to her and their only proper use and benefit forever," must be held

to defeat a right to curtesy in the premises on the grantee's death, where by the statute of the state a married woman could hold real estate as if unmarried ; since the restriction in the grant can have no force whatever given to it unless the intention was to exclude the estate by the curtesy.

See, also : *Post*, §§ 873, 874.

Words which simply create a separate estate in the wife during coverture, or which merely deprive the husband of any right to make the estate responsible for his debts, or to control it during coverture, will not be sufficient to deprive him of the right of curtesy.

Jones v. Brown, 1 Md. Ch. 191 ;

Hatfield v. Sneden, 54 N. Y. 280 ;

Matter of Winne, 2 Lans. (N. Y.) 21, 508 ;

Carter v. Dale, 3 Lea (Tenn.) 710 ; s.c. 31 Am. Rep. 660 ;

Sayers v. Wall, 26 Gratt. (Va.) 354.

Same—Provisions that do not exclude.—Thus a deed to a married woman, habendum "to her, her heirs and assigns, to her and their sole use, benefit, and behoof," will not exclude the husband's curtesy.

De Hart v. Dean, 2 McCa. D. C. 60 ; s.c. 1 S. & B. 269.

And where a testator devises real estate to his daughters for their sole and separate use, to pass at their death directly to their children, the daughters' husbands are entitled to curtesy.

Stovall v. Austin, 16 Lea (Tenn.) 700.

² *Johnson v. Cummins*, 16 N. J. Eq.

SEC. 844. In equitable estates of inheritance.—Originally curtesy could not be claimed in an estate of which the wife had a *cestui que use*; but now a husband is entitled to curtesy in the wife's equitable estates of inheritance, if the requisites of such a title in legal estates existed.¹ And this is true even in those equitable estates which are granted to the sole and separate use of the wife² where not dis-

- (1 C. E. Gr.) 97; s.c. 84 Am. Dec. 142.
 See: *Cushing v. Blake*, 30 N. J. Eq. (3 Stew.) 697;
Belford v. Crane, 16 N. J. Eq. (1 C. E. Gr.) 273; s.c. 84 Am. Dec. 155;
Johnson v. Fritz, 44 Pa. St. 449.
 A contrary opinion was held in the construction of a New York married women's statute in *Billings v. Baker*, 28 Barb. (N. Y.) 343; but the decided weight of authority in that state is adverse to the decision in *Billings v. Baker*, *supra*, and in accordance with the views expressed in the text.
Vallance v. Bausch, 28 Barb. (N. Y.) 633;
Clark v. Clark, 24 Barb. (N. Y.) 581;
Smith v. Colvin, 17 Barb. (N. Y.) 157;
Hurd v. Cass, 9 Barb. (N. Y.) 366.
 The better opinion is said in *Johnson v. Cummins*, 16 N. J. Eq. (1 C. E. Gr.) 97; s.c. 84 Am. Dec. 142, to be that the estate remains in the husband unaffected by the statute. This is in accordance with the clearly expressed opinion of Mr. Justice Vredenburg, and seems to be the necessary result of the opinion of the chief justice in *Naylor v. Field*, 29 N. J. L. (5 Dutch.) 287, and *Ross v. Adams*, 28 N. J. L. (4 Dutch.) 160.
¹ *Payne v. Payne*, 11 B. Mon. (Ky.) 138;
Rawlings v. Adams, 7 Md. 54;
Dugan v. Gittings, 3 Gill (Md.) 138; s.c. 43 Am. Dec. 306;
Houghton v. Hapgood, 30 Mass. (13 Pick.) 154;
Taylor v. Smith, 54 Miss. 50;
Rabb v. Griffin, 26 Miss. 597;
Baker v. Nall, 59 Mo. 268;
Alexander v. Warrance, 17 Mo. 228;
Cushing v. Blake, 30 N. J. Eq. (3 Stew.) 689;
Adair v. Lott, 3 Hill (N. Y.) 182;
Duncomb v. Duncomb, 1 John. Ch. (N. Y.) 508; s.c. 7 Am. Dec. 504;
Forbes v. Smith, 5 Ired. (N. C.) Eq. 369; s.c. 49 Am. Dec. 452;
Sentill v. Robeson, 2 Jones (N. C.) Eq. 510;
Gilmore v. Burch, 7 Oreg. 374; s.c. 33 Am. Rep. 710;
Dubs v. Dubs, 31 Pa. St. 149;
Clepper v. Livergood, 5 Watts (Pa.) 113;
Shoemaker v. Walker, 2 Serg. & R. (Pa.) 554;
Nightingale v. Hidden, 7 R. L. 115;
Tillinghast v. Coggeshall, 7 R. L. 383;
Withers v. Jenkins, 14 S. C. 597;
Carter v. Dale, 3 Lea (Tenn.) 710; s.c. 31 Am. Rep. 660;
Baker v. Heiskell, 1 Coldw. (Tenn.) 641;
Davis v. Mason, 26 U. S. (1 Pet.) 503, 508; bk. 7 L. ed. 241;
Fletcher v. Ashburner, 1 Bro. C. C. 497, 499;
Cooper v. Macdonald, L. R. Ch. Div. 288; s.c. 23 Moak's Eng. Rep. 581;
Morgan v. Morgan, 5 Madd. 408;
Tremmel v. Kleiboldt, 75 Mo. 225; s.c. 6 Mo. App. 549;
Watts v. Ball, 1 Pr. Wms. 109;
Robinson v. Codman, 1 Sumn. C. C. 128;
Sweetapple v. Bindon, 2 Vern. 536;
 4 Kent Com. (13th ed.) 31.
² *Sentill v. Robeson*, 2 Jones (N. C.) Eq. 510;
Carter v. Dale, 3 Lea (Tenn.) 710; s.c. 31 Am. Rep. 660;
Nightingale v. Hidden, 7 R. L. 115;
Tillinghast v. Coggeshall, 7 R. L. 383.

posed of by deed or by will ;¹ but the equitable estate must be a several one, or else held under a tenancy in common, and must not be one of which the wife was seized or possessed jointly with any other person or persons.² Actual possession of the estate, or the receipt of rents, issue, and profits, by the wife, or possession by her trustee for her benefit, is considered as such seisin of the equitable estate as is equivalent to legal seisin and sufficient to support the right of curtesy.³ The husband will not be entitled to curtesy in a mere equitable right ;⁴ thus the husband is not entitled to curtesy in the pre-emption rights of the wife in public lands of the United States.⁵

SEC. 845. **Same—Intention of grantor.**—The husband will not be entitled to curtesy, however, in an equitable estate of the wife, where it is manifest from the deed of the grantor that it was the intention to exclude the husband from such equitable estate ;⁶ but it has been held that a husband is entitled to curtesy in lands conveyed to trustees

Compare : Moore v. Webster, L. R. 23 Eq. 267 ;

Appleton v. Rowley, L. R. 8 Eq. 139, and cases cited in note 2.

¹ Cooper v. Macdonald, L. R. 7 Ch. Div. 288 ; s.c. 23 Moak's Eng. Rep. 581.

Compare : Post, § 873.

² 2 Co. Litt. (19th ed.) 183a.

See : Post, §§ 866, 881.

³ Rawlings v. Adams, 7 Md. 54 ; Houghton v. Hapgood, 30 Mass. (13 Pick.) 154 ;

Alexander v. Warrance, 17 Mo. 228 ;

Cushing v. Blake, 30 N. J. Eq. (3 Stew.) 689 ;

Duncomb v. Duncomb, 1 Johns. Ch. (N. Y.) 508 ; s.c. 7 Am. Dec. 504 ;

Forbes v. Smith, 5 Ired. (N. C.) Eq. 369 ; s.c. 49 Am. Dec. 432 ;

Sentill v. Robeson, 2 Jones (N. C.) Eq. 510 ;

Clepper v. Livergood, 5 Watts (Pa.) 113 ;

Nightingale v. Hidden, 7 R. I. 115 ;

Tillinghast v. Coggeshall, 7 R. I. 383 ;

Carter v. Dale, 3 Lea (Tenn.) 710 ; s.c. 31 Am. Dec. 660 ;

Davis v. Mason, 26 U. S. (1 Pet.) 503 ; bk. 7 L. ed. 239 ;

Robinson v. Codman, 1 Sumn. C. C. 128.

⁴ **In estate in equity.**—Thus it is said in Sentill v. Robeson, 2 Jones (N. C.) Eq. 510, that "a husband is entitled to curtesy in trust or other equitable estates of his wife. This means an express trust—one by the consent of the parties so as to give an estate in equity as distinguished from a right in equity."

⁵ McDaniel v. Grace, 15 Ark. 455-465.

See : Post, § 879.

⁶ Monroe v. Van Meter, 100 Ill. 347 ; Pool v. Blakie, 53 Ill. 495, 500 ;

Clark v. Clark, 24 Barb. (N. Y.) 582 ;

Rigler v. Cloud, 14 Pa. St. 361 ; Stokes v. McKibben, 13 Pa. St. 207 ;

Carter v. Dale, 3 Lea (Tenn.) 710 ; s.c. 31 Am. Rep. 660 ;

Hearle v. Greenback, 3 Atk. 716 ; Bennett v. Davis, 2 Pr. Wms. 316.

for the wife's separate use by a deed expressly excluding her husband from any control.¹

SEC. 846. **In estate of former husband.**—We have already seen² that where a wife dies leaving children by a deceased husband, also another husband, and children by him, surviving her, this husband shall take as tenant by the curtesy so much of the real estate left by the wife as may be inherited by the children begotten by him.³

SEC. 847. **In lands recovered.**—Where, by a decree of a court of equity, a deed from a woman to her affianced husband, which was procured by the latter through undue influence, is annulled after marriage, the husband's right to tenancy by curtesy re-attaches.⁴ Where a husband and wife attempted to bar an estate-tail of the latter by process provided by statute, and the wife died before the transaction was properly completed, the consideration of the conveyance being merely nominal, it was held that, whether the act was a mere nullity, or whether an equitable estate in fee resulted, the husband was entitled to his curtesy.⁵

SEC. 848. **In lands deed to which is taken in wife's name.**—The husband will be entitled to an estate by the curtesy in lands of which the wife becomes seized during coverture by deed in her own name, and as her own property, either on purchase by her husband, or by a parent;⁶ because such purchase is deemed *prima facie*, as intended to be a settlement or provision for the wife by the husband,⁷ or as an advancement⁸ by the parent.

¹ Cochran v. O'Hern, 4 Watts & S. (Pa.) 95; s.c. 39 Am. Dec. 60.

² See: *Ante*, § 756.

³ Kingsley v. Smith, 14 Wis. 360; Paine's Case, 8 Co. 34b.

⁴ Gilmore v. Burch, 7 Oreg. 374; s.c. 33 Am. Rep. 710.

⁵ Pierce v. Hakes, 23 Pa. St. (11 Har.) 231.

Mutual Fire Ins. Co. v. Deale, 18

Md. 26; s.c. 79 Am. Dec. 673;

Curtis v. Fox, 47 N. Y. 299.

See: Schindel v. Schindel, 12 Md. 108, 121; s.c. Ib. 294, 312;

Wright v. Wright, 2 Md. 429,

453, 454; s.c. 56 Am. Dec. 723;

Reed v. Reed, 52 N. Y. 650;

Phillips v. Wooster, 36 N. Y. 412;

Borst v. Spelman, 4 N. Y. 284.

⁷ Mutual Fire Ins. Co. v. Deale, 18

Md. 26; s.c. 79 Am. Dec. 673;

Curtis v. Fox, 47 N. Y. 299.

See: Groff v. Rohrer, 35 Md. 327, 337;

Reed v. Reed, 52 N. Y. 651;

Phillips v. Wooster, 36 N. Y. 412;

Borst v. Spelman, 4 N. Y. 284.

⁸ Mutual Fire Ins. Co. v. Deale, 18

Md. 26; s.c. 79 Am. Dec. 673, 675.

SEC. 849. **In lands of which wife seized by direct gift.**—A married woman may become seized of lands by direct gift as well as by purchase in her own name and as her own property, and in such lands the husband will be entitled to an estate by the curtesy where all the requisites of such an estate exist.¹

SEC. 850. **In lands conveyed to wife by husband.**—Where a husband conveys land to his wife without the intervention of a trustee, such conveyance not being in fraud of existing creditors, will be valid in equity,² and the husband will be entitled to an estate by the curtesy in such lands,³ even though the wife may never have been actually possessed of the lands.⁴ In Virginia, however, a contrary doctrine seems to prevail. Thus it is said in the case of *Sayer v. Wall*,⁵ that a conveyance from a husband to his wife, though invalid at law, is good in equity, and, being absolute, vests in her a separate estate, thereby defeating his right of curtesy. And it is said by the same court in the case of *Dugger v. Dugger*,⁶ that a separate estate created by the husband for his wife, whether directly or through a trustee, presumptively excludes the husband from tenancy by the curtesy.⁷

SEC. 851. **In lands conveyed to trustee—By husband.**—A husband will be entitled to an estate by the curtesy in lands which he has conveyed to a trustee for the sole and separate use and benefit of his wife and her heirs,⁸ where

See : *Gilbert v. Gilbert*, 2 Abb. Dec. (N. Y.) 256 ;

Farrell v. Lloyd, 69 Pa. St. 239 ;

Dennet v. Bennet, 10 Ch. Div. 474 ; s.c. 27 Moak's Eng. Rep. 41 ;

Sidmouth v. Sidmouth, 2 Beav. 447 ;

In re De Verne, 2 DeG. J. & S. 17.

¹ *Mutual Fire Ins. Co. v. Deale*, 18 Md. 26 ; s.c. 79 Am. Dec. 673, 675 ;

Schindel v. Schindel, 12 Md. 108 121 ; s.c. Ib. 294, 312 ;

Wright v. Wright, 2 Md. 453 ; s.c. 56 Am. Dec. 723.

² See : *Sayer v. Wall*, 26 Gratt. (Va.) 354.

³ *Robie v. Chapman*, 59 N. H. 41 ;

Adair v. Lott, 3 Hill (N. Y.) 182.

⁴ *Adair v. Lott*, 3 Hill (N. Y.) 182.

⁵ 26 Gratt. (Va.) 354.

⁶ 84 Va. 130 ; s.c. 4 S. E. Rep. 171.

⁷ See : *Irvine v. Greever*, 32 Gratt. (Va.) 419 ;

2 Miner's Inst. 353 (318).

Also : *Rigler v. Cloud*, 14 Pa. St. 361.

⁸ See : *Soltau v. Soltau*, 93 Mo. 307 ; s.c. 6 S. W. Rep. 95 ; 12 West. Rep. 115 ;

Tremmel v. Kleiboldt, 75 Mo. 255, aff'g s.c. 6 Mo. App. 549 ;

Cushing v. Blake, 29 N. J. Eq. (2 Stew.) 399 ;

Ege v. Medlar, 82 Pa. St. 86 ;

Frazer v. Hightower, 12 Heisk. (Tenn.) 94.

the conveyance contains a power (1) in the wife of appointment, or to dispose of the property by deed or will, and she dies without exercising such power;¹ or (2) in the trustee to permit the wife, her heirs and assigns, to have the occupation, possession, and enjoyment of the property, and to receive the rents.² In Pennsylvania³ and Virginia,⁴ however, a husband who has conveyed land to another in trust for his wife is not entitled, on her death, to a tenancy by the curtesy in the trust estate.

SEC. 852. Same—By the wife.—Where a wife, in a deed by her and her husband, conveys her real estate to a trustee, reserving for her benefit the rents and profits of her estate to her sole and separate use during her life, this does not amount to an expression of an intent on her part to exclude her husband⁵ from curtesy therein at her death.⁶

SEC. 853. Same—By third party.—Where lands are conveyed by a third person to a trustee for the sole and

¹ *Jones v. Brown*, 1 Md. Ch. 191 ;
Soltau v. Soltau, 93 Mo. 307 ; s.c.
 6 S. W. Rep. 95 ; 12 West. Rep.
 115 ;

Tremmel v. Kleiboldt, 75 Mo. 255,
 aff'g 6 Mo. App. 549 ;

Cushing v. Blake, 29 N. J. Eq.
 (2 Stew.) 399 ;

Baker v. Heiskell, 1 Coldw.
 (Tenn.) 641 ;

Morgan v. Morgan, 5 Madd. 408.
 See : *Clark v. Clark*, 24 Barb. (N.
 Y.) 582 ;

Cochran v. O'Hern, 4 Watts &
 S. (Pa.) 95 ; s.c. 39 Am. Dec.
 60.

By decree in chancery.—In the case of *Baker v. Heiskell*, 1 Coldw. (Tenn.) 641, the wife derived her equitable estate with the power to dispose thereof from a decree of the Court of Chancery.

In the case of *Soltau v. Soltau*, 93 Mo. 307 ; s.c. 6 S. W. Rep. 95 ; 12 West. Rep. 115, a husband conveyed to a trustee for the use of his wife, and the wife devised the land to her children, the court held that the husband was entitled to curtesy in the estate.

Conveyance in contemplation of marriage.—In the case of *Cushing v. Blake*, 29 N. J. Eq. (2 Stew.) 399, a man, in contemplation of marriage, conveyed lands to B, in trust, for the sole and separate benefit of his intended wife ; and, upon the further trust, to convey to such persons as she might, during her life, appoint, either by deed or will ; and, upon failure thereof, to her heirs at law forever. The husband, together with one child of the marriage, survived his wife, who died without appointment. The court held that the estate of the wife was an equitable fee-simple, in which A was entitled to curtesy.

² *Baker v. Heiskell*, 1 Coldw. (Tenn.) 641 ;

Frazer v. Hightower, 12 Heisk. (Tenn.) 94.

³ *Rigler v. Cloud*, 14 Pa. St. 361.

⁴ *Dugger v. Dugger*, 84 Va. 130 ; s.c. 4 S. E. Rep. 171 ;

Sawyer v. Wall, 26 Gratt. (Va.) 354.

⁵ See : *Ante*, § 845.

⁶ *Tillinghast v. Coggeshall*, 7 R. I. 383.

separate use of a married woman and her heirs, her husband will, on surviving her, and the other requisites of curtesy existing,¹ be entitled to an estate by the curtesy in such lands, in the same manner as if the estate were a legal one,² because in this respect equity follows the law.³ But the right of the husband to curtesy in the equitable estate of inheritance of his wife after her death will depend largely upon the wording of the instrument creating the estate, and the intention of the parties executing the same. The trust itself only requires that the husband should be excluded from control or interference during the lifetime of the wife, and to deprive him of his estate by curtesy there must be a manifest intention on the part of the person settling the estate that he shall be excluded from all interest whatsoever.⁴

SEC. 854. Same—Same—Express exclusion of husband.—Where lands are devised or deeded to the wife for her separate and exclusive use, with a clear and distinct expression that the husband is not to have a life estate or other interest, but the same to be for the wife and her heirs, a court of chancery will bar the husband of his curtesy.⁵ Lord HARDWICKE, in the case of *Hearle v. Green-*

¹ See: *Ante*, §§ 718–760.

² *Payne v. Payne*, 11 B. Mon. (Ky.) 183;
Robert v. Chapman, 59 N. H. 41;
Ege v. Medlar, 82 Pa. St. 86;
Tillinghast v. Coggeshall, 7 R. I. 383;
Nightingale v. Hidden, 7 R. I. 115.

In English decisions there is a conflict of opinion as to the husband's right to curtesy in an estate belonging to the wife for her separate use.

See: *Hearle v. Greenback*, 3 Atk. 695, 715, 716; s.c. 1 Ves. Sr. 298;

Roberts v. Dixwell, 1 Atk. 607;
Morgan v. Morgan, 5 Madd. 408;
Follett v. Tyrer, 14 Sim. 125;
Eager v. Furnivall, 17 Ch. Div. 115;

Cooper v. Macdonald, 7 Ch. Div. 288; s.c. 23 Moak's Eng. Rep. 581;

Appleton v. Rowley, L. R. 8 Eq. 139;

Moore v. Webster, L. R. 8 Eq. 139.

But it may now be regarded as settled in England that where a married woman has an equitable estate of inheritance to her separate use, and does not dispose of it by will or deed, her husband will be entitled to curtesy.

See: *Cooper v. Macdonald*, 7 Ch. Div. 288; s.c. 23 Moak's Eng. Rep. 581.

³ See: *Robinson v. Codman*, 1 Sumn. C. C. 121, 128.

⁴ *Morgan v. Morgan*, 5 Madd. 408.

⁵ *Cochran v. O'Hern*, 4 Watts & S. (Pa.) 95; s.c. 39 Am. Dec. 60;
Morgan v. Morgan, 5 Madd. Ch. 245;

Bennet v. Davis, 2 Pr. Wms. 316;
Hearle v. Greenback, 3 Atk. 716; s.c. 1 Ves. Sr. 298.

See: *Ege v. Medlar*, 82 Pa. St. 89;

Page's Estate, 76 Pa. St. 87;
Johnson v. Fritz, 44 Pa. St. 449;

back,¹ puts the reason for this rule on two grounds : (1) want of seisin in the wife, or rather in the husband ; and (2) on the intention of the devisor. He observes that to make the husband tenant by the curtesy, the wife must have the inheritance, and there must be likewise a seisin in deed in the wife during coverture. It was true she had the inheritance, but then the father, whose estate it was, has made the daughter a *feme sole*, and has given the profits to her separate use ; therefore, what seisin, he asks, could the husband have during the coverture ? He could neither come at the possession nor the profit. In the subsequent case of *Morgan v. Morgan*,² *Hearle v. Greenback*³ is much shaken if not overruled as to the first ground, as to seisin, taken by Lord Hardwicke. It is thought to be in conflict with *Roberts v. Dixwell*,⁴ where the same judge said that a devise to her separate use would not bar the husband, because there was a sort of seisin in the wife ; and in *Pitt v. Jackson*,⁵ where it seems to have been held that the receipt of rents and profits is a sufficient seisin in the wife ; and also in *De Grey v. Richardson*,⁶ where it would appear as if no seisin in the wife is necessary to entitle the husband to be tenant by the curtesy.⁷

SEC. 855. In lands held by guardian.—The Supreme Court of Kentucky have held, in the case of *Phillips v. Phillips*,⁸ that a husband is entitled to curtesy in the land of his wife, held by her mother as her guardian to her use.

SEC. 856. In wild lands.—The other necessary incidents

Dubs v. Dubs, 32 Pa. St. 149 ;
Rigler v. Cloud, 14 Pa. St. 363.

¹ 3 Atk. 716 ; s.c. 1 Ves. Sr. 298.

² 5 Madd. Ch. 245.

³ 3 Atk. 716 ; s.c. 1 Ves. Sr. 298.

⁴ 1 Atk. 606.

⁵ 2 Bro. Ch. 51.

⁶ 3 Atk. 469.

⁷ It may be observed that *Roberts v. Dixwell* is but a dictum, whereas in *Hearle v. Greenback* the point is expressly ruled, and in the latter case it is put not on seisin of the wife but of the

husband ; for what seisin could the husband have, as the court say, during the coverture, when he could come at neither the possession nor the profits, for the husband cannot be tenant by the curtesy, unless he can show seisin in himself in right of his wife.

See : *Cochran v. O'Hern*, 4 Watts & S. (Pa.) 95 ; s.c. 39 Am. Dec. 60.

⁸ 2 Duv. (Ky.) 549.

existing,¹ a husband is entitled to an estate by the curtesy in wild, waste, and uncultivated lands,² of which the wife dies seized in law, and which are not held adversely to her,³ she being deemed seized in fact so as to entitle the husband to his rights;⁴ for the right of possession of uncultivated land draws to it the possession where the land is not held adversely, and is a sufficient seisin to support the husband's right to curtesy.⁵

SEC. 857. *In lands cast by descent.*—A husband is entitled to an interest, as tenant by the curtesy, in real estate that descended to his wife during coverture.⁶ Thus where upon the death of an intestate, the title to his land becomes vested in his only daughter and heir, subject to the dower of his widow, which dower is never assigned to her, if such daughter subsequently marries and has a child, the widow's quarantine right will not prevent the husband of such daughter, upon her death, from taking an estate by the curtesy.⁷

SEC. 858. *In lands devised in trust.*—In some of the states

¹ See: *Ante*, § 718, *et seq.*

² See: *Ante*, § 743.

³ *Wells v. Thompson*, 13 Ala. 793; s.c. 48 Am. Dec. 76;

Malone v. McLaurin, 40 Miss. 161; s.c. 90 Am. Dec. 320;

McCorry v. King's Heirs, 3 Humph. (Tenn.) 267; s.c. 39 Am. Dec. 165.

⁴ *Wells v. Thompson*, 13 Ala. 793; s.c. 48 Am. Dec. 76.

⁵ *Malone v. McLaurin*, 40 Miss. 161; s.c. 90 Am. Dec. 320.

⁶ *Griswold v. Penniman*, 2 Com. 564;

Mettler v. Miller, 129 Ill. 630; s.c. 22 N. W. Rep. 529;

Proctor v. Newhall, 17 Mass. 81;

Rabb v. Griffin, 26 Miss. 579;

Matter of Cregier, 1 Barb. Ch. (N. Y.) 598; s.c. 45 Am. Dec. 416;

Hitner v. Ege, 23 Pa. St. 305;

Hyde v. Barney, 17 Vt. 280; s.c. 44 Am. Dec. 335.

In the case of *Hitner v. Ege*, 23 Pa. St. 305, the wife of the defendant was heir in fee to real estate subject to the dower of her mother. The defendant

mortgaged the property, a levy was made on his life estate in it, and a sequestrator appointed, who paid one-third of the rents and profits to the widow. The defendant's wife did not survive the widow. The court held that the defendant was not entitled to curtesy.

In the *Matter of Cregier*, an infant, reported in 1 Barb. Ch. (N. Y.) 598; s.c. 45 Am. Dec. 416, A died intestate, leaving real estate, and a widow entitled to dower therein, and five sons and one daughter, his only heirs at law, and in the lifetime of A's widow, B, one of the sons, died, leaving a widow and infant child, and C, the daughter, died, leaving a husband and one infant child by him. The court held that A's widow was entitled to dower in the whole estate, and that B's widow was entitled to dower, and C's husband to curtesy, in only one-sixth each of the remaining two-thirds.

⁷ *Mettler v. Miller*, 129 Ill. 630; s.c. 22 N. E. Rep. 529.

the husband is entitled to curtesy in the wife's trust estate.¹ Thus in *Payne v. Payne*,² a testatrix devised lands in trust to the use of her daughter, to her separate use, to be disposed of as she might think proper; and after the death of her daughter's husband, A directed that the trust should terminate, and the daughter's title become absolute. The daughter died before her husband, leaving three children; and it was held that the husband was tenant by the curtesy of the devised premises, whether the trust was determined or not by the death of the beneficiary.

SEC. 859. In lands of beneficiary under will.—Where lands are devised to a *feme covert* in fee, the testator cannot deprive her husband of his estate by the curtesy by any words of restraint or limitation in his will;³ and this is true even where lands are devised in trust, to be held for the separate use of a woman free from the control of any future husband, and without the power of alienation, or of anticipation of the income.⁴ And where the wife holds lands as beneficiary under a will, with power of appointment, the trust to terminate upon the husband's death, he will be tenant by the curtesy, if he survives her, and

¹ Others hold that he is not entitled to curtesy in an estate devised to the wife's sole and separate use.

See: *McCulloch v. Vallentine*, 24 Neb. 215; s.c. 38 N. W. Rep. 854;

Cochran v. O'Hern, 4 Watts & S. (Pa.) 95; s.c. 39 Am. Dec. 60.

Compare: *Post*, bk. III., c. XVII., section VII.

² 11 B. Mon. (Ky.) 188.

³ *Mullany v. Mullany*, 4 N. J. Eq. (3 H. W. Gr.) 8; s.c. 31 Am. Dec. 238.

See: *Buchanan v. Duncan*, 40 Pa. St. 82;

Dubs v. Dubs, 31 Pa. St. 149;

Buchanan v. Sheffer, 2 Yeates (Pa.) 374;

Crumley v. Deake, 8 Baxt. (Tenn.) 361;

Bierne v. Bierne, 33 W. Va. 663; s.c. 11 S. E. Rep. 46.

Thus where a testator devised his

estate to his daughter, "to her, her heirs and assigns, forever," but if she should die without issue, his whole estate was to be sold by his executors, and the money arising therefrom, after his widow's decease, to be equally divided among his brothers' and sisters' sons. The daughter married, and had issue that died during her life. Her husband was held entitled to her estate as tenant by the curtesy.

Buchanan v. Sheffer, 2 Yeates 374.

Under a similar state of facts same doctrine was held in *Crumley v. Deake*, 8 Baxt. (Tenn.) 361.

⁴ *Dubs v. Dubs*, 31 Pa. St. 149.

See: *Burke v. Valentine*, 52 Barb. (N. Y.) 417;

Buchanan v. Duncan, 40 Pa. St. 82.

she has made no appointment ;¹ but if she exercises the power of appointment, the husband is barred of his right to curtesy.²

SEC. 860. **In mortgaged estate.**—The interest of the mortgagor in the mortgaged premises being an estate of inheritance which may be devised or granted,³ and the mortgagor being merely a security for the payment of the debt,⁴ that is, being nothing more than a lien on the property, the estate in the premises is in no way affected by the existence of the mortgage before actual entry or foreclosure ;⁵ and until that time, as to all the world except the mortgagee and those persons claiming under him, the mortgagor retains the freehold interest which existed prior to the execution of the mortgage,⁶ and consequently

¹ *Payne v. Payne*, 11 B. Mon. (Ky.) 138.

But it is said by the Supreme Court of North Carolina in the case of *Grove v. Trueblood*, 96 N. C. 495 ; s.c. 1 S. E. Rep. 918, that an estate settled on a *feme covert* for life, with a power of appointment at her death in fee, does not give her such an estate as will entitle the husband if she fails to appoint.

² *Pool v. Blakie*, 53 Ill. 495, 500 ; *Morgan v. Morgan*, 5 Gill & J. (Md.) 395 ;

Stewart v. Ross, 50 Miss. 776.

In the case of *Stewart v. Ross*, *supra*, it is said that "the interest of the wife must be such that the husband may have seisin in her right (Bacon Abr., title Curtesy). If there be an outstanding particular freehold estate which does not fall into the inheritance during coverture, there is not such a seisin and right of immediate possession as will support the estate of curtesy. *Redus v. Hayden*, 43 Miss 614, 633, 636 ; *Malone v. McLaurin*, 40 Miss. 162."

³ *Chamberlain v. Thompson*, 10 Conn. 243 ; s.c. 26 Am. Dec. 391 ;

Wilkins v. French, 20 Me. 111 ;

White v. Whitney, 44 Mass. (3 Met.) 81 ;

Hitchcock v. Harrington, 6 John. (N. Y.) 290, 295 ; s.c. 5 Am.

Dec. 229, 231.

See : *Mills v. Van Voorhis*, 2 N. Y. 416 ;

Roosevelt v. Fulton, 7 Cow. (N. Y.) 71, 78 ;

Wilson v. Troup, 2 Cow. (N. Y.) 195, 231 ;

Astor v. Hoyt, 5 Wend. (N. Y.) 603, 616 ;

Lane v. Shears, 1 Wend. (N. Y.) 433, 437.

⁴ See : *Wiltie on Mortg. Forec.* (2d ed.), § 826.

⁵ *White v. Rittenmeyer*, 30 Iowa 268 ; *Kortright v. Cady*, 21 N. Y. 343.

See : *Middletown Savings Bank v. Bates*, 11 Conn. 519, 523 ;

Johnson v. Watson, 87 Ill. 535 ; *Hancock v. Carlton*, 72 Mass. (6

Gray) 39 ; *Fay v. Cheney*, 31 Mass. (14 Pick.) 399 ;

Lund v. Lund, 1 N. H. 39 ; *Shields v. Loyear*, 34 N. J. L. (5

Vr.) 496 ; *Breese v. Bangs*, 2 E. D. Smith (N. Y.) 486 ;

Hemphill v. Ross, 66 N. C. 477 ; *Waterman v. Matteson*, 4 R. I.

539, 545 ; *Hagar v. Brainerd*, 44 Vt. 294 ;

Wood v. Trask, 7 Wis. 566 ; *Conrad v. Atlantic Ins. Co.*, 26 U.

S. (1 Pet.) 386 ; bk. 7 L. ed. 189.

⁶ *Cooper v. Davis*, 15 Conn. 556 ; *Clark v. Beach*, 6 Conn. 142 ;

Brown v. Snell, 6 Fla. 741 ; *Farnsworth v. City of Boston*, 126

Mass. 3, 4 ;

the estate will be subject to curtesy in the husband or dower in the wife.¹ It will be otherwise with the husband of a mortgagee in fee, unless the equity of redemption has been barred by time.²

SEC. 861. *In trust estate.*—By the common law, the husband is entitled to curtesy in the trust estate of his wife, in the same manner as he would be if it were a legal estate.³ In some of the states, however, there is no tenancy by the curtesy in an estate held in trust for the benefit of a married woman as if she were a *feme sole*, and so that the same shall not be in the power, or subject to the debt, contract, or engagements of her husband, with the remainder to her heirs or appointees.⁴ Where the legal estate is held by the wife as trustee, it will not be subject to curtesy.⁵

SEC. 862. *In fees with conditional limitation.*—The husband is entitled to an estate by the curtesy in an estate in fee that is subject to a conditional limitation,⁶ even

- Bradley v. Fuller, 40 Mass. (23 Pick.) 1;
 Orr v. Hadley, 36 N. H. 570, 578;
 Bryan v. Butts, 27 Barb. (N. Y.) 503, 505;
 Childs v. Childs, 10 Ohio St. 342; s.c. 75 Am. Dec. 512;
 Asay v. Hoover, 5 Pa. St. 21; s.c. 45 Am. Dec. 713;
 Doe ex d. Lyster v. Goldwin, 2 Ad. & E. N. S. 143; s.c. 42 Eng. C. L. 610;
 Beamish v. Overseers, 24 L. J. (N. S.) C. P. 7; s.c. 7 Eng. L. & Eq. 485.
¹ Clark v. Beach, 6 Conn. 142;
 Groton v. Roxborough, 6 Mass. 50;
 Alexander v. Warrant, 17 Mo. 228;
 Coles v. Coles, 15 John. (N. Y.) 319; s.c. 8 Am. Dec. 231;
 Titus v. Nelson, 5 John. Ch. (N. Y.) 452;
 Boothby v. Vernon, 9 Madd. 147.
² Chaplin v. Chaplin, 3 Pr. Wms. 234;
 4 Kent Com. (13th ed.) 32;
 7 Vin. Abr. 156, pl. 22.
³ Phillips v. Worford, 2 Duv. (Ky.) 549;
 44
 Houghton v. Hapgood, 30 Mass. (13 Pick.) 154;
 Rabb v. Griffin, 26 Miss. 579;
 Sentill v. Robinson, 2 Jones Eq. (N. C.) 510;
 Davis v. Mason, 26 U. S. (1 Pet.) 503, 508; bk. 7 L. ed. 239, 241;
 Robinson v. Codman, 1 Sumn. C. C. 128;
 Casborne v. Inglis, 1 Atk. 603; s.c. 2 Eq. Cor. Abr. 728;
 Morgan v. Morgan, 5 Madd. 408;
 Chaplin v. Chaplin, 3 Pr. Wms. 229, 234;
 Watts v. Ball, 1 Pr. Wms. 108;
 1 Co. Litt. (19th ed.) 29a, note 165;
 4 Kent Com. (13th ed.) 30, 31.
⁴ Stokes v. McKibbin, 13 Pa. St. 267.
⁵ Welch v. Chandler, 13 B. Mon. (Ky.) 420, 431;
 Chew v. Commissioners of Southwark, 5 Rawle (Pa.) 160.
⁶ Wells v. Thompson, 13 Ala. 793; s.c. 48 Am. Dec. 76;
 Webb v. Lexington First Colored Baptist Church (Ky.), 13 S. W. Rep. 362; s.c. 11 Ky. L. Rep. 926;
 Young v. Langbein, 14 N. Y. Super. Ct. 151;
 Thornton v. Krepp, 37 Pa. St. 391;

after the condition divesting the estate has happened.¹ Thus where a woman is given, by will, an absolute estate in land, subject only to be defeated upon her dying without leaving issue or descendants, her husband is entitled to curtesy upon her death if a child has been born to them.² It has been said that an estate by the curtesy attaches to an equitable conditional fee as in other estates of the wife, but she must have been seized, and it must appear that the instrument creating her estate does not clearly indicate an intention to exclude the husband's estate of curtesy.²

SEC. 863. In fees determinable.—The question as to the right of the husband to curtesy in the estate of his wife as determined by limitation, or by an executory devise, is one which has given rise to considerable discussion,⁴ and

Odom v. Beverly, 32 S. C. 107 ;
s.c. 10 S. E. Rep. 835.

See: *Hatfield v. Sneden*, 54 N. Y.
280, 285 ;

Grout v. Townsend, 2 Hill (N. Y.)
554, aff'd 2 Den. (N. Y.) 336 ;

Evans v. Evans, 9 Pa. St. 190 ;

Wright v. Herron, 6 Rich. (S. C.)
Eq. 146 ;

Moody v. King, 2 Bing. 447 ; s.c.
9 Eng. C. L. 475 ;

Buckworth v. Thirkell, 3 Bos. &
P. 652 ;

Taliaferro v. Burwell, 4 Call (Va.)
321 ;

Smith v. Spencer, 5 DeG. M. &
G. 631 ;

2 Co. Litt. (19th ed.) 241a, But-
ler's note 170 ;

4 Kent Com. (13th ed.) 33.

Compare: *Weller v. Weller*, 28
Barb. (N. Y.) 588, 589 ;

Doe v. Hutton, 3 Bos. & P. 653.

South Carolina doctrine.—It was questioned in the case of *Wright v. Herron*, 6 Rich. (S. C.) Eq. 406, whether a husband is entitled to hold, as tenant by the curtesy, land in which his wife was seized of a fee conditional ; but in the recent case of *Odom v. Beverly*, 32 S. C. 107 ; s.c. 10 S. E. Rep. 835, the court say that a grant of land to a daughter for life, and after her death to the heirs of her body, creates a conditional fee in the daughter ; and after her death, leav-

ing children, her husband is entitled to hold the land as tenant by the curtesy.

¹ See: *Wells v. Thompson*, 13 Ala.
793 ; s.c. 48 Am. Dec. 76 ;

Thornton v. Krepp, 37 Pa. St. 391 ;

Crumley v. Deake, 8 Baxt. (Tenn.)
361.

Thus where there was a devise to three sisters, A, B, and C, and the will contained a provision that in case of the death of any one without leaving issue, her share should go to the others, and C married and had a child which died before its mother, the court held that after C's death her husband was entitled to his curtesy.

Crumley v. Deake, 8 Baxt. (Tenn.)
361.

² *Webb v. Lexington First Colored Bap. Church* (Ky.), 13 S. W. Rep. 362 ; s.c. 11 Ky. L. Rep. 926 ;

Odom v. Beverly, 32 S. C. 107 ;
s.c. 10 S. E. Rep. 835.

³ *Withers v. Jenkins*, 14 S. C. 597.

⁴ **Discussion and criticism.**—It is said in *Hatfield v. Sneden*, 54 N. Y. 280, 284, that this question "has been the subject of elaborate discussions in the text-books, and of criticism upon the case of *Buckworth v. Thirkell*, decided by Lord Mansfield, and reported in 4 Dug. 323 ; s.c. 3 Bos. & P. 625, note ; Collect.

on which the courts are divided. It has been laid down as a general proposition that "any circumstances which would have defeated or determined the estate of the wife, if living, will, of course, put an end to the estate by the curtesy."¹ The prevailing rule in this country is that if the estate of the wife is an estate of inheritance upon a condition or upon limitation, determinable thereby, estates which take effect and are determined according to the rules of the common law, and limitations over, which take effect as common-law estates, operate to defeat the husband's right of curtesy.² If, however, the estate be in fee determinable upon the happening of some future event, with the limitation over, by way of executory devise or shifting use, the happening of the contingency will not affect the husband's right to curtesy.³

Jur. 332, and upon that of *Moody v. King*, 6 Bing. 447; s.c. 9 Eng. C. L. 475, which fully upholds it after it had been spoken of as disappropriation by Lord ALVANLEY, in *Doe v. Hutton*, 3 Bos. & P. 643, 651. The discussion has been so full and complete that it seems impossible to throw any additional light upon the views and various arguments which have been adduced upon it. * * * It may be properly added that the strong objection proposed to this doctrine by its critics is to the consequence which they deem unreasonable, that an estate determined according to the terms of its creation should by the incident of curtesy or dower be prolonged. To this, it seems to me a fair and complete answer to say, as Lord COKE says (in *Paine's Case*, *Coke R.*, part VIII., *Fraser's ed.*, p. 212, marg. 36a), in answer to a similar difficulty as to curtesy after an estate-tail determined by the death of the wife tenant in tail and of her issue, 'the husband's estate shall continue, for it is not derived merely out of the estate of the wife, but is created by law,' 'by the privilege and benefit of the law *tacite* annexed to the gift.' This pos-

sible continuance of dower or curtesy as an incident of the estate created may well be deemed to have been in the contemplation of the testatrix, and is not an unreasonable or unnatural provision for the possible husband or wife of one clothed with a fee-simple not defeasible, except upon death without children living. The only authority in this state in conflict with this conclusion is a decision at special term in *Weller v. Weller*, 28 Barb. N. Y. 588, in a case of dower, which was put upon the ground of the criticism in *Park on Dower*, upon Lord Mansfield's decision."

¹ 1 Atk. Conv. 255.

² *Hatfield v. Sneden*, 54 N. Y. 280, 285.

³ *Northcut v. Whipp*, 12 B. Mon. (Ky.) 65;

Hatfield v. Sneden, 54 N. Y. 280, 285;

Grout v. Townsend, 2 Hill (N. Y.) 554;

Thornton v. Knapp, 37 Pa. St. 391;

Evans v. Evans, 9 Pa. St. 190;

Wright v. Herron, 6 Rich. (S. C.) Eq. 406;

Moody v. King, 2 Bing. 447; s.c. 9 Eng. C. L. 475;

Buckworth v. Thirkell, 3 Bos. & P. 652, note;

SEC. 864. *In estate in remainder.*—There being no curtesy in the wife's remainder expectant upon an estate of freehold,¹ the husband of a woman entitled to a remainder is not so seized during the life of the tenant for life as to make him tenant by the curtesy initiate,² and will not be entitled to curtesy consummate where the wife dies before the expiration of the life estate, and never had right to the possession,³ because there can be no seisin in deed or in law of a vested remainder limited upon a precedent freehold estate,⁴ but where a life estate and the immediate reversion meet in the same person, the particular or less estate is merged in the greater,⁵ and if such person be a *feme covert*, the husband will be entitled to an estate as tenant by the curtesy.⁶ Thus where the tenant of a particular estate surrenders to the owner of a vested remainder in tail, who is a married woman, the latter there-

Smith v. Spencer, 6 DeG. M. & G. 631;

2 Co. Litt. (19th ed.) 241a, Butler's note 170;

4 Kent Com. (13th ed.) 33.

See: *Ante*, § 862.

¹ See: Ellingsworth v. Cook, 8 Paige Ch. (N. Y.) 643;

Jackson ex d. Swartwout v. Johnson, 5 Cow. (N. Y.) 74; s.c. 15 Am. Dec. 433, 437;

Adair v. Lott, 3 Hill (N. Y.) 182;

Stoddard v. Gibbs, 1 Sumn. C. C. 263;

De Gray v. Richardson, 3 Atk. 469;

Stoughton v. Leigh, 1 Taunt. 402.

* Planters' Bank of Tennessee v. Davis, 31 Ala. 636;

Mackey v. Proctor, 12 B. Mon. (Ky.) 433;

Stewart v. Barclay, 2 Bush (Ky.) 550;

Shores v. Carley, 90 Mass. (8 Allen) 425;

Malone v. McLaurin, 40 Miss. 160, 161;

Orford v. Benton, 36 N. H. 395;

Taylor v. Gould, 10 Barb. (N. Y.) 388;

Reed v. Reed, 3 Head (Tenn.) 49;

Prater v. Hooper, 1 Coldw. (Tenn.) 544.

³ Planters' Bank v. Davis, 31 Ala. 626;

Todd v. Oviatt, 58 Conn. 178; s.c. 7 L. R. A. 693;

Mackey v. Proctor, 12 B. Mon. (Ky.) 433;

Adams v. Logan, 6 T. B. Mon. (Ky.) 176;

Webster v. Ellsworth, 147 Mass. 602;

Brooks v. Everett, 95 Mass. (13 Allen) 457;

Shores v. Carley, 90 Mass. (8 Allen) 425;

Redus v. Hayden, 43 Miss. 633;

Orford v. Benton, 36 N. H. 395;

Fisk v. Eastman, 5 N. H. 240;

Ferguson v. Tweedy, 43 N. Y. 543;

Taylor v. Gould, 10 Barb. (N. Y.) 388;

Adair v. Lott, 3 Hill (N. Y.) 182;

Doe v. Rivers, 7 Durnf. & E. (7 T. R.) 272.

⁴ Ferguson v. Tweedy, 43 N. Y. 543;

Taylor v. Gould, 10 Barb. (N. Y.) 401;

Green v. Putnam, 1 Barb. Ch. (N. Y.) 500, 506;

Re Creiger, 1 Barb. Ch. (N. Y.) 598.

⁵ James v. Morey, 2 Cow. (N. Y.) 246; s.c. 14 Am. Dec. 475;

Roberts v. Jackson, 1 Wend. (N. Y.) 484;

2 Bl. Com. 177.

⁶ Taylor v. Gould, 10 Barb. (N. Y.) 388;

Pierce v. Hakes, 23 Pa. St. (11 Har.) 231.

by gains such an estate as will entitle her husband to curtesy, even against the next remainderman.

SEC. 865. **In estate in reversion.**—Where the wife has a reversionary interest merely, expectant upon an estate for life,¹ this will not be sufficient to entitle the husband to an estate by the curtesy,² unless the estate for life is a merely equitable interest,³ or the prior freehold determines during coverture;⁴ and this is true even though the husband is the tenant of the prior freehold,⁵ but seisin in law of a reversion by the wife during coverture gives the husband curtesy in the lands.⁶

SEC. 866. **In lands held in joint tenancy.**—At common law, to entitle the husband to curtesy, the estate of the wife, whether legal or equitable, must be a legal one, and must not be one of which the wife was seized or possessed jointly with any other person or persons.⁷ But where the husband and wife hold premises jointly, on the death of the wife the husband becomes a tenant by the curtesy.⁸

¹ An outstanding term of years will not have that effect.

Wier v. Humphries, 4 Ired. (N. C.) Eq. 264, 279.

And this is true even if the term be of great length.

Lessee of Lowry v. Steele, 4 Ohio 170.

See: *De Gray v. Richardson*, 3 Atk. 436.

Reason for the rule.—The reason for this is because the termor is not properly possessed of the land but of the term, the possession of tenant of the land still remaining in the wife.

Lessee of Lowry v. Steele, 4 Ohio 170 ;

2 Bl. Com. 144.

² *Jackson v. Johnson*, 5 Cow. (N. Y.) 75 ; s.c. 15 Am. Dec. 433 ;

Lowry v. Steele, 4 Ohio 170 ;

Stoddard v. Gibbs, 1 Sumn. C. C. 263.

³ *Adair v. Lott*, 3 Hill (N. Y.) 182.

⁴ *Planters' Bank v. Davis*, 31 Ala. 626 ;

Adams v. Logan, 6 B. Mon. (Ky.) 175 ;

Shores v. Carley, 90 Mass. (8 Allen) 426 ;

Malone v. McLaurin, 40 Miss. 161 ;

Orford v. Benton, 36 N. H. 395 ;

Ferguson v. Tweedy, 43 N. Y. 543 ;

Lowry v. Steele, 4 Ohio 170 ;

Hitner v. Ege, 23 Pa. St. 305 ;

Clure v. Commissioners, 5 Rawle (Pa.) 160 ;

Doe v. Scuddamore, 2 Bos. & P. 294 ;

Doe v. Rivers, 7 Durnf. & E. (7 T. R.) 272 ;

Plunket v. Holmes, 1 Lev. 11.

⁵ See: *Planters' Bank v. Davis*, 31 Ala. 633 ;

Shores v. Carley, 90 Mass. (8 Allen) 426 ;

Malone v. McLaurin, 40 Miss. 163 ;

Orford v. Benton, 38 N. H. 395 ;

Ferguson v. Tweedy, 43 N. Y. 543 ;

Robertson v. Stevens, 1 Ired. (N. C.) Eq. 247 ;

Hitner v. Ege, 23 Pa. St. 305 ;

Doe v. Rivers, 7 Durnf. & E. (7 T. R.) 272 ;

Stoddard v. Gibbs, 1 Sumn. C. C. 263.

⁶ *McKee v. Cuttle*, 6 Mo. App. 416.

⁷ 1 Co. Litt. (19th ed.) 30a, 37b ; 2 Id. 183a ;

Litt., § 45.

⁸ *Berry v. Hall* (Ky.), 118 W. Rep. 474 ; s.c. 11 Ky. L. J. 30.

The reason for the exception is that the possession of the husband is the possession of the wife, and not an adverse holding by the husband.¹

SEC. 867. **Estates in coparcenary.**—A man may be tenant by the curtesy of an estate in fee-simple, or in tail, held in coparcenary, or in common with other persons, where not required for the payment of debts and the adjusting of equitable claims.²

SEC. 868. **In merged estates.**—We have already seen that an intervening estate of freehold has the effect to cut off the husband's right to curtesy.³ But where a life estate and the immediate reversion meet in the same person, the particular estate is merged in the greater estate, and if the two estates unite in a *feme covert*, her husband is entitled to a life estate, as tenant by the curtesy.⁴ Thus where a married woman, who is tenant for life, becomes also the reversioner in fee under a will, with an interposed contingent remainder,⁵ her husband will be entitled to curtesy; and in *Robertson v. Stevens*,⁶ when a testator devised his estate to his widow until such time as she should raise a specified sum of money, and then devised the entire estate to his daughter, subject to the previous devise to the widow, the court held the husband of the daughter entitled to an estate by the curtesy in the devised estate.

SEC. 869. **In money when.**—The rule in equity is that money agreed or directed to be laid out in the purchase of

¹ *Berry v. Hall* (Ky.), 118 W. Rep. 474; s.c. 11 Ky. L. J. 30; *Semmons v. McKay*, 5 Barb. (Ky.) 25.

² *Buckley v. Buckley*, 11 Barb. (N. Y.) 43;

Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 164.

See: *Shearer v. Shearer*, 98 Mass. 107;

Campbell v. Campbell, 30 N. J. Eq. (3 Stew.) 415, 417;

Uhler v. Semple, 20 N. J. Eq. (5 C. E. Gr.) 288.

Where land needed to pay partnership debts or in adjusting equi-

table claims it will be otherwise.

Willet v. Brown, 65 Mo. 138; s.c. 27 Am. Rep. 265.

³ See: *Ante*, §§ 864, 865.

⁴ *Tayloe v. Gould*, 10 Barb. (N. Y.) 388.

See: *Doe v. Scudamore*, 2 Bos. & P. 294;

Kent v. Hartpoole, 3 Keble 731;

Plunket v. Holmes, 1 Leav. 11;

Boothby v. Vernon, 9 Mod. 147; s.c. 2 Eq. Cas. Abr. 728.

⁵ See: *Hooker v. Hooker*, Cas. Temp. Hardw. 13.

⁶ 1 Ired. (N. C.) Eq. 247.

land shall be considered as land to all intents and purposes. Upon this principle it is held that a man may be tenant by the curtesy of money agreed or directed to be laid out in the purchase of land.¹ Thus where a testator devises real estate to his daughter, and she marries, has a child, and dies, previously to a sale of the lands by the executors, under a power contained in her father's will, the husband is entitled to the interest of the money arising from the sale during his life.² And where lands belonging to the wife, as tenant in common, are by order of court sold in order to make partition, the husband is entitled to curtesy in the money accruing from such sale.³ It was said by the Supreme Judicial Court of Massachusetts, in the case of *Houghton v. Hapgood*,⁴ that where an executor sells the land of a female heir under such circumstances that she might confirm the sale and take the money, or avoid it and take the land, and she preferred the money, her husband was held entitled to the curtesy out of the money, she having died before it was paid over; but where the money derived from a sale of her land was loaned out by the wife during her life, and at her death divided equally between the husband and the children, he was held to be estopped from claiming curtesy in the land.⁵

SEC. 870. In incorporeal hereditaments. — At common law, some incorporeal hereditaments, such as advowsons, tithes, commons, and rents, are liable to curtesy; advow-

¹ *Green v. Green*, 1 Ohio 535;
Clepper v. Livergood, 5 Watts
 (Pa.) 115;
Davis v. Mason, 26 U. S. (1 Pet.)
 503, 508; bk. 7 L. ed. 24;
Fletcher v. Ashburner, 1 Bro. C.
 C. 497, 499;
Dodson v. Hay, 3 Bro. C. C.
 404;
Sweetapple v. Bindon, 2 Vern.
 536;
 3 Prest. Abst. 381.
² *Dunscorn v. Dunscorn*, 1 John.
 Ch. (N. Y.) 508; s.c. 7 Am.
 Dec. 504.
 See: *Boynnton v. Dyer*, 35 Mass.
 (18 Pick.) 6;
King v. Talbot, 40 N. Y. 76, 95;

Rundle v. Allison, 34 N. Y. 180,
 184;
Gillet v. Van Rensselaer, 15 N. Y.
 397;
Duffy v. Duncan, 32 Barb. (N. Y.)
 593;
White v. Parker, 8 Barb. (N. Y.)
 48, 73;
Hasler v. Hasler, 1 Bradf. (N. Y.)
 252;
Brown v. Rickets, 4 John. Ch.
 (N. Y.) 305;
In re Thorp, Davies (2 Ware) 293;
Piatt v. Oliver, 2 McL. C. C. 313.
³ *Clepper v. Livergood*, 5 Watts
 (Pa.) 115.
⁴ 30 Mass. (13 Pick.) 154.
⁵ *Johnson v. Fritz*, 44 Pa. St. 449.

sons and tithes have been abolished in this country if ever adopted. The doctrine respecting the liability of rents to curtesy will be hereafter fully treated under that title.

SECTION VII.—WHAT PROPERTY NOT SUBJECT TO CURTESY.

- SEC. 871. Introduction.
- SEC. 872. Estates not of inheritance.
- SEC. 873. Life estates.
- SEC. 874. Separate estate when.
- SEC. 875. Same—Will of grantor.
- SEC. 876. Same—With reservation.
- SEC. 877. Same—Settlement by husband.
- SEC. 878. Estates held as trustee.
- SEC. 879. Pre-emption claim.
- SEC. 880. Land assigned for dower.
- SEC. 881. Estates held in joint tenancy.
- SEC. 882. Determinable fees.
- SEC. 883. In proceeds of land.
- SEC. 884. Lands of former husband.
- SEC. 885. Lands sold before marriage.
- SEC. 886. Adverse possession and bar of statute.
- SEC. 887. In lands mortgaged to wife.
- SEC. 888. In remainder and reversion.

SECTION 871. **Introduction.**—Having stated the different kinds of property which are liable to curtesy, it will now be necessary to inquire what things are not subject to this right. We have already seen that the estate of the wife, to entitle the husband to curtesy, must be an estate of inheritance in possession ;¹ consequently whether the husband is entitled to hold as tenant by the curtesy or not must be determined by the estate of which the wife was seized during coverture.²

SEC. 872. **Estates not of inheritance.**—An estate by the curtesy being regarded as a continuation of the wife's inheritance,³ it follows that an estate in lands less than an estate of inheritance will not be subject to curtesy ; for the reason that it is absolutely necessary that the moment the husband takes as tenant by the curtesy, the inheritance should descend from the wife to her child or children.⁴

¹ See : *Ante*, § 723, *et seq.*

² *Haynes v. Bourne*, 42 Vt. 686.

³ See : *Ante*, § 764.

⁴ See : *Sumner v. Partridge*, 2 Atk. 47 ;

SEC. 873. **Life estates.**—Life estates being estates of freehold and not of inheritance,¹ and the rule being that a tenancy by the curtesy must come out of the inheritance and not out of the freehold,² it necessarily follows that there cannot be an estate by the curtesy in a life estate.³ Thus it has been said that an estate settled on a *feme covert* for life, with a power of appointment at her death in fee, does not give to her such an estate as will entitle her husband to curtesy on her failure to appoint ;⁴ and that a devise or conveyance of an estate to a woman and the “heirs of her body” does not vest in her such an estate as will entitle the husband to curtesy.⁵

SEC. 874. **Separate estate when.**—We have already seen that both by common law⁶ and under statute⁷ a husband is entitled to an estate by the curtesy in the separate estate of his wife, unless excluded therefrom by express words. But a husband cannot be tenant by the curtesy of real estate conveyed to the wife for her sole and separate use, with power of disposal, after she has disposed of it by will duly executed and attested.⁸ And some courts hold that where real estate is limited to the use of a woman, independently of her husband, and to be disposed

Roberts v. Dixwell, 1 Atk. 607 ;

Boothby v. Vernon, 9 Mod. 147 ;

Barker v. Barker, 2 Sim. 249.

¹ See : *Ante*, § 557, *et seq.*

² See : Sumner v. Partridge, 2 Atk. 47 ;

Barker v. Barker, 2 Sim. 249.

³ Phillips v. La Forge, 89 Mo. 72 ;
s.c. 1 S. W. Rep. 220 ; 4 West.
Rep. 683 ;

Burris v. Page, 12 Mo. 359 ;

Graves v. Trueblood, 96 N. C. 495.

See : Lamb v. Lamb, 14 N. Y. Supp. 206 ; s.c. 37 N. Y. St. R. 699 ;

Haynes v. Bourne, 42 Vt. 686 ;

Sumner v. Partridge, 2 Atk. 47 ;

Barker v. Barker, 2 Sim. 249.

⁴ Graves v. Trueblood, 96 N. C. 495.

Compare : *Ante*, § 844.

⁵ Burris v. Page, 12 Mo. 358 ;

Lamb v. Lamb, 14 N. Y. Supp. 206 ; s.c. 37 N. Y. St. R. 699 ;

Sumner v. Partridge, 2 Atk. 47 ;

Barker v. Barker, 2 Sim. 249.

Will of wife—Gives no interest when.

—In Lamb v. Lamb, 14 N. Y. Supp. 206 ; s.c. 37 N. Y. St. Rep. 699, it is said that a husband is not entitled by the will of his wife in his favor to any interest in land in which a life interest only was devised to her by her father, even though the fee went to the latter's heirs at law.

⁶ See : *Ante*, § 842.

⁷ See : *Ante*, § 843.

⁸ Pool v. Blakie, 53 Ill. 495, 500.

It is said in the case of Graves v. Trueblood, 96 N. C. 495, that an estate settled on a *feme covert* for life, with a power of appointment at her death in fee, does not give her such an estate as will entitle the husband to curtesy if she fails to appoint.

of by deed or will as she may think fit, her husband cannot be tenant by the curtesy.¹

SEC. 875. **Same—Will of grantor.**—We have already seen that where the manifest intention of the grantor is to cut off the husband's estate by the curtesy, he will be excluded;² consequently where the language of a will clearly showed it to be the intention of the testator that his daughter's husband should not acquire an estate by curtesy in land devised to her, such intention will prevail.³ Thus it is said, in the case of *Haight v. Hall*,⁴ that a deed to a married woman, "to her sole and separate use, and free from the interference or control of her said husband, or any husband, and her heirs and assigns, to her and their only proper use and benefit forever," must be held to defeat a right to curtesy in the premises on the grantee's death, where, by the statutes of the state, a married woman could hold real estate as if unmarried, as the restriction in the grant can have no force whatever given to it unless the intention was to exclude the estate by the curtesy.

SEC. 876. **Same—With reservation in.**—A reservation in the conveyance of lands to a married woman may operate to defeat the husband's right to curtesy. Thus where lands are conveyed during coverture to the separate use of the wife in fee, and the deed reserves a life estate to the grantor, the husband does not, on the death of the wife, leaving the grantor, become tenant by the curtesy.⁵ And it is said by the Supreme Court of Kentucky, in the case of *Yankey v. Sweeney*,⁶ that where a father conveys land to his daughter in consideration of love and affection, and also of an agreement by the daughter to support him and his wife during their lives, reserving a lien to secure such support, he is entitled, upon the death of the daughter leaving her husband, to the exclusive use and control of

¹ See: *Beecher v. Hicks*, 5 Lea (Tenn.) 207; ² *Monroe v. Van Meter*, 100 Ill. 347.

Burris v. Page, 12 Me. 358;

Haight v. Hall, 74 Wis. 152; s.c.

42 N. W. Rep. 109; 3 L. A. R. 857;

Moore v. Webster, L. R. 3 Eq. 267.

³ See: *Ante*, § 845.

See: *Ante*, § 845, and authorities cited.

⁴ 74 Wis. 152; s.c. 42 N. W. Rep. 109; 3 L. R. A. 857.

⁵ *Planters' Bank v. Davis*, 31 Ala. 626.

⁶ 85 Ky. 55; s.c. 2 S. W. Rep. 559.

the land during his life, and also to so much of the land itself as is necessary to support him and his wife, as against the husband's claim for curtesy, it appearing that the husband and father are estranged and that the estrangement is likely to continue.

SEC. 877. **Same—Settlement by husband.**—We have already seen that the general rule is that where a husband settles lands upon his wife for her sole and separate use, by conveying them to a trustee to hold for her benefit, or that of her and her heirs, that he will be entitled to curtesy therein.¹ A contrary doctrine, however, prevails in Nebraska,² Pennsylvania,³ Virginia,⁴ and perhaps elsewhere, but the general rule⁵ has the better reason as well as the weight of decision.

SEC. 878. **Estates held as trustee.**—The mere possession of a legal estate, of which the wife may be seized as trustee, will not suffice to make the husband tenant by the curtesy, though she has the beneficial interest in the reversion;⁶ and this is true, whether the trust be express or implied by law from the wife's contract entered into prior to her marriage.⁷ Therefore where a woman held a ground rent, in fee, in trust for another during his life, and she afterwards married and died, and then the *cestui*

¹ See: *Ante*, § 851.

² In the case of *McCulloch v. Valentine*, 24 Neb. 215; s.c. 38 N. W. Rep. 854, where the share of a daughter was bequeathed to trustees for her benefit and her children, her husband to have no control over the same whatever; and the habendum clause of a deed of land purchased therewith was: "To have and to hold said real estate for the sole and separate use of said daughter for life, and thereafter for her children," with the further clause that the husband might occupy and control it for her during her life, the court held that no right of curtesy existed upon the wife's death.

Citing: *Pool v. Blakie*, 53 Ill. 495;

Stokes v. McKibbin, 13 Pa. St. 267;

Bennet v. Davis, 2 Pr. Wms. 316.

³ *Rigler v. Cloud*, 14 Pa. St. 361;

Stokes v. McKibbin, 13 Pa. St. 267;

Cochran v. O'Hern, 4 Watts & S. (Pa.) 95; s.c. 39 Am. Dec. 60.

⁴ *Dugger v. Dugger*, 84 Va. 130; s.c. 4 S. E. Rep. 171;

Irvine v. Greever, 32 Gratt. (Va.) 411, 419;

Sayers v. Wall, 26 Gratt. (Va.) 354.

⁵ See: *Ante*, §§ 851-854.

⁶ *Chew v. Commissioners of Southwark*, 5 Rawle (Pa.) 160.

See: *Welch v. Chambers*, 13 B. Mon. (Ky.) 420, 431;

Sentill v. Robeson, 2 Jones (N. C.) Eq. 510.

⁷ *Welch v. Chambers*, 13 B. Mon. (Ky.) 420, 431.

que trust died, the husband was held not to be entitled to the rent, as such tenant.¹

SEC. 879. **Pre-emption claim.**—Until the title to public lands has been duly transferred as provided by law, the property therein remains in the government; for this reason a husband has been held not to be entitled to curtesy in the pre-emption rights of his wife in public lands of the United States.²

SEC. 880. **Land assigned for dower.**—A man cannot be tenant by the curtesy of lands which are assigned to a woman for her dower. The reason for this rule will be given in the next title.³ Thus where a woman on whom lands descend endows her mother, afterwards marries, has issue, and dies in the lifetime of her mother, her husband will not be entitled to an estate by the curtesy in those lands whereof the mother was endowed, because the daughter's seisin was defeated by the endowment.⁴

SEC. 881. **Estates held in joint tenancy.**—We have already seen that at common law, to entitle a husband to an estate by the curtesy, whether the wife's estate be a legal or an equitable one, there must be a several seisin;⁵ consequently estates in fee or in tail which are held in joint tenancy are not subject to curtesy. The reason for this rule will be given in that title.⁶

SEC. 882. **Determinable fees.**—We have already seen that the courts are divided in opinion in regard to the right of a husband to an estate by the curtesy in a determinable fee. Any further discussion not being desirable, reference is hereby made to the previous discussion and authorities.⁷

¹ *Chew v. Commissioners of Southwark*, 5 Rawle (Pa.) 160.

² *McDaniel v. Grace*, 15 Ark. 465.

³ *Stewart v. Barclay*, 2 Bush (Ky.) 550;

Reed v. Reed, 3 Head (Tenn.) 491; s.c. 75 Am. Dec. 777.

⁴ *Reed v. Reed*, 3 Head (Tenn.) 491; s.c. 75 Am. Dec. 777.

⁵ See: *Ante*, § 866.

⁶ *Exception to the rule.*—The single exception to this rule is where

the husband and wife hold premises jointly. On the death of the wife the husband becomes a tenant by the curtesy, and no right of action exists in the children to recover the land until the estate by curtesy terminates.

Berry v. Hall, 11 Ky. L. Rep. 30; s.c. 11 S. W. Rep. 474.

⁷ See: *Ante*, § 863.

SEC. 883. **In proceeds of land.**—We have already seen that under certain conditions money is to be regarded as land, and a husband will be entitled to curtesy therein,¹ such as where the estate is sold by order of court on partition proceedings ;² but if the husband voluntarily conveys his interest in the curtesy, together with the title to the estate, and invests the proceeds of such sale in other lands and takes the title thereto in his children's name or in his own as guardian, he will not be entitled to have curtesy in the last purchased tract, for the reason that his wife never was seized thereof.³

SEC. 884. **Lands of former husband.**—We have already seen that the general rule is that a husband will be entitled to curtesy in so much of the estate of a former husband of his wife or his child by her may by possibility inherit ;⁴ but to this general rule there are some exceptions, as under the Michigan⁵ and Ohio⁶ statutes. And it has been held that where a husband and wife convey the land of the wife, and the husband agrees to invest the proceeds in land for the use of the children of the wife by a former husband, the husband has no curtesy in the land thus purchased, and if, in violation of his agreement, he takes the title to himself, a court of equity will enforce the trust in favor of his step-children, and will require him to account for rents and profits, even during the lifetime of the wife.⁷

SEC. 885. **Lands sold before marriage.**—A husband does not become tenant by the curtesy of lands of his wife sold prior to marriage, where the full consideration was paid and possession given, but no deed passed.⁸ And where a woman, who occupied lands as tenant in tail, previous to her marriage, conveyed them, by lease and re-lease, to a trustee, to the use of her husband for life, remainder to herself for

¹ See : *Ante*, § 869.

² *Clepper v. Livengood*, 5 Watts (Pa.) 115.

³ *Bogy v. Roberts*, 48 Ark. 17 ; s.c. 3 Am. St. Rep. 211 ; 2 S. W. Rep. 186.

⁴ See : *Ante*, §§ 756, 846.

⁵ See : *Hathon v. Lyon*, 2 Mich. 93.

⁶ See : *Tilden v. Barker*, 40 Ohio St. 411 ;

Denny v. McCabe, 35 Ohio St. 576.

⁷ *Carpenter v. Davis*, 72 Ill. 14.

⁸ *Welch v. Chandler*, 13 B. Mon. (Ky.) 420.

life, remainder to the first and other sons of the marriage, and the woman died in the lifetime of the husband, it was held that the husband did not take any estate under the settlement, because it was not competent for the wife to pass the estate by such a conveyance, to the prejudice of her issue, after her death, and that he did not take any estate by the curtesy ; because the instant the marriage took effect, the estate was vested in the husband during the joint lives of himself and his wife ; consequently there never was one moment during the coverture when the wife was seized of an estate-tail in possession ; which was necessary, in order to make the husband tenant by the curtesy.¹

SEC. 886. **Adverse possession and bar of statute.**—Where coverture began and ended during adverse possession of the estate, the husband will not be entitled to an estate therein by the curtesy,² unless indeed actual seisin during coverture was prevented by bodily fear.³ And where the joint right of husband and wife is barred by the statute of limitations, the husband's interest is thereby extinguished, and should he survive his wife, he has no right to, or interest in, her real estate as tenant by the curtesy.⁴

SEC. 887. **In lands mortgaged to wife.**—The husband will not be entitled to an estate by the curtesy in lands held by his wife as mortgagee thereof, unless the equity of redemption has been barred by the statute of limitations.⁵

SEC. 888. **In remainder and reversion.**—The seisin of the wife, whether actual or potential, must be a present one to entitle the husband to curtesy ; consequently the common-law rule was that where a wife had no seisin of remainder in fee, expectant upon a life estate, and died before the determination of the life estate, there could be no tenancy by the curtesy of such remainder or reversion,

¹ 1 Cruise Real Prop. (4th ed.) 165, 166 ;

Doe v. Rivers, 7 Durnf. & E. (7 T. R.) 276.

² Baker v. Oakwood, 49 Hun (N. Y.) 416.

³ Lessee of Barr v. Galloway, 1 McL. C. C. 476.

See : *Ante*, § 726.

⁴ Weisinger v. Murphy, 2 Head (Tenn.) 674.

⁵ Chaplin v. Chaplin, 3 Pr. Wms. 234 ;

4 Kent Com. (13th ed.) 32 ;
7 Vin. Abr. 156, pl. 22.

unless the particular estate be ended during the coverture, and this rule obtains in this country, where it has not been changed by statute.¹ We have already seen that where an outstanding life estate and the immediate reversion meet in the same person, the particular estate is merged in the greater; and if the two estates meet in a *feme covert*, her husband will be entitled to a life estate as tenant by the curtesy.²

' *Planters' Bank v. Davis*, 31 Ala. 626;
Todd v. Oviatt, 58 Conn. 178;
 s.c. 7 L. R. A. 693;
Mackey v. Proctor, 12 B. Mon. (Ky.) 433;
Adams v. Logan, 6 T. B. Mon. (Ky.) 176;
Stewart v. Barclay, 2 Bush (Ky.) 550;
Webster v. Ellsworth, 147 Mass. 602; s.c. 18 N. E. Rep. 569;
Brooks v. Everetts, 95 Mass. (13 Allen) 575;
Shores v. Carley, 90 Mass. (8 Allen) 425;
Blood v. Blood, 40 Mass. (23 Pick.) 80;
Eldredge v. Forrestal, 7 Mass. 253;
Redus v. Hayden, 43 Miss. 633;
Malone v. McLaurin, 40 Miss. 161; s.c. 90 Am. Dec. 320;
Orford v. Benton, 36 N. H. 395;
Fiske v. Eastman, 5 N. H. 240;
Ferguson v. Tweedy, 43 N. Y. 549;
Taylor v. Gould, 10 Barb. (N. Y.) 401;
Green v. Putnam, 1 Barb. Ch. (N. Y.) 506;
Re Creiger, 1 Barb. Ch. (N. Y.) 598;
Adair v. Lott, 3 Hill (N. Y.) 182;
Ellingsworth v. Cook, 8 Paige Ch. (N. Y.) 643;
Dunham v. Osburn, 1 Paige Ch. (N. Y.) 634;
Weir v. Humphries, 4 Ired. (N. C.) Eq. 297;
Gentry v. Wahstaff, 3 Dev. (N. C.) 270;
Watkins v. Thornton, 11 Ohio St. 367;
Hitner v. Ege, 23 Pa. St. 305;
Shoemaker v. Walker, 2 Serg. & R. (Pa.) 544;
Reed v. Reed, 3 Head (Tenn.) 491; s.c. 75 Am. Dec. 777;

Young v. McIntyre, 6 W. N. C. 252;
Doe v. Rivers, 7 Durnf. & E. (7 T. R.) 272;
Stoddard v. Gibbs, 1 Sumn. C. C. 263;
De Gray v. Richardson, 3 Atk. 467;
Stoughton v. Leigh, 1 Taunt. 402;
 1 Co. Litt. (19th ed.) 29a;
 2 Bl. Com. 127;
 4 Kent Com. (13th ed.) 29, 30.
 See: *Ante*, § 64.
 Thus where a daughter, a *feme covert*, dies in her mother's lifetime, her husband is not entitled to curtesy, in the third assigned as dower, even after termination of the widow's life estate.
Ferguson v. Tweedy, 43 N. Y. 549;
Taylor v. Gould, 10 Barb. (N. Y.) 401;
Re Creiger, 1 Barb. Ch. (N. Y.) 598;
Green v. Putnam, 1 Barb. Ch. (N. Y.) 506.
 The court say, in *Malone v. McLaurin*, 40 Miss. 161; s.c. 90 Am. Dec. 320, that "a man shall not be tenant by the curtesy of a remainder or reversion" (2 Bl. Com. 127). But this proposition is restricted by the later authorities to cases of remainders or reversions expectant upon estates of freehold; and upon a reversion expectant upon an estate for years, the right of curtesy and dower both accrue, for the reason that the possession of the tenant for years constitutes a legal seisin of the freehold in reversion.
Stoughton v. Leigh, 1 Taunt. 410;
De Gray v. Richardson, 3 Atk. 470;
Goodlittle v. Newman, 3 Wils. 521.

² See: *Ante*, § 864.

